A TREATISE

ON

THE LAW

OF

EXECUTORS AND ADMINISTRATORS.

BY THE RIGHT HONORABLE

SIR EDWARD VAUGHAN WILLIAMS,

LATE ONE OF THE JUDGES OF HER MAJESTY'S COURT OF COMMON PLEAS.

SEVENTH EDITION.

BY THE RIGHT HONORABLE

SIR EDWARD VAUGHAN WILLIAMS,

AND

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OF THE INNER TEMPLE, BARRISTER AT LAW.

SIXTH AMERICAN EDITION,

IN WHICH THE SUBJECT OF WILLS IS PARTICULARLY DISCUSSED AND ENLARGED UPON.

BY J. C. PERKINS, LL. D.

IN THREE VOLUMES.

VOL. I.

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To

THE RIGHT HONORABLE

LORD HATHERLEY,

THIS EDITION OF

A TREATISE ON THE LAW OF EXECUTORS AND ADMINISTRATORS

IS INSCRIBED,

IN TESTIMONY OF THEIR RESPECT AND ADMIRATION,

BY

MAY 12, 1873. THE EDITORS.

ADVERTISEMENT

WITH regard to the *construction of wills of real estate*, no book has yet appeared or probably for a long time will appear, either in England or in this country, to occupy the entire field covered by the great and classical work of Mr. Jarman.

But the scheme and structure of that work, involving as they do the statement of cases at length, render it difficult to multiply editions of it even in England, and, of course, more difficult here. This, at least in part, will account for the fact that no edition of it has been published in England since the third, in 1861, and no American edition since 1859.

In view of these circumstances, and in order to adapt this work of Mr. Justice Williams more fully to the requirements of the legal profession in the United States, and to render it more generally and practically useful here, it has been deemed expedient very much to extend the scope of the American notes, more especially, by enlarging and expanding in them *the treatment of the subject of wills*, including, of course, whatever relates to the capacity and competency of testators, the exigencies of the execution of wills, all matters pertaining to the probate of them, and to their construction; and the evidence which is admissible and has been admitted in judicial investigations of these topics; and it is intended thereby that these three volumes shall furnish a complete treatise on the law of Wills, as well as on the law of Executors and Administra-

tors. In fact, it would now be quite as appropriate to style the treatise a work on Wills and Administrations, as to apply to it the name it now bears.

The editor has endeavored to increase the facilities for examining the contents of the work by adding largely to the index and referring therein to the matter of the notes as well as to that of the text.

The table of cases contains nearly ten thousand citations in addition to those embraced in the English edition.

The large increase in the volume of American notes, both on the subject of wills and on the other topics discussed, and these additions to the index and table of cases, has rendered it imperative that the work should be published in three volumes, instead of two as heretofore.

With these suggestions this sixth American from the seventh and last English edition of Williams on the Law of Executors and Administrators is respectfully submitted to the use and indulgence of the legal profession

By J. C. Perkins.

PREFACE

TO THE

SEVENTH EDITION.

THE number of cases concerning the law of Executors and Administrators which have arisen, especially in the court of probate, since the last edition of this Treatise, has necessarily increased the bulk of the book considerably. No material alteration, however, in the law with respect to executors and administrators has taken place since the publication of the sixth edition, with the exception of the statute 32 & 33 Vict. c. 46, which abolishes, after the year 1870, the distinction, with regard to the priority of payment of debts, between specialty and simple contract debts.

E. V. W.
W. V. V. W.

MAY 12, 1873.

PREFACE TO THE SIXTH EDITION.

As the statute 1 Vict. c. 26 (*Act for the amendment of the laws with respect to wills*) is intimately connected with some of the subjects of the following work, it has been deemed advisable to prefix thereto the whole of the act, *verbatim*, with reference to those parts of the Treatise which have relation to, or are affected by, the respective enactments.

It must be borne in mind, that the statute (see sect. 34) does not extend to any wills made before the 1st January, 1838. (*a*)

Since the earlier editions of this Treatise, several statutes have been passed which have rendered extensive alterations necessary in that portion of it which is contained in the 1st and 2d Books of the 5th Part, and relates to remedies for and against executors and administrators in equity. These alterations I have intrusted to the care of my friend Mr. HERBERT FISHER.

(*a*) See *infra*, pp. 129, 203, 204, as to the construction of this clause.

THE STATUTE 1 VICT. c. 26.

An Act for the amendment of the Laws with respect to Wills.
[3d July, 1837.]

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows: (that is to say), the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled *An act for taking away the court of wards and liveries and tenures*, in capite *and by knights service, and purveyance, and for settling a revenue upon his majesty in lieu thereof*, or by virtue of an act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled *An act for taking away the court of wards and liveries and tenures*, in capite *and by knights service*, and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well

Meaning of certain words in this act:

"Will:"

12 Car. 2, c. 24.

14 & 15 Car. 2 (I).

"Real estate:"

"Personal estate:"

Number:

as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Gender:

II. And be it further enacted, that an act passed in the thirty-second year of the reign of King Henry the Eighth, intituled *The act of wills, wards, and primer seisins, whereby a man may devise two parts of his land;* and also an act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled *The bill concerning the explanation of wills;* and also an act passed in the parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled *An act how lands, tenements, &c. may be disposed by will or otherwise, and concerning wards and primer seisins;* and also so much of an act passed in the twenty-ninth year of the reign of King Charles the Second, intituled *An act for prevention of frauds and perjuries*, and of an act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled *An act for prevention of frauds and perjuries*, as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estates being assets, or to nuncupative wills, or to the repeal, altering, or charging of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an act passed in the fourth and fifth years of the reign of Queen Anne, intituled *An act for the amendment of the law and the better advancement of justice*, and of an act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled *An act for the amendment of the law and the better advancement of justice*, as relates to witnesses to nuncupative wills; and also so much of an act passed in the fourteenth year of the reign of King George the Second, intituled *An act to amend the law concerning common recoveries, and to explain and amend an act made in the twenty-ninth year of the reign of King Charles the Second, intituled "An act for prevention of frauds and perjuries,"* as relates to estates *pur autre vie;* and also an act passed in the

Repeal of the statutes of wills, 32 Hen. 8, c. 1, and 34 & 35 Hen. 8, c. 5.

10 Car. 2, sess. 2, c. 2 (I).

Sects. 5, 6, 12, 19, 20, 21, & 22 of the statute of frauds, 29 Car. 2, c. 3; 7 W. 3, c. 12 (I).

Sect. 14 of 4 & 5 Anne, c. 16.

6 Anne, c. 10 (I).

Sect. 9 of 14 G. 2, c. 20.

twenty-fifth year of the reign of King George the Second, intituled *An act for avoiding and putting an end to certain doubts and questions relating to the attestation of wills and codicils concerning real estates in that part of Great Britain called England, and in his majesty's colonies and plantations in America*, except so far as relates to his majesty's colonies and plantations in America; and also an act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled *An act for the avoiding and putting an end to certain doubts and questions relating to the attestations of wills and codicils concerning real estates;* and also an act passed in the fifty-fifth year of the reign of King George the Third, intituled *An act to remove certain difficulties in the disposition of copyhold estates by will*, shall be and the same are hereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates *pur autre vie*, to which this act does not extend.

25 G. 2, c. 6 (except as to colonies).

25 G. 2, c. 11 (I).

55 G. 3, c. 192.

III. And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate (*a*) which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir-at-law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise, to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by

All property may be disposed of by will,

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

(*a*) See *infra*, p. 5.

will according to the power contained in this act, if this act had not been made; and also to estates *pur autre vie*, (*b*) whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, (*c*) whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will. (*d*)

estates *pur autre vie*:

contingent interest;

rights of entry and property acquired after execution of the will.

IV. Provided, always, and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will, shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: Provided also, that where the testator was entitled to have been admitted to such real estate, and might if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue

As to the fees and fines payable by devisees of customary and copyhold estates.

(*b*) See *infra*, p. 686.
(*c*) See *infra*, p. 887 *et seq.*
(*d*) See *infra*, pp. 6, note (*d*), 220.

thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

Wills or extracts of wills of customary freeholds to be entered on the court rolls;

V. And be it further enacted, that when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall as against the devisee of such estate have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

and the lord to be entitled to the same fine, &c. when such estates are not now devisable as he would have been from the heir in case of descent.

Estates *pur autre vie*.

VI. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as

assets by descent as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate. (*e*)

No will of a person under age valid;

VII. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid. (*f*)

nor of a *feme covert*, except such as might now be made.

VIII. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act. (*g*)

Every will shall be in writing, and signed by the testator in the presence of two witnesses at one time.

IX. And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (*h*) (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

X. And be it further enacted, that no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

(*e*) See *infra*, p. 1974 *et seq.*
(*f*) See *infra*, pp. 15, 16.
(*g*) See *infra*, p. 52 *et seq.*
(*h*) See *infra*, p. 67 *et seq.*

XI. Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner, or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act. (*i*)

Soldiers' and mariners' wills excepted.

XII. And be it further enacted, that this act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his majesty King George the Fourth, and the first year of the reign of his late majesty King William the Fourth, intituled *An act to amend and consolidate the laws relating to the pay of the royal navy*, respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other moneys payable in respect to services in her majesty's navy. (*k*)

Act not to affect certain provisions of 11 G. 4, & 1 W. 4, c. 20, with respect to wills of petty officers and seamen and marines.

XIII. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

Publication not to be requisite.

XIV. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Will not to be void on account of incompetency of attesting witness.

XV. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove

Gifts to an attesting witness to be void.

(*i*) See *infra*, p. 116 *et seq.*

(*k*) See *infra*, p. 395 *et seq.*

the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment, mentioned in such will. (*l*)

Creditor attesting to be admitted a witness.

XVI. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Executor to be admitted a witness.

XVII. And be it further enacted, that no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Will to be revoked by marriage.

XVIII. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (*m*) (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions.)

No will to be revoked by presumption.

XIX. And be it further enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. (*n*)

No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction.

XX. And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same. (*o*)

XXI. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will, after the execution

(*l*) See *infra*, pp. 1053, 1054.
(*m*) See *infra*, pp. 201, 202.
(*n*) See *infra*, p. 204 *et seq.*
(*o*) See *infra*, p. 127 *et seq.*

thereof, shall be valid or have any effect except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin, or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will. (*p*)

No alteration in a will shall have any effect unless executed as a will.

XXII. And be it further enacted, that no will or codicil or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the reëxecution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown. (*q*)

No will revoked to be revived otherwise than by re-execution or a codicil to revive it.

XXIII. And be it further enacted, that no conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death. (*r*)

A devise not to be rendered inoperative by any subsequent conveyance or act.

XXIV. And be it further enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. (*s*)

A will shall be construed to speak from the death of the testator.

XXV. And be it further enacted, that, unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or intended to be

A residuary devise shall in-

(*p*) See *infra*, p. 144 *et seq.*
(*q*) See *infra*, p. 205 *et seq.*
(*r*) See *infra*, p. 1330.
(*s*) See *infra*, pp. 220, 221, 1331, 1436.

clude estates comprised in lapsed and void devises.

comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

XXVI. And be it further enacted, that a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

XXVII. And be it further enacted, that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

A general gift shall include estates over which the testator has a general power of appointment.

XXVIII. And be it further enacted, that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real

A devise without any words of limitation shall be con-

estate, unless a contrary intention shall appear by the will. strued to pass the fee.

XXIX. And be it further enacted, that in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: Provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue. The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death. (*t*)

XXX. And be it further enacted, that where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication. No devise to trustees or executors, except for a term or presentation to a church, shall pass a chattel interest. (*u*)

XXXI. And be it further enacted, that where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had Trustees under an unlimited devise where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

(*t*) See *infra*, p. 1106, note (*w*). (*u*) See *infra*, p. 690.

power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

Devises of estates tail shall not lapse.

XXXII. And be it further enacted, that where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

XXXIII. And be it further enacted, that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will. (*x*)

Act not to extend to wills made before 1838 (*y*) nor to estates *pur autre vie* of persons who die before 1838.

XXXIV. And be it further enacted, that this act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will reëxecuted or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so reëxecuted, republished, or revived; and that this act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

Act not to extend to Scotland.

XXXV. And be it further enacted, that this act shall not extend to Scotland.

Act may be altered this session.

XXXVI. And be it enacted, that this act may be amended, altered, or repealed by any act or acts to be passed in this present session of parliament.

(*x*) See *infra*, p. 1221 *et seq.*

(*y*) See *infra*, pp. 129, 203, 216.

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OF THE APPOINTMENT OF EXECUTORS AND ADMINISTRATORS.

BOOK THE FIRST.

OF THE ORIGIN OF WILLS OF PERSONAL ESTATE: AND OF THEIR NATURE AND INCIDENTS.

CHAPTER THE FIRST.

OF THE ORIGIN OF WILLS OF PERSONAL ESTATE.

ALTHOUGH from the time of the Norman Conquest until the passing of the statute of wills (32 & 34 Hen. 8), a subject of this realm had, generally speaking, no testamentary power over *land*; (*a*) yet the power of making a will of *personal property* appears to have existed and continued from the earliest period of our law. And, under the description of personal property so disposable, are not only to be considered goods and chattels, but also terms for years and chattel interests in land, which, on account of their original imbecility and insignificance, were deemed personalty, and as such were disposable by will. (*a*[1])

But this power, it seems, did not extend to the whole of a man's personal estate, unless he died without either wife or issue; for by the common law, as it stood, according to Glanvil, in the reign of Hen. 2, a man's goods were to

At common law a man could not be-

(*a*) [In regard to the history of devises, see 4 Kent, 501–505. "The English law of devise," Chancellor Kent observes, "was imported into this country by our ancestors, and incorporated into our colonial jurisprudence, under such modifications in some instances as were deemed expedient. Lands may be devised by will in all the United States, and the statute regulations on the subject are substantially the same, and they have been taken from the English statutes of 32 Hen. 8 and 29 Charles 2." 4 Kent, 504, 505. As to Louisiana, see 4 Kent, 505, note (*a*), 519, 520.]

(*a*[1]) Co. Lit. 111 *b*, note (1), by Hargrave.

queath the whole of his personal estate, unless he died without either wife or children:

be divided into three equal parts; one of which went to his * heirs, or lineal descendants, another to his wife, and the third was at his own disposal: or if he died without a wife, he might then dispose of one moiety, and the other went to his children: and so, *è converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal. (*b*) The shares of the wife and children were called their reasonable parts; and the writ *de rationabili parte bonorum* was given to recover them. (*c*) This writ lay for the wife against the executors of her husband, and was founded on a complaint that the said executors unjustly detained from the plaintiff her reasonable part of the goods and chattels which were of the deceased, and refused to render the same to her. (*d*) And the sons and daughters were entitled to the like writ against the executors in case their third part was withheld. (*e*)

writ *de rationabili parte bonorum*:

It must indeed be remarked, that there has been a controversy whether this was the general law of the land, or only such as obtained in particular places by custom. Fitzherbert, in his commentary on the writ *de rationabili parte bonorum*, contends that the distribution, which excludes the testamentary power from a certain portion of the personal estate, was in his time the common law of the land, and therefore needed not a special custom to support it. (*f*) And Mr. Justice Blackstone (*g*) expresses a strong opinion to the same effect, citing Glanvil, Bracton, Magna Charta, the Year Books, and a passage from Sir Henry Finch; the last of which authorities expressly lays it down, in the reign of Charles 1, to be the general law of the land. But, on the other hand, Lord Coke says that it appears by the Register, * and many of our books, that there must be a custom alleged in some county, &c. to enable the wife and children to the writ *de rationabili parte bonorum*, and that so it had been resolved in parliament. (*h*)

controversy whether this was the general law, or only obtaining in particular places by custom.

(*b*) 2 Bl. Com. 492.

(*c*) F. N. B. 122, L. 9th ed.; 2 Saund. 66, note (9).

(*d*) F. N. B. *ubi supra*.

(*e*) The word "*pueri*" was used in the writ, but was taken as meaning children of both sexes, it being held that sons and daughters might join in the writ. Co. Lit. 176 *b*, note (3), by Hargrave.

(*f*) F. N. B. *ubi supra;* Co. Lit. 176 *b*, note (6), by Hargrave.

(*g*) 2 Bl. Com. 492.

(*h*) Co. Lit. 176 *b*. "Mr. Justice Blackstone considers the passage cited by

The law, however, whether general or prevailing in particular places only by custom, has been altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels; though we cannot trace out when first the alteration began. (*i*) In the province of York, (*j*) the principality of Wales, and in the city of London, the ancient method continued in use till modern times: when, in order to favor the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes were provided; one, 4 & 5 W. & M. c. 2 (explained by 2 & 3 Anne, c. 5), for the province of York; another, 7 & 8 W. 3, c. 38, for Wales; and a third, 2 Geo. 1, c. 18, for London; * whereby it is enacted, that persons within those districts, and liable to those customs, may (if they think proper) dispose of all their personal estate by will; and the claims of the widow, children, and other relations to the contrary are totally barred. Thus is the old common law now utterly abolished throughout all the kingdom of England, and a man may devise the whole of his chattels as freely as he formerly could his third part or moiety. In disposing of which, he was bound by the custom of many places to remember his lord and the church, by leaving them his two best chattels, which was the original of heriots and mortuaries;

Alteration of the law:

by certain statutes for the province of York, Wales, and London.

Lord Coke from Bracton as making directly against his opinion, and regards Fleta also as a clear authority to the same purpose. But Mr. Somner, whose very learned and extended discussion of this subject seems to have escaped the author of the Commentaries, though not inclined to an entire agreement with Lord Coke, cites various passages of the same ancient authors, from which it appears that their writings in this respect are contradictory. See in Somn. Gavelk. 91, a dissertation on the question, *Whether the writ de rationabili parte bonorum was by the common law or by custom.* Nor is it a slight testimony of its being settled law in Lord Coke's time, not to allow of the writ *de rationabili parte bonorum* without a special custom, that Mr. Somner, whose book, before cited, was finished as early as 1647, though not published till the Restoration, observes on the order of partition under this writ, that it was then, and *that not lately,* antiquated, and vanished out of use in Kent and other counties, surviving only in the province of York and some few cities." Co. Lit. 176 *b*, note (6), by Hargrave. It may further be observed, that the writs *de rationabili parte bonorum,* in the Register, as it is admitted by Fitzherbert, rehearse the customs of the counties, stating that "whereas according to the custom which has hitherto obtained in the said county, wives, after the death of their husbands, ought to have a reasonable part of the goods and chattels of their said husbands, &c." F. N. B. 122, L.

(*i*) 2 Bl. Com. 492.

(*j*) What bishoprics the province of York contains, see Co. Lit. 94; and *post,* pt. 1. bk. IV. ch. II.

and afterwards he was left at his own liberty to bequeath the remainder as he pleased. (*k*)

Mr. Hargrave, in a note to Coke upon Littleton, (*l*) observes: "Sir Wm. Blackstone treats the testamentary power over personal estate as now prevailing through all England. But if there be no other statutes than those he cites, I take this to be a mistake, so far at least as regards the city of Chester. The fact is, that both the cities of York and Chester were excepted in the 4th of W. & M., and that the 2 & 3 Anne takes away the exception as to the city of York only. As, too, the statutes, which subject the custom of dividing the personal estate of deceased persons to the testamentary power, do not name any place in England except London and the province of York, it follows that the local custom of any other part of England, on this subject, is not disturbed by any statutory provision." But with respect to the city of Chester, it was remarked by Lord Alvanley in Pickering *v.* Stamford: (*m*) "A vulgar error prevailed, that the custom of York goes through the whole province. The legislature themselves fell into it by reserving to the citizens of York and Chester the customs of those cities; the latter of which has no custom. When by another act they repealed that as to the city of York, they left Chester just as it was by the first act. The custom * of York never attached upon any part of the province that was not so at the time of Henry 8; and Chester was annexed since that period." (*n*)

And now by stat. 1 Vict. c. 26 (which, however, does not extend to any will made before January 1, 1838), it is enacted that it shall be lawful for every person to devise, bequeath, and dispose of, by his will executed as required by that act, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death. (*o*)

1 Vict. c. 26.

(*k*) 2 Bl. Com. 493.

(*l*) 176 *b*, note (5).

(*m*) 3 Ves. 338.

(*n*) Chester is situate within the archdeaconry of Chester, which was part of the ancient diocese of Lichfield and Coventry, and was incorporated with the Archdeaconry of Richmond, in the diocese of York, to form the newly erected diocese of Chester, by statute 33 Hen. 8, c. 31.

(*o*) See this enactment (s. 3), *verbatim*, preface. The interpretation clause (s. 1), enacts that the words "personal estate" shall extend to leasehold estates and other chattels real, and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all property whatsoever which by law devolves upon any executor or administrator, and to any share or interest therein. But the third section does not intend to make

any kind of personalty bequeathable which was not bequeathable before, but only to regulate the form of executing wills. Lord Campbell, in Bishop *v.* Curtis, 18 Q. B. 881. Therefore a testator cannot bequeath a promissory note made to him, so as to pass the right to sue in respect of it. Such right is in the executor. Bishop *v.* Curtis, 18 Q. B. 879. [See Mitchell *v.* Smith, 4 De G., J. & S. 422. The donee of a negotiable note not indorsed, but received by him as a gift *causa mortis*, may maintain an action on it, in the name of the executor or administrator of the donor, without his consent, and even against his protest. Bates *v.* Kempton, 7 Gray, 382; Sessions *v.* Moseley, 4 Cush. 87; Grover *v.* Grover, 24 Pick. 261.]

* CHAPTER THE SECOND.

OF THE NATURE AND INCIDENTS OF WILLS AND CODICILS OF PERSONAL PROPERTY.

Definition of a will and testament.

A LAST will and testament is defined to be "the just sentence of our will, touching what we would have done after our death;" (*a*) and in strictness, perhaps, the definition might be narrowed by adding "respecting personal estate;" for a devise of *lands* is considered by our courts not so much in the nature of a testament, as of a conveyance by way of appointment of particular lands to a particular devisee; (*b*) and upon that principle it was established that a man could devise those lands only which he had at the time of the date of such conveyance, and no after purchased lands would pass, whatever words might be used; (*c*) whereas a will and testament

(*a*) Swinb. pt. 1, s. 2; Godolph. pt. 1, c. 1, s. 2; 2 Bl. Com. 499; [Smith *v.* Bell, 6 Peters, 75. It is *in its own nature* ambulatory and revocable during the life of the testator. It is this ambulatory quality which forms the characteristic of wills, for though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature of the instrument. 1 Jarman Wills (3d Eng. ed.), 12; Brown *v.* Betts, 9 Cowen, 208; Moye *v.* Kittrell, 29 Geo. 677; Loveren *v.* Lamprey, 22 N. H. 434, 442; Shaw C. J. in Wait *v.* Belding, 24 Pick. 136.]

(*b*) Harwood *v.* Goodright, Cowp. 90, by Lord Mansfield; 1 Saund. 277 *e*, note (4), to Duppa *v.* Mayo. [See 4 Kent, 502; Johnson J. in Tompkins *v.* Tompkins, 1 Bailey, 96; Ross *v.* Vertner, Freem. Ch. (Miss.) 599; Bayley *v.* Bailey, 5 Cush. 245; Langdon *v.* Astor, 16 N. Y. 9, 49.] It is said by Lord Coke, Co. Lit. 111 *a*, that in law most commonly *ultima voluntas in scriptis* is used, where lands or tenements are devised, and *testamentum*, when it concerneth chattels. See, also, to the same effect, Godolph. pt. 1, c. 6, s. 7. ["When the will operates upon personal property, it is sometimes called a *testament*, and when upon real estate, a *devise;* but the more general and the more popular denomination of the instrument, embracing equally real and personal estate, is that of *last will and testament.*" 4 Kent, 502.]

(*c*) 1 Saund. 277 *e*, note (4); Wind *v.* Jekyl, 1 P. Wms. 575; [Minuse *v.* Cox, 5 John. Ch. 441; Carter *v.* Thomas, 4 Greenl. 345; Brewster *v.* McCall, 15 Conn. 274; George *v.* Green, 13 N. H. 521; M'Kinnon *v.* Thompson, 3 John. Ch. 307, 310; Livingston *v.* Newkirk, 3 John. Ch. 312; Thompson *v.* Scott, 1 McCord Ch. 32; Kemp *v.* M'Pherson, 7 Harr. & J.

would operate upon whatever personal estate a man died possessed of, whether acquired before or since the execution of the instrument. (*d*)

320; Carroll *v.* Carroll, 16 How. (U. S.) 275; Hays *v.* Jackson, 6 Mass. 149; Wait *v.* Belding, 24 Pick. 129; Bullard *v.* Carter, 5 Pick. 114; Girard *v.* Philadelphia, 4 Rawle, 323; Meador *v.* Sorsby, 2 Ala. (N. S.) 712; Foster *v.* Craige, 3 Ired. 536; Battle *v.* Speight, 9 Ired. 288. In many of the American States, every descendible interest in real estate is a devisable interest. Rights of entry are devisable in *Massachusetts*, whether the devisor was disseised at the time of making the will, or became so afterwards. Genl. Sts. c. 92, § 3; so in *New Hampshire*, Rev. Sts. c. 156, § 3; so in *Maine*, Rev. Sts. 1841, p. 376. As to *Pennsylvania*, Humes *v.* M'Farlane, 4 Serg. & R. 435; *New York*, Jackson *v.* Varick, 2 Wend. 166; S. C. 7 Cowen, 238; *Virginia*, Watts *v.* Cole, 2 Leigh, 664. See Ross *v.* Ross, 12 B. Mon. 437; Smith *v.* Jones, 4 Ohio, 115. A will may operate on a contingent reversionary interest. Brigham *v.* Shattuck, 10 Pick. 306, 309; Austin *v.* Cambridgeport Parish, 21 Pick. 215; Hayden *v.* Stoughton, 5 Pick. 528; Steel *v.* Cook, 1 Met. 281; Kean *v.* Roe, 2 Harring. 103; Keating *v.* Smith, 5 Cush. 236; Shelby *v.* Shelby, 6 Dana, 60. A possibility coupled with an interest is devisable. Den *v.* Manners, 1 Spencer, 142. So a power to sell lands. Wright *v.* Trustees Meth. Epis. Church, 1 Hoff. 204. See 4 Kent, 512, 513. A person who had sold an estate under circumstances which entitle him in equity to have the sale set aside, has a devisable interest in the estate. Gresley *v.* Mousley, 4 De G. & J. 78. So has a person, who has made a valid agreement for the purchase of an estate, a devisable interest in it. Malin *v.* Malin, 1 Wend. 625; Marston *v.* Fox, 8 Ad. & El. 14. See Livingston *v.* Newkirk, 3 John. Ch. 312; M'Kinnon *v.* Thompson, 3 John. Ch. 307.] It did not turn upon the construction of the statutes of wills (23 Hen. 8, c. 1, and 34 Hen. 8, c. 5), which say that any person *having* land may devise (as it has sometimes been said, see Toller on Executors, p. 2); for the same rule held before the statute, where lands were devisable by custom. Harwood *v.* Goodright, Cowp. 90, by Lord Mansfield; Brunker *v.* Cook, 11 Mod. 122; Brydges *v.* Duchess of Chandos, 2 Ves. jun. 427; 1 Wms. Saund. 277 *e*, note (4).

(*d*) Wind *v.* Jekyl, 1 P. Wms. 575. And now, by statute 1 Vict. c. 26, s. 3 (which, however, does not apply to any will made before January 1, 1838), the power of disposing by will, executed as required by that act, is extended to all such real and personal estate as the testator may be entitled to at the time of his death, notwithstanding he may become entitled to the same subsequently to the execution of his will. See this enactment, *verbatim*, preface. [The law in regard to after acquired lands has been changed in a similar manner by statute, in many of the American States. In *Massachusetts*, by Genl. Sts. c. 92, § 4, it is enacted that "any estate, right, or interest in lands, acquired by the testator after making his will, shall pass thereby in like manner as if possessed at the time of making the will, if such clearly and manifestly appears by the will to have been the intention of the testator." In *Vermont*, see Rev. Sts. 1839, p. 254, § 2; *Pennsylvania*, Rev. Acts relating to wills (1833), § 10; *Missouri*, Liggat *v.* Hart, 23 Missou. 127; *New York*, 2 Rev. Sts. p. 57, § 5; *Virginia*, Act 1850, c. 122, § 11; Smith *v.* Edrington, 8 Cranch, 66; Allen *v.* Harrison, 3 Call, 289; Turpin *v.* Turpin, 1 Wash. 75; Hyer *v.* Shobe, 2 Munf. 200; *Indiana*, Rev. Sts. 1843, p. 485, § 3; *Maine*, Rev. Sts. 1840–41, p. 376; *Maryland*, St. 1850, c. 259; see Carroll *v.* Carroll, 16 How. (U. S.) 275; Johns *v.* Doe, 33 Md. 515; *Connecticut*, Laws of Conn. 1838, p. 245; *New Hampshire*, Rev. Sts. 1842, c. 156, § 2. In Kentucky, land may pass by a will, though acquired after the publication of it. Walton

Codicil.

* In strictness, according to the older authorities of the ecclesiastical law, the appointment of an executor was essential to a testament. "The naming or appointment of an executor," says Swinburne, (*e*) "is said to be the foundation, the substance, the head, and is indeed the true formal cause of the testament, without which a will is no proper testament, and by the which only the will is made a testament." So Godolphin observes, (*f*) that "the appointment of an executor is the very foundation of the testament, whereof the nomination of an executor, and the *justa voluntas* of the testator, are two main essentials." And the common law judges, in Woodward *v.* Lord Darcy, (*g*) laid down that "without an executor a will is null and void." (*h*) However, this strictness has long ceased to exist, (*i*)

v. Walton, 7 J. J. Marsh. 58; so in Ohio, Smith *v.* Jones, 4 Ohio, 115; Brush *v.* Brush, 10 Ohio, 287; *North Carolina*, Battle *v.* Speight, 9 Ired. 288; *Illinois* and *Alabama*, 4 Kent, 512; Meador *v.* Sorsby, 2 Ala. (N. S.) 712. The above statute of Massachusetts has been held to apply to a will made before its passage, where the death of the testator occurred after its passage. Cushing *v.* Aylwin, 12 Met. 169; Pray *v.* Waterston, 12 Met. 262. The statute of New York has been similarly applied. See De Peyster *v.* Clendenning, 8 Paige, 295; Bishop *v.* Bishop, 4 Hill, 138; and of Virginia, Smith *v.* Edrington, 8 Cranch, 66; and of New Hampshire, Loveren *v.* Lamprey, 22 N. H. 434. In Wakefield *v.* Phelps, 37 N. H. 295, 306, Eastman J. said: "A will does not take effect, nor are there any rights acquired under it, until the death of the testator; and its construction and validity depend upon the law as it then stands. A statute passed after the making of a will but before the death of the testator, by which the law is changed, takes effect upon the will." The statute of Maryland above referred to, has been held not to apply to wills made before it took effect, though the testator died afterwards. Carroll *v.* Carroll, 16 How. (U. S.) 275. The same construction has been given to the Pennsylvania statute of 1833, Mullock *v.* Sonder, 5 Watts & S. 198; so to that in Connecticut, Brewster *v.* McCall, 15 Conn. 274; and North Carolina, Battle *v.* Speight, 9 Ired. 288. It has been considered a sufficient manifestation of the intention of the testator that real estate acquired by him, after the making of his will, shall pass thereby, according to the Massachusetts statute, where it appears by the whole scheme and tenor of the will that he intended to make an entire disposition of all of his property, real and personal. Winchester *v.* Forster, 3 Cush. 366; Cushing *v.* Aylwin, 12 Met. 169; Brimmer *v.* Sohier, 1 Cush. 118. In Cushing *v.* Aylwin, *ubi supra*, the court treat it as an important manifestation that the testatrix did not intend to die intestate as to any of her property. "And there is no reason," say the court "to suppose that her intention was changed when she purchased the estate in question after making her will." To the same effect, see Loveren *v.* Lamprey, 22 N. H. 434. See Wait *v.* Belding, 24 Pick. 136. To prevent after acquired lands passing under the Pennsylvania act (1833), there must be an express prohibition. Roney *v.* Stiltz, 5 Whart. 381, 384.]

(*e*) Pt. 1, s. 3, pl. 19.

(*f*) Pt. 1, c. 1, s. 2.

(*g*) Plowd. 185.

(*h*) See, also, Chadron *v.* Harris, Noy, 12; Finch, 45 *b*; Bro. Test. pl. 20; and see the judgment of Mr. Baron Wood, in Attorney General *v.* Jones, 3 Price, 383.

(*i*) Wyrall *v.* Hall, 2 Chanc. Rep. 112;

as it will appear in the subsequent chapter, respecting the form and manner of making the will; (*j*) and even by the old authorities above mentioned, an instrument which would have amounted to a testament, if an executor had been nominated, was recognized as obligatory on him who had the administration of the goods of the deceased, under the appellation of a codicil; which is accordingly defined by Swinburne (*k*) and Godolphin (*l*) to be "the just sentence of our will, touching that which we would have done after our death, *without the appointing of an executor;*" and hence a codicil was called "an unsolemn last will." (*m*) It was termed codicil, *codicillus*, as a diminutive of a testament, *codex*. (*n*)

* But although it appears that "codicils" might be made by those who died without testaments, (*o*) yet the more frequent use of a codicil was, as an addition made by the testator, and annexed to, and to be taken as part of a testament; being for its explanation or alteration, or to make some addition to, or else some subtraction from, the former disposition of the testator: (*p*) in which sense the term codicil is applied in modern acceptation.

A codicil, in this latter sense of it, is part of the will, all making but one testament. (*q*) A strong illustration of this princi-

[Stebbins *v.* Lathrop, 4 Pick. 43; Drury *v.* Natick, 10 Allen, 169, 174; Newcomb *v.* Williams, 9 Met. 533, 534.]

(*j*) *Post*, pt. I. bk. II. ch. II. § III.

(*k*) Pt. 1, s. 5, pl. 2.

(*l*) Pt. 1, c. 6, s. 2.

(*m*) Swinb. pt. 1, s. 5, pl. 4; Godolph. pt. 1, c. 6, s. 2.

(*n*) Godolph. pt. 1, c. 6, s. 1. However, in respect of distribution, under the custom of York, &c. it may at this day be a material question whether a man dies testate in the strict sense of having appointed an executor. See Wheeler *v.* Sheer, Moseley, 302; Wilkinson *v.* Atkinson, 1 Turn. Ch. Rep. 255; Pickford *v.* Brown, 2 Kay & J. 426; Chappell *v.* Haynes, 4 Kay & J. 163; and *infra*, pt. III. bk. IV. ch. II.

(*o*) Swinb. pt. 1, s. 5, pl. 9; Godolph. pt. 1, c. 6, s. 3.

(*p*) Swinb. pt. 1, s. 5, pl. 5; Godolph. pt. 1, c. 6, s. 1. Although in a codicil, regularly, executors may not be instituted or primarily appointed, yet executors may be substituted or added by a codicil. Godolph. pt. 1, c. 1, s. 3; Swinb. pt. 1, s. 5, pl. 5. [This rule has been carried to the extent of enabling two persons to prove a will and codicil, one of whom was named as sole executor in the will and the other as sole executor in the codicil. Mullin P. J. in Wetmore *v.* Parker, 7 Lansing, 121, 129.]

(*q*) Fuller *v.* Hooper, 2 Ves. sen. 242, by Lord Hardwicke; Crosbie *v.* MacDoual, 4 Ves. 610; Evans *v.* Evans, 17 Sim. 108; Hartley *v.* Tribber, 16 Beav. 510; and see Reeves *v.* Newenham, 2 Ridgw. I. P. C. 43. [A codicil is an addition or supplement to a will, and must be executed with the same solemnity. 4 Kent, 531; Metcalf J. in Tilden *v.* Tilden, 13 Gray, 103, 108. "The term 'will' shall include codicils." Genl. Sts. Mass. c. 3, § 7. A codicil does not interfere with any of the specific provisions of the will, unless its language naturally and obviously produce such result, or the terms of the codicil expressly recognize the alteration. Mullin

ple may be found in the case of Sherer *v.* Bishop, (*r*) where the testator gave the residue of his personal estate among such of his relations only *as were mentioned in that his will.* He afterwards made a codicil which he directed to be taken as part of his will; and a second, by which he gave legacies to two of his relations, but gave no such direction; and it was held by Lord Commissioner Eyre (*dubitantibus* Ashhurst J. and Wilson J.), as that every codicil was part of the testamentary disposition, though not part of the instrument, the relations named in the second codicil were entitled to a share of the residue. (*s*) But in Fuller *v.* * Hooper, (*t*) where a person by will gave legacies to all her nephews and nieces, *except those thereinafter named*, and desired her executors to look upon all memoranda in her handwriting as parts of, or a codicil to, her will, and then bequeathed the residue to the children of her sisters; and by a codicil she gave legacies to

P. J. in Wetmore *v.* Parker, 7 Lansing, 121, 129. It is the established rule not to disturb the dispositions of the will further than is absolutely necessary for the purpose of giving effect to the codicil. 1 Jarman Wills (3d Eng. ed.), 162; Conover *v.* Hoffman, 1 Bosw. 214; Tilden *v.* Tilden, 13 Gray, 108, 109. Where the will contains a clear and unambiguous disposition of property, real or personal, such a gift is not allowed to be revoked by doubtful expressions in a codicil. 1 Jarman Wills (3d Eng. ed.) 168; Wetmore *v.* Parker, 52 N. Y. 450; Hearle *v.* Hicks, 1 Cl. & Fin. 20; Robertson *v.* Powell, 2 H. & C. 762; In re Arrowsmith's Trusts, 2 De G., F. & J. 474; Norman *v.* Kynaston, 3 De G., F. & J. 29; Lemage *v.* Goodban, L. R. 1 P. & D. 57; Brant *v.* Wilson, 8 Cowen, 56; Coster *v.* Coster, 3 Sandf. Ch. 111; *post*, 185, and note. "It is an established *primâ facie* rule of construction that an additional legacy, given by a codicil, is attended with the same incidents and qualities as the original legacy." Metcalf J. in Tilden *v.* Tilden, 13 Gray, 103, 108; *post*, 1295. A codicil depending upon the body of the will for interpretation or execution, cannot be established as an independent will, when the will itself has been revoked. Youse *v.* Forman, 5 Bush, 337. See Pinckney's Will, 1 Tuck. (N. Y. Sur.) 436.]

(*r*) 4 Bro. C. C. 55.

(*s*) This decision has been considered as carrying the principle too far; and in Hall *v.* Severne, 9 Sim. 515, 518, Shadwell V. C. said he could not accede to it. In the latter case, the testator, by his will, gave pecuniary legacies to several persons, and directed his residue to be divided amongst his before mentioned legatees in proportion to their several legacies therein before given. By a codicil, which he directed to be taken as part of his will, he gave several pecuniary legacies to persons, some of whom were legatees under his will, and declared that the several legacies mentioned in the codicil were given to the therein mentioned legatees in addition to what he had given to them or any of them by his will; and the V. C. held that none of the legatees under the codicil were entitled to share in the residue in respect of their legacies under the codicil. Where a testator devised property to the children of B. in like manner as they were entitled under the will of B., it was held that the testator referred to the will and codicils of B., as the whole together must be taken to be his will. Pigott *v.* Wilder, 26 Beav. 90.

(*t*) 2 Ves. sen. 242, and Supplement by Belt, 333.

some other nephews and nieces; Lord Hardwicke held, that the nephews and nieces mentioned in the subsequent part of the will, *and not those mentioned in the codicil*, were excluded from the first mentioned legacies; because the testatrix meant to refer, not to her will or testament, which takes in all the parts, but to the particular instrument. (*u*)

A will is in its nature a different thing from a deed, and although the testator happen to execute it with the *formalities of a deed; *e. g.* though he should seal it, which is no part or ingredient of a will; yet it cannot in such case be considered as a deed. (*x*)

A will is different in its nature from a deed:

It is also a peculiar property in a will, as it will hereafter more fully appear, that by its nature it is in all cases a revocable instrument, even should it in terms be made irre-

in all cases revocable:

(*u*) So, in Early *v.* Benbow, 2 Coll. 354, the testator, by his will, directed that the legacies "herein before by me bequeathed" should be paid free of legacy duty. By a codicil which he directed might be taken as part of his will, he gave other legacies; and Knight Bruce V. C. held that the legacies given by the codicil were not given free of legacy duty, his honor being of opinion that the word "*herein*" was meant to refer to no more than the particular instrument in which it was contained. However, several cases may be found, where an additional legacy given by a codicil, though not so expressed, has been held subject to the same incidents as the original legacy given by the will. See Day *v.* Croft, 4 Beav. 561; Warwick *v.* Hawkins, 5 De G. & Sm. 481. See, also, the other decisions with respect to the legacy duty, collected, *infra*, pt. III. bk. V. ch. III. Where a testator executed a codicil to his last will, and by such codicil absolutely revoked and made void all bequests and dispositions in the will, and nominated executors, but did not in direct terms revoke the appointment of executors and guardians in the will, it was held by Lord Penzance that the will was not revoked. In the Goods of Howard, L. R. 1 P. & D. 636. [Where the residue was given to executors by will, and a codicil directed that A. should also be executor, and that the will should take effect as if his name had been inserted therein as executor, A. was held not entitled to a share of the residue. Hillersdon *v.* Grove, 21 Beav. 518.]

(*x*) Lord Darlington *v.* Pulteney, 1 Cowp. 260; Attorney General *v.* Jones, 3 Price, 368; [Gillman *v.* Mustin, 42 Ala. 365.] See *post*, pt. I. bk. II. ch. II. § III. as to what instruments are testamentary. [A seal is not necessary to the validity of a will, either of personal or real estate, unless required by statute. Avery *v.* Pixley, 4 Mass. 460, 462; Arndt *v.* Arndt, 1 Serg. & R. 256; Williams *v.* Burnett, Wright, 53; Piatt *v.* McCullough, 1 McLean, 70; Hight *v.* Wilson, 1 Dallas, 94; Doe *v.* Pattison, 1 Blackf. 355; In re Diez, 50 N. Y. 88. A seal is, however, not unfrequently annexed to a will, although not required; and if the testator, considering the seal an essential part of the execution, should tear it off, with the express design thereby to revoke the will, it might become important in that aspect. Avery *v.* Pixley, 4 Mass. 460, 462; In re Will of Angelina S. White, 25 N. J. Eq. 501. A seal was required to a will of real estate by the Revised Statutes of New Hampshire, 1842, c. 156, § 6. See 1 Greenl. Ev. § 272, note.]

vocable; (*y*) for it is truly said, that the first grant and the last will is of the greatest force. (*z*)

Therefore a will made by way of provision for a wife, in contemplation of marriage, is revoked by a will of later date. (*a*)

there cannot be a joint will.

Another essential difference between a will and a deed may be mentioned, that there cannot be a conjoint or mutual will. An instrument of such a nature is unknown to the testamentary law of this country. (*b*) But there are several authorities which appear to show that this doctrine does not go farther than to deny that a conjoint or mutual will can be made with the characteristic quality of being irrevocable, unless with the concurrence of the joint or mutual testators. Such a will is certainly revocable. (*c*) But if either of the testators dies without revoking it, the will is valid and entitled to probate as far as respects his property. (*d*) * Where, however, two testators

(*y*) Vynoir'a case, 8 Co. 82 *a*. See *post*, pt. 1. bk. II. ch. III.

(*z*) Co. Lit. 112 *b*.

(*a*) Pohlman *v.* Untzellman, 2 Cas. temp. Lee, 319.

(*b*) [Lord Darlington *v.* Pulteney,] 1 Cowp. 268, in Lord Mansfield's judgment; Hobson *v.* Blackburn, 1 Add. 277. [In Clayton *v.* Liverman, 2 Dev. & Bat. 558, a conjoint will, offered for probate after the death of both the parties, was rejected upon the idea that Hobson *v.* Blackburn, *supra*, as decided by Sir John Nicholl, established the invalidity of such instruments as wills. Judge Daniel, in dissenting from the opinion of his brethren in this case, admitted that, as a joint will it could not be admitted to probate, but urged, with great force and earnestness, that it should have been admitted to proof as the separate will of each of the decedents. The idea that a will is invalid because signed by more parties than one, and purporting on its face to be the will of more than one, is not in consonance with established law. Bradford, Surrogate, in Ex parte Day, 1 Bradf. 481; Rogers et al. Appts. 2 Fairf. 303; Lewis *v.* Scofield, 26 Conn. 452; Schumaker *v.* Schmidt, 44 Ala. 454;] but see *post*, pt. 1. bk. II. ch. III. as to the validity of such a will in equity.

(*c*) [Schumaker *v.* Schmidt, 44 Ala. 454.] But see *post*, pt. 1. bk. II. ch. III. as to the irrevocability of such a will in equity.

(*d*) In the Goods of Stracey, Dea. & Sw. 6; In the Goods of Lovegrove, 2 Sw. & Tr. 453; [Evans *v.* Smith, 28 Geo. 98. A will made and executed jointly by husband and wife, devising estates of which he was sole owner, was at his death sustained as a valid will of the husband alone. Rogers et al. Appts. 2 Fairf. 303. See Lewis *v.* Scofield, 26 Conn. 455; Kunnen *v.* Zurline, 2 Cin. (Ohio) 440. And where a husband and wife are empowered to dispose of an estate by will, and they jointly make and duly execute a will, it is not in the power of either, by a separate act, to revoke the will so made. Breatwitt *v.* Whittaker, 8 B. Mon. 530. So it has been held that a mutual will executed by husband and wife, devising reciprocally to each other, is valid. Such an instrument operates as the separate will of whichever dies first. In re Diez, 50 N. Y. 88. This subject was ably discussed, and the cases bearing upon it reviewed, by Bradford, Surrogate, in Ex parte Day, 1 Bradf.

made a joint will containing devises and legacies to take effect after the decease of both of them, it was held that probate could not be granted of the will during the lifetime of either. (*e*)

467, where he decided that a conjoint or mutual will is valid, and may be admitted to probate, on the decease of either of the parties, as his will; that such an instrument, though irrevocable as a compact, is revocable as a will, by any valid subsequent testamentary paper; but if unrevoked, it may be proved as a will, if it has been executed with the formalities requisite to the due execution of a will. The learned surrogate reviews the case of Hobson *v.* Blackburn, cited in note (*b*) above, and concludes that there is nothing in it inconsistent with the propositions stated in Ex parte Day, and adds: "Sir John Nicholl's own language in Passmore *v.* Passmore, 1 Phillim. 216, and Masterman *v.* Maberly, 2 Hagg. 235, shows that his decision in Hobson *v.* Blackburn has been entirely misconceived; that instead of deciding that a compact of a testamentary character could not be proved as a will because it was a mutual or conjoint act, he only held that such an instrument could not be set up as irrevocable against a subsequent will revoking it." "Nor do I see anything in the formal requisites prescribed by our statute, in relation to the due execution of wills, militating against the admission of a mutual will to probate, from the mere fact that it was executed as a will by two persons at the same time, provided that all the proper solemnities were duly observed. . . . . Because the will happens to be made in conformity to some agreement, or contains on its face matter of agreement, or shows mutuality of testamentary intention between two persons, and a compact or intention not to revoke, in my judgment it is none the less a will, and if it happens that the party who first dies, observes religiously his solemn compact and dies, leaving this in fact his last will and testament, it ought to be admitted to proof as such. The compact is not unlawful, it is not contrary to good manners, it will be sustained in a court of equity, on the ground that the will is valid at law, and by the death of the first dier has become irrevocable; unless there is some matter of form, some technical arbitrary rule springing out of the statute, or the necessary form or construction of a will, it is difficult to see why a conjoint will should not be admitted to probate on the death of either of the parties, as his separate will." In Lewis *v.* Scofield, 26 Conn. 452, it appeared that two sisters jointly executed an instrument in the following form: "We, A. and B. make this, our last will and testament, in manner and form as follows, viz, that in the event of the death of either of us, testators, the surviving sister shall have and hold for her own use and benefit, to dispose of in manner that shall seem most expedient, all of the real and personal estate we shall be possessed of," and the instrument was executed with the formalities requisite to a will, it was held that the instrument, construed according to the legal effect of its language, undertook to operate only as the will of the sister who should first die, and only upon

(*e*) In the Goods of Raine, 1 Sw. & Tr. 144, *coram* Sir C. Cresswell. But *quære*, whether the delay of the effect of the will interfered with its title to immediate probate as the will of the deceased testator. [A still more important and difficult question relates to the disposition to be made of the property of the joint testator first deceased between the time of his death and the time of the decease of his surviving joint testator. In Schumaker *v.* Schmidt, 44 Ala. 454, it was held that, if the will so provides, and the disposition made of the property requires it, the probate should be delayed until the death of both or all the testators.]

her estate; and that upon the death of the sister who first died, it was valid as her will. Hinman J. having considered the remarks of Lord Mansfield in Darlington *v.* Pulteney, and the decision in Hobson *v.* Blackburn, said, "We do not therefore consider the authorities as at all decisive as against the probate of such an instrument as is before the court in this case; and as the point has not, to our knowledge, ever been raised before in this state, we feel at liberty to decide it upon the reason and good sense of the case, as it appears to us." A similar paper was upheld as a will in Evans *v.* Smith, 28 Geo. 98; Schumaker *v.* Schmidt, 44 Ala. 454. It was said in Bynum *v.* Bynum, 11 Ired. 632, that, where two persons agree to make mutual wills, it would seem that bad faith in the one, either in not making his will or in cancelling it after it was made, will not prevent the probate of the will of the other party. An agreement to make mutual wills appears to be valid. Ex parte Day, 1 Bradf. 476, 477, and cases there cited; Izard *v.* Middleton, 1 Desaus. 116; Dufour *v.* Pereira, 2 Harg. Jurid. Arg. 304; Rivers *v.* Rivers, 3 Desaus. 190; *post*, 124, note (c^1); Gould *v.* Mansfield, 103 Mass. 408. Reciprocal wills seem to have been sanctioned by the civil law. Ex parte Day, 1 Bradf. 480, 481; Domat, pt. 2, lib. 3, tit. 1, § 8, art. 20; Dig. lib. 28, tit. 5, De Heredibus Inst. c. 70.]

*BOOK THE SECOND.

OF THE MAKING, REVOCATION, AND REPUBLICATION OF WILLS OF PERSONAL ESTATE.

CHAPTER THE FIRST.

WHO IS CAPABLE OF MAKING A WILL OF PERSONALTY.

It may be laid down generally, that all persons are capable of disposing of their personal estate by testament, who have sufficient discretion, their own free will, and who have not been guilty of certain offences. (*a*) Wherefore there are three grounds of incapacity: 1, the want of sufficient legal discretion; 2, the want of liberty or free will; 3, the criminal conduct of the party.

This may be the proper place to mention two cases which do not come, in strictness, under any one of these heads. Aliens. Alien friends, or such whose countries are at peace with ours, may make wills to dispose of their personal estate (a^1) (although being incapable of holding real property, they are of course equally so of devising it; (*b*) but alien enemies, unless

(*a*) Swinb. pt. 2, s. 1. [There seems to be no distinction in the degree of mental capacity requisite for the execution of a valid will of real estate and that required for the execution of such a will of personal estate. Sloan *v.* Maxwell, 2 Green Ch. 563, 566; Marquis of Winchester's case, 6 Co. 23. In either case the testator must have a sound disposing mind at the time of making his will. Kinne *v.* Kinne, 9 Conn. 102; Boyd *v.* Eby, 8 Watts, 66; Harrison *v.* Rowan, 3 Wash. C. C. 586; Whitenach *v.* Stryker, 1 Green Ch. 11; Duffield *v.* Robeson, 2 Harring. 379.]

(a^1) [Craig *v.* Leslie, 3 Wheat. 589; Polk *v.* Ralston, 2 Humph. 500; Commonwealth *v.* Martin, 5 Munf. 117.]

(*b*) This incapacity extends to chattels real. Co. Lit. 2 *b*. But in Fourdrin *v.* Gowdey, 3 My. & K. 383, where an alien resident in England purchased an equitable interest in freehold lands, and also a lease for a long term of years, and afterwards obtained letters of denization, which in terms conferred upon him not only the power of acquiring lands in future, but of retaining and enjoying all lands which he had theretofore acquired, Sir John Leach M. R. held that he had power to devise the freehold and chattel interest in land which he had purchased previously to the letters of denization. See stat. 7 & 8 Vict. c. 66 (Act to amend the Laws respecting Aliens). [Great modification of the law on

they have the king's license, express or implied, to reside in this *country are incapable of making any testamentary disposition of their property. (*c*)

this subject must result, in England, from the 33 Vict. c. 14, "The Naturalization Act," 1870. For by sect. 2 of that act, an alien is empowered to take, acquire, hold, and dispose of real and personal property of every description, in the same manner in all respects as if he were a natural born British subject; and a title to real and personal property of every description may be devised through, from, or in succession to, an alien, in the same manner in all respects as through, from, or in succession to a natural born British subject; with certain provisos not material to this subject. The statute appears to give this power to all aliens, whether they be the subjects of a friendly state or not; and whether they reside in England or not. 1 Chitty Contr. (11th Am. ed.) 259, 260; 1 Dan. Ch. Pr. (4th Am. ed.) 47. The disabilities of aliens to take, hold, or transmit real estate have been partially removed in some of the American States, and wholly in others. See 2 Kent, 69 *et seq.*; 1 Dan. Ch. Pr. (4th Am. ed.) 46, note (6). By the General Statutes of Massachusetts, c. 90, § 38, aliens, whether residents or non-residents, may take, hold, transmit, and convey real estate, and no title to real estate shall be invalid on account of the alienage of any former owner. See Foss *v.* Crisp, 20 Pick. 121; Lumb *v.* Jenkins, 100 Mass. 527. The above provisions were first enacted in substance by stat. 1852, cc. 29, 86. Before that statute, the rule of law prevailed, in Massachusetts, as in other states where there is no statute upon the subject, that an alien could *take* real estate, by deed or devise, or other act of purchase, but could not *hold* against the state; he, therefore, took a defeasible estate, good against all except the state, and good against that until proceedings were instituted, and judgment obtained on its behalf by inquest of office. But an alien could not take by act of law, as by descent, because the law would be deemed to do nothing in vain, and therefore it would not cast the descent upon one who could not by law hold the estate. Wilbur *v.* Tobey, 16 Pick. 179, 180; Foss *v.* Crisp, 20 Pick. 124, 125; Waugh *v.* Riley, 8 Met. 295; 2 Kent, 53, 54; Montgomery *v.* Dorion, 7 N. H. 475; Slater *v.* Nason, 15 Pick. 345; Jackson *v.* Adams, 7 Wend. 367; Fairfax *v.* Hunter, 7 Cranch, 603; Fox *v.* Southack, 12 Mass. 143; Smith *v.* Zaner, 4 Ala. 99; Rubec *v.* Gardner, 7 Watts, 455; Craig *v.* Leslie, 3 Wheat. 563; Doe *v.* Robertson, 11 Wheat. 332; Marshall *v.* Conrad, 5 Call, 364; Mooers *v.* White, 6 John. Ch. 360, 366; Scanlan *v.* Wright, 13 Pick. 543; People *v.* Conklin, 2 Hill, 67; M'Creery *v.* Allender, 4 Harr. & M'H. 409; Fiott *v.* Commonwealth, 12 Grattan, 564. Statutes of a like character with that above cited from Massachusetts exist in many other states. And in some states provisions modifying the disability of alienage have been introduced into their constitutions. But it is to be observed, as stated by Chancellor Kent, that these civil privileges conferred upon aliens by state authority must be taken to be strictly local, and until a foreigner is duly naturalized, according to the act of Congress, he is not entitled in any other state to any other privileges than those which the laws of that state allow to aliens. No other state is bound to admit, nor would the United States admit, any alien to any privileges to which he is not entitled by treaty, or the law of nations, or of the state in which he dwells. 2 Kent, 70, 71. See 2 Sugden V. & P. (8th Am. ed.) 685, note (*d*); Lynch *v.* Clarke, 1 Sandf. Ch. 583. The statutes of several of the states and a synopsis of their provisions will be found in 1 Cruise Dig. by Mr. Greenleaf, tit. 1, § 39, in note, pp. 53, 54; Const. Iowa (1857), art. 1, sec. 22.]

(*c*) Wentw. c. 1, p. 35, 14th ed.; Vin. Abr. Devise, G. 17; Bac. Abr. Wills, B. 17.

With respect to the power of the reigning sovereign to make a will of his or her personal property; it appears by the Rolls of Parliament, that in the sixteenth year of King Richard the Second "the bishops, lords, and commons assented in full parliament, that the king, his heirs and successors, might lawfully make their testaments." (*d*) And the statute 39 & 40 George 3, c. 88, s. 10, enacts, "that all such personal estate of his majesty, and his successors respectively, as shall consist of moneys which may be issued or applied for the use of his or their privy purse, or moneys not appropriated to any public service, or goods, chattels, or effects, which have not or shall not come to his majesty or shall not come to his successors respectively, with or in right of the crown of this realm, shall be deemed and taken to be personal estate and effects of his majesty and his successors respectively, subject to disposition by last will and testament, and that such last will and testament shall be in writing, under the sign manual of his majesty and his successors respectively, or otherwise shall not be valid; and that all and singular the personal estate and effects whereof or whereunto his majesty or any of his successors shall be possessed or entitled at the time of his and their respective demises, subject to such testamentary disposition as aforesaid, shall be liable to the payment of all such debts as shall be properly payable out of his or their privy purse, and that subject thereto, the same personal estate and effects of his majesty and his successors respectively, or so much thereof respectively as shall not be given or bequeathed or disposed of as aforesaid, shall go in such and the same manner, on the * demise of his majesty and his successors respectively, as the same would have gone if this act had not been made." The king or queen.

But it should seem that the ecclesiastical court has no jurisdiction to grant any probate of the will of a deceased sovereign. On one occasion, (*e*) an application was made to the prerogative court of Canterbury for its process, calling on the proctor of his majesty, King George 4, to see and hear an alleged testamentary paper of his late majesty King George 3, propounded and proved; but the court refused the application, on the ground that

(*d*) 4 Inst. 335. Whether kings and sovereign princes can make their testaments, says Godolphin (pt. 1, c. 7, s. 4), is resolved in the affirmative; but of what things is such a *questio statûs* as is safest resolved by a *noli me tangere*. See, also, Swinb. pt. 2, s. 27.

(*e*) In the Goods of his late Majesty George 3, 1 Add. 255.

in substance the process was prayed, and a demand adversely made, against the reigning sovereign; contrary to the established doctrine, that no action or suit, even in civil matters, can be brought against the king. The learned judge, Sir John Nicholl, in the course of his judgment, observed, that the history of the wills of sovereigns, from Saxon times, from Alfred the Great down to the present day, had been diligently searched and examined; but no instance had been produced of any sovereign having taken probate in the archbishop's court, or of any sovereign's will having been proved there; (*f*) nor any instance of any successor of any intestate sovereign coming to the court for letters of administration; which the learned judge considered as furnishing decisive evidence that the * court had no jurisdiction whatever therein. (*g*) This decision was subsequently approved and acted on by Sir Cresswell Cresswell. (*h*)

SECTION I.

Persons incapable from Want of Discretion.

Infants.

In this class are to be reckoned infants, with respect to whom it is enacted by stat. 1 Vict. c. 26, s. 7, "that no will made by any person under the age of twenty-one years shall be valid." (*h*[1])

(*f*) One single instance occurs in the Rolls of Parliament of something like a reference to this jurisdiction in respect of a royal will. In the 1st of Henry 5 it is stated that Henry 4, having made a will, and appointed executors thereof, those executors, fearing the assets would be insufficient, declined to act. It is then recited that under these circumstances the effects would be *at the disposal of the archbishop of Canterbury as ordinary*, who should direct them to be sold. But Henry 5, instead of allowing the effects to be sold, took them, and agreed to pay their appraised value. 1 Add. 263; 4 Inst. 335. The only will of a sovereign deposited in the registry of the prerogative court is the will of Henry 8. That is understood to be a copy merely, and there is no appearance of any probate of it having been taken. It was probably deposited there for safe custody or as a place of notoriety for such a purpose. 1 Add. 263.

(*g*) 1 Add. 262, 264, 265.

(*h*) In the Goods of his late Majesty Geo. 3, 3 Sw. & Tr. 199.

(*h*[1]) [There is a strong tendency in the legislation of the American States to establish the age of twenty-one as that at which a person, whether male or female, may make a will, either of real or personal estate. Such is the case in Massachusetts, Maine, New Hampshire, Delaware, Michigan, New Jersey, Ohio, Indiana, Pennsylvania, Florida, Kentucky, and probably other states. See Moore *v.* Moore, 23 Texas, 637. There is a distinction made in some of the states between the age at which a person may make a will of personal, and that at which he may make a will of real estate. Thus in Virginia, Arkansas, North Carolina, Rhode Island, and Mis-

This statute does not extend to any will made before January 1, 1838; and it is, therefore, necessary to consider the law as applicable to wills on which the act cannot operate.

In such cases the doctrine is, that infants who have attained the age of fourteen, if males, and twelve, if females, are capable of making wills of personal estate. (*h*[2]) At these ages the Roman law allowed of testaments; and the civilians agree that our ecclesiastical courts follow the same rule. (*i*) And as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law. (*k*) But this doctrine is not sustained by the authority of civilians only: books of considerable authority, written by common lawyers, mention twelve and fourteen for the same purpose: (*l*) prohibitions have been refused by the king's bench, when applied for to restrain the ecclesiastical court from allowing wills made at such early ages, (*m*) and there are several instances in which the doctrine * has been recognized and adopted in the court of chancery. (*n*) These ages are also selected by the law of England as those when in-

souri, all persons may dispose of personal estate by will at the age of eighteen, but of real estate, not until twenty-one. As to North Carolina, see Williams *v.* Heirs, Busb. (N. C.) 271; as to South Carolina, see Poscy *v.* Posey, 3 Strobh. (S. C.) 167. In Connecticut, the age of twenty-one is required for a will of real estate, and seventeen for personal estate. In some of the states a distinction is made between males and females as to the testamentary age. In New York, the age for making a will of personalty is eighteen in males and sixteen in females; but for a will of real estate the required age is twenty-one for all persons. In Iowa, the period of minority extends in males to twenty-one years, in females to eighteen years. Laws of Iowa, Rev. of 1860, c. 104, § 2539; see c. 100, § 2309. In Vermont, females arrive at majority, for all purposes, when they become eighteen years of age. "The statute of wills in this state, in general terms, limits the right of disposing of property by testament to persons of full age." Steele J. in Goodell *v.* Pike, 40 Vt. 319, 323. In Illinois, persons, both male and female, at seventeen years of age may make wills of personal, estate, but as to real estate the age required is twenty-one in males and eighteen in females. In Maryland, the period of testamentary capacity, as to real estate, is fixed at twenty-one in males and eighteen in females. In Texas, the age must be "twenty and upwards, in both males and females." Laws of 1840, p. 167; 4 Kent, 506; 1 Red. Wills, c. III. sec. II. § 4, pl. 2.

(*h*[2]) [Deane *v.* Littlefield, 1 Pick. 239; 4 Kent, 506.]

(*i*) Swinb. pt. 2, s. 2, pl. 6; Godolph. pt. 6, c. 8, s. 8.

(*k*) 2 Bl. Com. 497. It must be borne in mind, that with respect to a devise *of bands*, by the provision of the statute of wills (32 & 34 Henry 8), infants under the age of twenty-one are intestable.

(*l*) Wentw. Off. Ex. c. 18, p. 389, 14th ed.; Touch. 403.

(*m*) Smallwood *v.* Brickhouse, 2 Mod. 315; S. C. Show. 204; —— *v.* Chancellor of Lichfield, T. Jones, 210; Dalby *v.* Smith, Comberb. 50; 1 Gibs. Cod. 461.

(*n*) Hyde *v.* Hyde, Prac. Chan. 316; S. C. Gilb. Eq. Rep. 74; Anon. Mosely, 5; Ex parte Holyland, 11 Ves. 11.

fants of the respective sexes shall have the power of choosing guardians. (*o*)

In the case of Arnold *v.* Earle, (*p*) in the prerogative court of Canterbury, the will of a schoolboy of the age of sixteen in favor of his schoolmaster was established, where no evidence of fraud, improper influence, or control was shown. (*q*)

But though no objection can be admitted to the will of an infant of fourteen, if a male, or twelve, if a female, merely for want of age, yet if the testator was not of sufficient discretion, whether of the age of fourteen or four-and-twenty, that will overthrow the testament. (*r*)

No custom of any place can be good to enable a male infant to make any will before he is fourteen years of age. (*s*)

When an infant hath attained the age above mentioned, he or she may make a will without and against the consent of their tutor, father, or guardian. (*t*) If he or she hath attained the last day of fourteen or twelve years, the testament *by him or her made in the very last day of their several ages aforesaid is as good and lawful as if the same day were already then expired. (*u*) Likewise, if after they have accomplished these years of fourteen or twelve, he or she do expressly approve of the testament made in their minority, the same by this new will and declaration is made strong and effectual. (*x*) But the mere circumstance of an infant having lived some time after the age when he became capable of making a will, cannot, without republication, give validity to one made during his incapacity. (*y*)

(*o*) Co. Lit. 89 *b*, note (83), by Hargrave. There are, however, many irreconcilable opinions on the subject, in the books. Lord Coke states eighteen to be the age, Co. Lit. 89 *b*, and others mention seventeen, that being the age when, before the stat. 38 Geo. 3, c. 87, an administration during the minority of an executor determined. Others mention twenty-one, because none can be administrators till that age. And in Perkins *four* is said to be the age for making a will of personalty; but this is supposed to be a mere error of the press by omission of the figure X. and most probably XIIII. was the age intended. Swinb. pt. 2, s. 2, note (*f*); Co. Lit. 89 *b*, note (83), by Hargrave.

(*p*) MS. *coram* Sir Geo. Lee, 5th June, 1758, cited in 4 Burn E. L. 45, note (9), by Tyrwhitt; S. C. 2 Cas. temp. Lee, 529.

(*q*) See, also, Ames *v.* Ward, Prer. T. T. 1767, *coram* Sir Geo. Hay, Ib.

(*r*) 2 Bl. Com. 497; [Deane *v.* Littlefield, 1 Pick. 243.]

(*s*) Garmyn *v.* Arstete, 2 And. 12; Godolphin, pt. 1, c. 8, s. 1; Com. Dig. Devise, H. 2; 4 Burn E. L. 46.

(*t*) Swinb. pt. 2, s. 2, pl. 6; Bac. Abr. Wills, B. 1.

(*u*) Swinb. pt. 2, s. 2, pl. 7; Herbert *v.* Torball, Sid. 162; Com. Dig. Devise, H. 2; Godolphin, pt. 1, c. 8, s. 1; Bac. Abr. Wills, B. 2.

(*x*) Ib.

(*y*) Herbert *v.* Torball, 1 Sid. 162;

An idiot, that is, a fool or madman from his nativity, who never has any lucid intervals, (*z*) is incapable of making a will. (*z*[1]) Such a one is described to be a person who cannot number twenty, tell the days of the week, does not know his own father or mother, his own age, &c. (*a*) But these, though they may be evidences, yet they are too narrow, and conclude not always; (*b*) for whether idiot or not is clearly a question of fact, referrible to the individual circumstances of each particular case. (*b*[1]) If an idiot should make his testament so well and wisely in appearance that the same may seem rather to be made by a reasonable man than by one void of discretion, yet this testament is void in law. (*c*) Idiots.

One who is deaf and dumb from his nativity is, in presumption of law, an idiot, and therefore incapable of making a will; but such presumption may be rebutted, and if it sufficiently appears that he understands what a testament means, and has a desire to make one, then he may by signs and tokens declare his testament. (*d*) One who is not deaf * and dumb by Deaf and dumb.

Swinb. pt. 2, s. 2, pl. 5. [In computing the age of a person, the day of his birth is included; thus, if he were born on the first day of January, 1800, he would have attained his majority on the thirty-first day of December, 1820; and as the law does not recognize fractions of a day, he would have attained his majority at the earliest minute of that day. Bardwell *v.* Purrington, 107 Mass. 425; Herbert *v.* Torball, 1 Sid. 142; S. C. Raym. 84; The State *v.* Clark, 3 Harring. 557; Hamlin *v.* Stevenson, 4 Dana, 597; Wells *v.* Wells, 6 Ind. 447; Fitzhugh *v.* Dennington, 6 Mod. 259; S. C. 1 Salk. 44; 2 Kent, 233.]

(*z*) 1 Hale P. C. 29; Bac. Abr. Idiots, &c. A. 1; Beverley's case, 4 Co. 124 *b*.

(*z*[1]) [See Stewart *v.* Lispenard, 26 Wend. 255, per Verplanck, Senator.]

(*a*) 1 Hale P. C. 29; Bac. Abr. Idiots, &c. A.; Swinb. pt. 2, s. 4. [See Hovey *v.* Chase, 52 Maine, 304, 315.]

(*b*) 1 Hale P. C. 29.

(*b*[1]) [See Rambler *v.* Tryon, 7 Serg. & R. 90; Shelford Lunacy, 276.]

(*c*) Swinb. pt. 2, s. 4, pl. 5, 7; Bac. Abr. Wills, B. 12; [per Potter J. in Harper *v.* Harper, 1 N. Y. Sup. Ct. Rep. 354.]

(*d*) Swinb. pt. 2, s. 4, pl. 2; Godolph. pt. 1, c. 11; [Potts *v.* House, 6 Geo. 324; In re Harper, 6 M. & Gr. 731; 7 Scott N. R. 431; Brower *v.* Fisher, 4 John. Ch. 441; Christmas *v.* Mitchell, 3 Ired. Ch. 535;] 4 Burn E. L. 60. See, also, Dickenson *v.* Blisset, 1 Dick. 268; and the judgment of Wood V. C. in Harrod *v.* Harrod, 1 Kay & J. 4, 9. Where a testator, who was deaf and dumb, made his will by communicating his testamentary instructions to an acquaintance by signs and motions, who prepared a will in conformity with such instructions, which was afterwards duly executed by the testator, the court required an affidavit from the drawer of the will, stating the nature of the signs and motions by which the instructions were communicated to him. In the Goods of Owston, 2 Sw. & Tr. 461. See, also, accord. In the Goods of Geale, 3 Sw. & Tr. 431; [Moore *v.* Moore, 2 Bradf. Sur. 265. It is doubtful whether at this day any presumption of mental incapacity exists in regard to this class of persons. In proving the will of a deaf

nature, but being once able to hear and speak, if by some accident he loses both his hearing and the use of his tongue, then in case he shall be able to write, he may with his own hand write his last will and testament. (*e*) But if he be not able to write, then he is in the same case as those which be both deaf and dumb by nature, *i. e.* if he have understanding he may make his testament by signs, otherwise not at all. (*f*) Such as can speak and cannot hear, they may make their testaments as if they could both speak and hear, whether that defect came by nature or otherwise. (*g*) Such as be speechless only, and not void of hearing, if they can write, may very well make their testament themselves by writing: if they cannot write, they may also make their testaments by signs, so that the same signs be sufficiently known to such as then be present. (*h*)

Blind persons.

It is laid down in the old text-books of the ecclesiastical law, that although he that is blind may make a nuncupative testament, (*i*) by declaring his will before a sufficient number of witnesses; yet that he cannot make his testament in writing, unless the same be read before witnesses, and in their presence acknowledged by the testator for his last will; (*k*) and that, therefore, if a writing be delivered to the testator, and he not hearing the same read, acknowledged the same for his will,

and dumb person it should, of course, be shown that the obstacles created by his physical infirmity had been overcome and his mind had been reached and communicated with, so that he was cognizant of the act, knew and approved of the contents of the will, and comprehended the force and purpose of the business he was engaged in when he was doing it. See Shelford Lunacy, 3, 4; Potts *v.* House, 6 Geo. 324; Morrison *v.* Lennard, 3 C. & P. 127; State *v.* De Wolf, 8 Conn. 93; 7 Ency. Brit. (7th ed.) 645, art. Deaf & Dumb; Weir *v.* Fitzgerald, 2 Bradf. Sur. 42. As to peraons deaf, dumb, and blind, Richardson J. in Reynolds *v.* Reynolds, 1 Spears, 256, 257, said: "I would not say that it is absolutely impossible (although so considered by great writers) that even a blind, deaf, and dumb man can make a will." See Weir *v.* Fitzgerald, 2 Bradf. Sur. 42. Mr. Jarman observes that "it is almost superfluous to observe, that, in proportion as the infirmities of a testator expose him to deception, it becomes imperatively the duty, and should be anxiously the care, of all persons assisting in the testamentary transaction, to be prepared with the clearest proof that no imposition had been practised." 1 Jarman Wills (3d Eng. ed.), 29.]

(*e*) Swinb. pt. 2, s. 10, pl. 2; Godolph. pt. 1, c. 11.

(*f*) Swinb. pt. 2, s. 10, pl. 2; Godolph. pt. 1, c. 11.

(*g*) Ib.

(*h*) Swinb. pt. 2, s. 10, pl. 4; Godolph. pt. 1, c. 11; [Potts *v.* House, 6 Geo. 324.]

(*i*) See *post*, chap. II. § VI. as to the restrictions on nuncupative wills.

(*k*) Swinb. pt. 2, s. 11; Godolph. pt. 1, c. 11. [A blind person may make a will. Ray *v.* Hill, 2 Strobh. 297; In the Goods of Piercy, 1 Robert. 278.]

this would not be sufficient; for it may be * that if he should hear the same he would not own it. (*l*) And the civil law expressly required that the will should be read over to the testator, and approved by him, in the presence of all the subscribing witnesses. But in England this strictness is not required, and it is sufficient if there is satisfactory proof before the court of the testator's knowledge and approval of the contents of the will which he executed; (*m*) and it is not necessary to produce evidence that the identical paper which the testator executed as his will was ever read over to him. (*n*)

And what precautions are necessary for authenticating a blind man's will, seem in like degree requisite in the case of a person who cannot read. For though the law in other cases may presume that the person who executes a will knows and approves of the contents thereof; yet that presumption ceases, where, by defect of education, he cannot read or by sickness he is incapacitated to read the will at that time. (*o*)

Persons who cannot read.

A lunatic, that is, a person usually mad, but having intervals of reason (*p*) during the time of his insanity, cannot make a testament, nor dispose of anything by will. (*q*) And "so strong is this impediment of insanity of mind, that if the testator make his testament after his *furor* has overtaken him, and while as yet it possesses his mind, although the *furor* after departing or ceasing, the testator recover his former understanding, yet does not the testament made during his former fit recover any force or strength thereby." (*r*)

Lunatic.

* If a party impeach the validity of a will on account of a sup-

(*l*) Ib. See, also, Barton *v.* Robins, 3 Phillim. 455, note (*b*).

(*m*) 4 Burn E. L. 60; Moore *v.* Paine, 2 Cas. temp. Lee, 595; [Wampler *v.* Wampler, 9 Md. 540; Martin *v.* Mitchell, 28 Geo. 382.] See, also, In re Axford, 1 Sw. & Tr. 540. The single oath of the writer has been allowed sufficient by the court of delegates to prove the identity of the will. Ib.

(*n*) Fincham *v.* Edwards, 3 Curt. 63; affirmed on appeal, 4 Moore P. C. 198; [Hess's Appeal, 43 Penn. St. 73; Boyd *v.* Cook, 3 Leigh, 32; Clifton *v.* Murray, 7 Geo. 564; Lewis *v.* Lewis, 6 Serg. & R. 496; Washington J. in Harrison *v.* Rowan, 3 Wash. C. C. 585.] See, also, Longchamp *v.* Fish, 2 N. R. 415; *post*, pt. I. bk. IV. ch. III. § V.

(*o*) 4 Burn E. L. 61; Barton *v.* Robins, 3 Phillim. 455, note (*b*); [Day *v.* Day, 2 Green Ch. 549; *post*, 115, note (x^5).] See *post*, pt. I bk. IV. ch. III. § V.

(*p*) Beverley's case, 4 Co. 124 *b*.

(*q*) Swinb. pt. 2, s. 3; Godolph. pt. 1, c. 8, s. 2.

(*r*) Swinb. pt. 2, s. 3, pl. 2; Godolph. pt. 1, c. 8, s. 2. But a will is not revoked by the subsequent insanity of the testator. Swinb. pt. 11, s. 3, pl. 3; 4 Co. 61 *b*; *post*, pt. I. bk. II. ch. III. § V.

posed incapacity of mind in the testator, it will be incumbent on such the party to establish such incapacity by the clearest and most satisfactory proofs. (*s*) The burden of proof rests upon the person attempting to invalidate what, on its face, purports to be a legal act. (*t*) Sanity must be presumed till the contrary is shown. (*u*) Hence, if there is no evidence of insanity at the time of giving the instructions for a will, the commission of suicide, three days after, will not invalidate the instrument by raising an inference of previous derangement. (*x*)

Presumption of sanity.

But it must be borne in mind, that the presumption of sanity is not to be treated as a legal presumption, (*x*[1]) but, at the utmost, as a mixed presumption of law and fact (if not as a mere presumption of fact), that is, an inference

(*s*) The law seems unsettled as to how far, in cases of alleged unsoundness of mind, hereditary constitutional insanity may be pleaded. Frere *v.* Peacocke, 3 Curt. 664. [It is competent on the trial of an issue of the testator's sanity, to show the insanity of his parents and of his uncle. Baxter *v.* Abbott, 7 Gray, 71, 81, 82; Tyrrell *v.* Jenner, cited 3 Curt. 669; Frere *v.* Peacocke, 3 Curt. 664; Shailer *v.* Bumstead, 99 Mass. 112, 131; Snow *v.* Benton, 28 Ill. 306. See Shelford Lunacy, 59, 60. But it seems such evidence is not admissible in aid of proof showing mere weakness of mind or eccentricity. Colt J. in Shailer *v.* Bumstead, 99 Mass. 131. Mere moral insanity, that is, disorder of the moral affections and propensities, will not, unless accompanied by insane delusion, be sufficient to invalidate a will or to incapacitate a person to make one. Boardman *v.* Woodman, 47 N. H. 120, 136–139; Frere *v.* Peacocke, 1 Robertson Ecc. 442; Forman's Will, 54 Barb. 274. See 3 Am. Law Reg. N. S. 385; Smith *v.* Commonwealth, 1 Duvall (Ky.), 224; Bitner *v.* Bitner, 65 Penn. St. 347.]

(*t*) 2 Phill. Ev. 293, 7th ed.

(*u*) Groom *v.* Thomas, 2 Hagg. 434; [Trumbull *v.* Gibbons, 2 Zabr. 117, 155; Sloan *v.* Maxwell, 2 Green Ch. 581.]

(*x*) Burrows *v.* Burrows, 1 Hagg. 109. See, also, Hoby *v.* Hoby, 1 Hagg. 146; [Brooks *v.* Barrett, 7 Pick. 94; Duffield *v.* Morris, 2 Harr. 583; Chambers *v.* Queen's Proctor, 2 Curt. 415. In Duffield *v.* Morris, *ubi supra*, the testator committed suicide on the day next after that on which the paper propounded as his will was executed. Harrington J. said: "The law draws no inference either of sanity or insanity from the fact of *suicide* itself alone." Still this is a fact for the court or jury to weigh with the other evidence in the case. Duffield *v.* Morris, *supra*.]

(*x*[1]) [This statement of the law is at variance with that which is declared in the opinion of a majority of the court in Baxter *v.* Abbott, 7 Gray, 71, 83; and more than justifies the dissent of Mr. Justice Thomas in that case, as well as the doubt suggested by the same learned judge in Crowninshield *v.* Crowninshield, 2 Gray, 524, 532, where he says, "we are by no means satisfied that, in relation to wills, there is any legal presumption, in this commonwealth, of the sanity of the testator," inasmuch as the doctrine stated in the text extends the denial of any legal presumption of sanity even to jurisdictions unaffected by any peculiar provisions of the Massachusetts statute respecting wills. But then it is added (2 Gray, 532), "If such presumption exists, no proof that the testator was of sound mind would be necessary, until those opposing the will had offered some

to be made by a jury from the absence of evidence to show that the testator did not enjoy that soundness which experience shows

evidence to impeach it. The presumption of sanity would be sufficient until there was something to meet it. Yet our cases uniformly hold that the party seeking probate of the will must produce the attesting witnesses to show not merely the execution of the instrument, but the sanity of the testator at the time of its execution. And such has been, we think, the uniform practice in the probate courts, and in this court sitting as the supreme court of probate." See per Parker C. J. in Brooks *v.* Barrett, 7 Pick. 98, 99. In these suggestions the course of practice applicable to one class of cases only, is stated to sustain a doubt as to a rule which ought to be made applicable to all classes, in some of which the practice suggested could not be availed of. The same course of practice has been long settled in New Hampshire, and probably in many other states. See per Whitman C. J. in Gerrish *v.* Nason, 22 Maine, 438, 441. But in New Hampshire it is not regarded as raising any inference against the presumption of sanity in the testator. In Perkins *v.* Perkins, 39 N. H. 163, 168, Bell C. J., in explanation of this practice and to show that it is consistent with the presumption of sanity, says, "Owing to the nature of the proceedings in the case of wills; that the probate of the will is the foundation of the grant of power to the executor to take possession of the estate and the charge of administration; it is, in that case, the long settled practice of courts of probate to require that the witnesses to wills should be examined as to the fact of the sanity of the testator, before the will is established. Its object is, that if it appears that there is either doubt or suspicion on the question, that doubt may be removed before the estate is placed in the hands of a man who may prove to have no title to it. . . . . That the rule of law, requiring that the attesting witnesses to a will shall be examined in relation to the sanity of the testator, is not founded on the absence of a presumption that the testator is sane, nor on a necessity that the propounder of the will should offer further evidence of the fact of the testator's sanity, is, we think, apparent from the state of the law as to cases where, from their death, or absence from the jurisdiction, the witnesses cannot be produced, or where, from loss of recollection, they are unable to testify. As to these cases, proof of the handwriting of the witnesses, and, in some jurisdictions, of the handwriting of the testator, is competent proof to be submitted to the jury of the due execution of the will. In such cases, there can, of course, be no examination of the witnesses as to the sanity of the testator, and it is nowhere laid down that the party is under any obligation to produce any other evidence upon that point, except the testimony of the attesting witnesses. From the rule of law thus stated, we think that, although the subscribing witnesses, if they can be produced, must be examined in relation to the soundness of the testator's mind, yet the party propounding a will for probate is under no general duty to offer any evidence of the testator's sanity, but may safely rely upon the presumption of the law that all men are sane until some evidence to the contrary is offered." In Thompson *v.* Kyner, 65 Penn. St. 368, Thompson C. J. says: "It is true, the witnesses to a will, when produced for probate, are asked whether they regarded the testator of sound and disposing mind and memory; but this is form merely, for in case of death, absence, or incapacity of the witnesses to testify, proof of their handwriting satisfies the requirement of the proof of execution." We apprehend that in the cases supposed by Chief Justice Bell, of the death, or absence of the witnesses to the will, or their failure to observe or remember the condition of the testator's mind, it would be entirely safe in Massachusetts, as in New Hamp-

to be the general condition of the human mind. If, therefore, a will is produced before a jury and its execution proved, and no other evidence is offered, the jury would be properly told that they ought to find for the will. (x^2) And if the party opposing the will gives some evidence of incompetency, the jury may nevertheless, if it does not disturb their belief in the competency of the testator, find in favor of the will. And in each case, the

shire, for the person propounding the will, in opening his case, to rest upon proof of the due execution of the will and the ordinary presumption of the sanity of the testator; and that no inference to the contrary is to be drawn from the practice of examining the witnesses to the will who are present at the trial as to the soundness of the testator's mind. This would result from the decision of the majority of the court in Baxter *v.* Abbott, 7 Gray, 71. The proponent of the will has the opening and close of the case. The burden of proving competency is on him. This burden is satisfied by the natural presumption of sanity. The contestant then introduces evidence tending to show incompetency and to rebut this presumption of sanity; and the case is thereupon open to the proponent to furnish such testimony as he may have in denial or explanation of the contestant's case, and in corroboration of his own. Any other practice would require the exercise of an arbitrary discretion on the part of the court to prevent great inconvenience, if not confusion. As to the rule of proceeding in Michigan, see *post*, 21, note (x^3). It may further be observed in this connection, that the mere fact of the attestation of a will by a witness furnishes no presumption of any opinion he may have had, favorable or unfavorable, of the sanity of the testator; and hence the declarations of a deceased subscribing witness, or of one beyond the jurisdiction, tending to show that he thought the testator sane or insane, are incompetent evidence upon the issue of sanity; Baxter *v.* Abbott, 7 Gray, 71; Boardman *v.* Woodman, 47 N. H. 120, 135; Thompson *v.* Kyner, 65 Penn. St. 368. See Flanders *v.* Davis, 19 N. H. 139; Stobart *v.* Dryden, 1 M. & W. 615; Williams *v.* Robinson, 42 Vt. 664, 665; and hence also, there is no presumption of capacity arising from the mere proof of attestation, to aid the ordinary presumption of the sanity of the testator. The cases upon this point are not entirely harmonious. See *post*, 352, note (*g*); Townshend *v.* Townshend, 9 Gill, 506; Harden *v.* Hays, 9 Penn. St. 151; Weatherhead *v.* Sewell, 9 Humph. 272.]

(x^2) [See per Bell C. J. in Perkins *v.* Perkins, 39 N. H. 163, 170. In McGinnis *v.* Kempsey, 27 Mich. 374, Graves J. said: "The force and efficacy of the presumption will vary with cases, yet it can never have much influence when the issue upon the testator's sanity is contested in the usual way, by an appeal to those facts which bear upon it. And whatever force may be due to it in given instances will be owing, not to its intrinsic weight as a distinct item of proof, but to its operation in some degree, more or less, in rendering the circumstances adduced to prove sanity more persuasive. Whenever the facts given in evidence are such as to leave room for it to have any appreciable influence upon results, it will be entitled to be viewed rather as a property of proponent's proofs, than as something apart, and then it will not fail to be recognized by the good sense of the jury, in its tendency to strengthen the other evidence favoring sanity. The efficacy of the presumption, when it has any in contested issues, can never be predetermined, nor can any rule about it be safely laid down, and the experience and general knowledge of the triers may be trusted to consider and estimate it rightly whenever occasions make the inquiry needful."]

presumption of competency would prevail. Still, the *onus probandi* lies, in every case, on the party relying on a will, and he must satisfy the jury that it is the will of a capable testator: and when the whole matter is before them on evidence given on both sides, * if the evidence does not satisfy them that the will is the will of a competent testator, they ought not to affirm by their verdict that it is so. (x^3) Accordingly, where, in an action by

(x^3) [The rules of law stated in the text are drawn from the decision of the court in Sutton *v.* Sadler, 3 C. B. N. S. 87. In considering the decisions of the American courts upon this much debated subject, it will be convenient to take these rules, which are so clearly stated, as the standard of comparison. The same rules substantially are adopted in Perkins *v.* Perkins, 39 N. H. 163, cited in note (x^1), *supra*. See Pettes *v.* Bingham, 10 N. H. 514. The result of the decision in Crowninshield *v.* Crowninshield, 2 Gray, 524, 534, as stated by the learned judge who delivered the opinion in that case, is not essentially at variance with the doctrine of the text. "On the whole matter," he says, "we are of opinion, that where a will is offered for probate, the burden of proof, in this commonwealth, is on the executor or other person seeking such probate, to show that the testator was, at the time of its execution, of sound mind; that, if the general presumption of sanity, applicable to other contracts, is to be applied to wills, it does not change the burden of proof; that the burden of proof does not shift in the progress of the trial, the issue throughout being one and the same; and that if, upon the whole evidence, it is left uncertain whether the testator was of sound mind or not, then it is left uncertain whether there was under the statute a person capable of making the will, and the will cannot be proved." In the subsequent case of Baxter *v.* Abbott, 7 Gray, 71, it was decided by a majority of the court that, in the absence of evidence to the contrary, the presumption is in favor of the sanity of the testator, and the whole court agreed that the burden of proof always rests upon the party seeking the probate of the will. In the still more recent case of Baldwin *v.* Parker, 99 Mass. 79, 85, it is, however, said by Hoar J. that "the decision in Crowninshield *v.* Crowninshield, and in Baxter *v.* Abbott, *ubi supra*, that the burden of proof is upon the party propounding the will to establish the sanity of the testator, although the presumption of law is in favor of sanity, is placed very much upon the construction of the statute of wills, which makes the sanity of the testator a condition precedent to his power to make a will." In Brooks *v.* Barrett, 7 Pick. 94, 98, Parker C. J. said that by the Massachusetts statute of wills, "all such instruments must be offered for probate in the probate office, and the subscribing witnesses are to testify, not only as to the execution of the will, but as to the state of mind of the testator at the time. Without such proof, no will can be set up. And this agrees with the English law on the same subject. Powell on Devises, 70; Wallis *v.* Hodgeson, 2 Atk. 56." Having referred to the above statement of the law, Whitman C. J. in Gerrish *v.* Nason, 22 Maine, 438, 441, said: "The presumption, therefore, that the person making a will was, at the time, sane, is not the same as in the case of the making of other instruments; but the sanity must be proved." It is undoubtedly true that the sanity must be proved, that is, the jury must be satisfied that the will was made by a competent testator. But the case suggested by Chief Justice Bell, above referred to, where none of the witnesses to the will can be produced, and the execution of it is proved by evidence of their handwriting, is left entirely out of view in the above quoted statement of the law, from Brooks *v.* Barrett. And the question still remains, whether in cases where

heir-at-law against devisees, — the question in issue being as to the capacity of the testator to make a will, — the judge in his

the witnesses cannot be produced, or did not observe, or if they did, fail to remember anything in regard to the sanity of the testator, it is necessary to produce any other evidence than that which is requisite to prove the due execution of the will; whether the ordinary presumption of sanity will not stand in the place of proof of sanity until some evidence to the contrary is produced. See Christiancy J. in Beaubien *v.* Cicotte, 8 Mich. 9, 13, 14; Cooley J. in Taff *v.* Hosmer, 14 Mich. 309; *post*, 342, note (t^1); Perkins *v.* Perkins, *infra*, and *ante*, 20, note (x^1). The case of Cilley *v.* Cilley, 34 Maine, 162, really goes no farther than that of Gerrish *v.* Nason, *supra*. In Cilley *v.* Cilley, it was contended by the party propounding the will, "that it is a rule of law of general application, that sanity is to be presumed, and that such presumption is conclusive until it is overcome by affirmative proof of insanity, and, therefore, that the burden is upon the contestant to show that the testator was not of sound mind at the time the instrument was executed, if he would set it aside for that cause." The court conceded that such was the general rule of law, and that it had often been applied to cases of wills, in the same manner as to other written instruments, but denied that its application to wills was coextensive with the rule; and then rested their decision of the point upon the rule above quoted from Gerrish *v.* Nason. There is nothing in this irreconcilable with the rule laid down in Sutton *v.* Saddler, *supra*, as set forth in the text. The concession claimed by the rule stated in the text is not that there is a *legal* presumption of sanity changing the burden of proof, but that there is a presumption of fact, or, at the utmost, of law and fact, in favor of sanity, on which the party offering the will for probate may rely, as making him a *primâ facie* case, until it is balanced by evidence to the contrary. In a recent case in Vermont (Williams *v.* Robinson, 42 Vt. 658), it was contended by the party propounding a will, that the burden of proving incapacity in the testator rested on the contestant. This was the only point raised for decision. The court held that the burden of proving the due execution of the will and the capacity of the testator was on the proponent of the will. "In the course of the trial the balance of testimony may fluctuate from one side to the other, but the burden of proof remains where it was at the outset, and unless at the close of the trial the balance is with the proponent, he must fail. It is not sufficient that the scales stand even; there must be a preponderance in his favor." But the remarks of the learned judge who delivered the opinion of the court took a wider range. "The proponent," he said, "presents the instrument and asks the court by its judgment to establish it as the last will and testament of the deceased. There is no presumption in its favor. . . . . By our statute, 'every person of full age and sound mind' may dispose of all his estate, both real and personal, by his will executed in accordance with the requirements of the statute. No person, unless of full age and sound mind, can so dispose of his property. Hence, when the proponent presents the instrument, he must satisfy the court that the deceased, at the time he executed the will, belonged to the class of persons that by law can make wills. . . . . This burden is upon him at the outset, even when there is no contest about the will. . . . . The capacity of the testator . . . . must be established by the proponent, even if it is not denied." Having disposed of the point at issue against the proponent upon his assumption of a presumption of sanity changing the burden of proof, the learned judge added: "I have thus far been considering the case upon the supposition that there is a legal implication that where a will is executed in due form, the person executing it had the requisite capacity. If there is such a presumption, from what

summing up told the jury "that the heir-at-law was entitled to recover unless a will was proved, but that, when a will was pro-

does it arise? Certainly it cannot arise from the fact that the great majority of mankind have sufficient capacity. The law will no more imply capacity from such a cause than it will imply that all men are white because a majority are," &c. Now it is obvious to remark, in the first place, that the case of Sutton *v.* Sadler, and the text, following it, expressly repudiate the idea of any *legal* presumption or implication of sanity. The suggestions of the court, however, strike as well at the existence of the natural as of the legal presumption. It is also manifest that the learned court has entirely misapprehended the foundation of the presumption. It does not rest on the assumption that the great majority of mankind are sane or insane, but on the ground that the general condition of the human mind in its natural, normal state, is one of soundness; that unsoundness of mind is a diseased condition and abnormal. The presumption is, that the natural, sound, and healthy condition of mind continues, until there is at least some evidence to raise a doubt about it. It is the ordinary presumption of continuance, applied to a condition of mind known once to have existed. In conclusion of the above case, the court say: "Upon the whole, we think the better rule is that which throws the burden on the proponent to prove the due execution of the will, and the capacity of the person executing it." This conclusion is certainly well supported by the current of authority. This subject has been discussed with much learning and ability in several cases in Michigan. The result upon the point under consideration is given in Aikin *v.* Weckerly, 19 Mich. 482, 502, 503. There were three witnesses to the will propounded for probate in this case, and all of them were present to testify. One of them does not appear to have given any opinion as to the sanity of the testator; the other two gave their opinion: one, that the testator's mind was sound; the other, that it was unsound. The statute of the state requires the testator to be of sound mind. The court, addressing itself to the point in dispute, said: "It is seen that the ground really occupied by proponent is that the presumption of testamentary capacity supplies all the evidence on that subject which the law requires, unless such counter-proof is offered as will overcome this presumption, and that even in cases where a contestant introduces opposing evidence on the issue of testamentary ability, the law casts upon him the burden of showing incapacity by some amount of proof not less than a preponderance. This view necessarily assumes that, without further proof than is supplied by this presumption, the finding should be in favor of competency in all cases where the probate is unopposed, and in all contested cases, where no evidence is given by contestant on the point of testamentary ability, or where the opposing evidence submitted on that subject will no more than balance the presumption. This position is believed to be untenable. This court decided in Beaubien *v.* Cicotte, 8 Mich. 9, that the proponent of a testamentary paper for probate was required to aver the soundness of mind of the testator at the time of execution, and that the burden of proving the fact rested on him. . . . . The case of Taff *v.* Hosmer, 14 Mich. 809, however, not only affirms that proponent before resting is bound to make a *primâ facie* case on the averment of soundness of mind, but is an authority that the necessity of making such a case on that point involves the production of some other evidence of testamentary capacity than is furnished by the legal presumption. It is true that this last proposition is not explicitly laid down in Taff *v.* Hosmer, but the opinion of my brother Cooley noticed the fact that proponents in that case before resting had submitted evidence in aid of the presumption of law, and treated the course so pursued as agreeable to usage and correct in

duced, and the execution of it proved, the law presumed sanity, and therefore the burden of proof was shifted; (x^4) and that

principle." This language of the court is quite clear and intelligible. It admits the existence of the presumption, inadvertently, however, styling it a presumption of law, and concedes to it some influence, precisely what the court does not state, but treats it as too feeble, without the aid of other evidence, to sustain the burden of proof, even in cases where no conflicting evidence is offered by the contestant. In the later case of Kempsey *v.* McGinniss, 21 Mich. 123, 148, the same court say: "In this particular class of cases, and upon the question of soundness or unsoundness, after a *primâ facie* case has been established by the proponents, the case, for all purposes connected with the order of proof upon that question, stands the same as if the burden of proof throughout rested upon the contestant to show mental capacity." See *post*, 342, note (t^1), as to the course of proceeding and order of proof, in Michigan, on an issue of sanity. The statute of wills in Connecticut provides that all persons of sound minds may make wills, and in the late case of Knox's Appeal, 26 Conn. 20, where a codicil to a will was offered for probate, and it was opposed on the ground that the testator had not the requisite capacity, the contestants claimed that the statute was an enabling act, under which a party must show that all its requirements have been complied with, in order to establish a claim under it, while on the other hand the proponents contended that when they had proved the codicil to have been executed and published according to the provisions of the statute, the law would presume the requisite testamentary capacity; but the court ruled that the proponents were bound to go farther in their proof than merely to prove the execution of the codicil; and that without some evidence of capacity the law did not presume it, as in the ordinary case of a party who executes a deed or other contract; and it was decided, "without reference to the question whether the statute was, or not, an enabling act," that this ruling was in conformity to the uniform practice in Connecticut, where the question has arisen in cases regarding the validity of wills. The court say: "It is undoubtedly true that there are conflicting decisions on this point; and it may be said that our practice is in conflict with the principle that a party is presumed to be capable of performing any legal act," and they make a distinction in regard to wills on account of their greater solemnity and importance, and the circumstances under which they are often made. See Christiancy J. in Beaubien *v.* Cicotte, 8 Mich. 9, 11, 12. All the cases, of course, hold that sanity is necessary to the power of making a valid will. And, so far as we have proceeded, all the cases hold that the burden of proving sanity is on the party affirming the validity of the will. See, also, Renn *v.* Lamon, 33 Texas, 760; Tingley *v.* Cowgill, 48 Misson. 291; Comstock *v.* Hadlyme, 8 Conn. 261. It is also very generally conceded that there is to some extent a presumption of fact, or of law and fact, in favor of sanity. See, further, Cotton *v.* Ulmer, 45 Ala. 378; Turner *v.* Hand, 3 Wallace jr. 88; Matter of Hutchins, 7 Phil. (Penn.) 69; Werstler *v.* Custer, 46 Penn. St. 602; Thompson *v.* Kyner, 65 Penn. St. 368; Perkins *v.* Perkins, 39 N. H. 163, 169, and cases cited. The main difference, among the cases thus far considered, lies in a matter of practice — some courts requiring that testimony, beyond the mere formal proof of execution, should be introduced in aid of the natural pre-

(x^4) [See the remarks upon this matter of the shifting of the burden of proof, in Crowninshield *v.* Crowninshield, 2 Gray, 524; Baldwin *v.* Parker, 99 Mass. 87; Brooks *v.* Barrett, 7 Pick. 99, 100; Waring *v.* Waring, 6 Moore P. C. 355; Judge of Probate *v.* Stone, 44 N. H. 593, 602.]

the devisee must prevail, unless the heir-at-law established the incompetency of the testator, and that if the evidence was such as

sumption of sanity, in order to make out a *primâ facie* case which would authorize a decision in favor of the will, even if no evidence were introduced by the contestant. Other courts regard the presumption of sanity as making a technical *primâ facie* case for the proponent. In Perkins *v.* Perkins, 39 N. H. 163, 171, cited above, Mr. Chief Justice Bell, in closing his opinion, said: "This question has been discussed elsewhere with much diligence and keenness, but it is, after all, a question merely verbal; a question of propriety of certain forms of expression; for we apprehend that whatever may be the terms used, the course of practice is everywhere the same." There are, however, decisions of other courts upon this subject, between which and those above referred to, there is a more substantial difference. I refer to those in which it has been held, that the burden of proving that the testator was of unsound mind at the time of executing a paper propounded as his will is upon the party claiming that the will is invalid for that cause; and that there is no difference in this respect between wills and deeds or other instruments. In Sloan *v.* Maxwell, 2 Green Ch. 580 (New Jersey), it is said to be a fixed principle "that whenever the formal execution of a will is duly proved, he who wishes to impeach it on the ground of incompetency, must support by proof the allegation he makes, and thereby overcome the presumption, which the law raises, of the sanity of the testator." In Tyson *v.* Tyson, 37 Md. 567 (Maryland), one of the issues made was on the question whether certain codicils were executed by the testator when he was of sound and disposing mind, and capable of executing a valid deed or contract; and the court said: "To sustain the issues then on the part of the caveators, it was incumbent on them to offer reasonable evidence to show that the testator was not of sound and disposing mind, and capable of executing a valid deed or contract at the time of the execution of the codicils." See Davis *v.* Calvert, 5 Gill & J. 300. In Higgins *v.* Carlton, 28 Md. 115, 141, Brent J. said, that all the decisions "agree upon the general proposition, that sanity is presumed by law. But in some of the states it is held, that this general presumption does not apply to last wills and testaments, — they forming an exception to the rule, — and that, therefore, a party propounding a will must not only prove execution, but must also offer positive proof of capacity. A different rule, however, is recognized in most of the American courts; and it is sustained by reason and weight of authority. If the presumption of law is in favor of sanity, we can discover no satisfactory reason why it should not be applied to wills, as well as to any other instrument of writing. The argument drawn from the fact, that the statute requires the testator to be 'of sound and disposing mind,' if a good one, would apply with equal force to the other requirements of the statute. The testator, in terms as affirmative as those in reference to capacity, is required to be of a certain age fixed by the statute. Yet no court has ever required a party propounding a will to prove the age of the testator, until the question was raised upon proof by the contestants. . . . . The rule is distinctly laid down as a logical conclusion from the presumption in favor of sanity, that the 'burden of proof lies upon the person who asserts unsoundness of mind.' . . . . The practice in this state has been in conformity to these views of the law. The caveators have always taken the position of plaintiffs, and have had the right to open and close. Brooke *v.* Townshend, 7 Gill, 24. It is true that it is said in Cramer *v.* Crumbaugh, 3 Md. 501, that the party propounding a will has the *onus* imposed on him, and he must discharge it by proof of capacity and the fact of execution. But the *quo modo* of proof must be in harmony with other recognized rules and principles. If capacity be estab-

to make it a measuring cast, and leave them in doubt, they ought to find for the defendants: (x^5) this was held to be a misdirection. (y)

lished by evidence of a fact from which it is to be presumed, 'proof of capacity' has in reality been given, and the *onus* cast upon the party propounding a will is discharged by proof of execution, because that being proved, the presumption of capacity follows." In Chandler *v.* Ferris, 1 Harr. 454, 461 (Delaware), Clayton C. J. said: "We are not to be governed by the question, who affirms or who denies the issue, but where is the *onus probandi?* The burden here is upon the caveators. They do not deny the execution of the will, but set up insanity and such an influence exercised by others over the testator's mind as will vitiate the will. After the formal proof of the paper, the executor might fold his arms until the caveators produced something to overthrow his case, which is *primâ facie* established by the production of the will and the inference of law in favor of sanity." This same doctrine respecting the burden of proof is supported in many other cases. See Jackson *v.* Van Deusen, 5 John. 144; Dean *v.* Dean, 27 Vt. 746; Hoge *v.* Fisher, 1 Peters, 163; Trumbull *v.* Gibbons, 2 N. Jer. 117; Jackson *v.* King, 4 Cowen, 207; Hawkins *v.* Grimes, 13 B. Mon. 257; Brooks *v.* Barrett, 7 Pick. 98, 99 (overruled on this point by Crowninshield *v.* Crowninshield, 2 Gray, 524); Pettes *v.* Bingham, 10 N. H. 514 (also overruled on this point in Perkins *v.* Perkins, 39 N. H. 163, 171); 2 Greenl. Ev. § 689; Grabill *v.* Barr, 5 Penn. St. 441; Stevens *v.* Vancleve, 4 Wash. C. C. 262. In a very late case in New York (Harper *v.* Harper, 1 N. Y. Sup. Ct. 351, 355), Potter J. said: "It is now the established law of this state, that the legal presumption, to begin with, is that every man is *compos mentis*, and the burden of proof that he is *non compos mentis* rests on the party who alleges that unnatural condition of mind existing in the testator. Delafield *v.* Parish, 25 N. Y. 9. But it is also the rule, that in the first instance, the party propounding the will must prove the mental capacity of the testator." Much of the conflict among the cases has arisen from treating the presumption of sanity in case of wills as one of law — a legal presumption — and then holding that the

(x^5) [See Williams *v.* Robinson, 42 Vt. 658, 664. Where the evidence, relating to the testator's mental soundness, aside from the presumption of sanity, is evenly balanced, it was held in McGinnis *v.* Kempsey, 27 Mich. 363, that the jury should not permit that presumption to turn the scale in favor of competency. In this case, Graves J. said: "When the question of capacity is actually controverted in case of a paper propounded as a will, it devolves upon the proponents to establish capacity by other evidence than is afforded by the common law presumption in favor of soundness of mind, and the measure of the evidence to establish must exceed that given in opposition. Perhaps it would be going too far to say that the statute in requiring substantive proof of testator's soundness of mind as a prerequisite to the establishment of the will, intended to put aside altogether and for all cases, the common law presumption in favor of sanity. But, conceding the existence of the presumption as a principle to operate, subject to circumstances, it is very clear that it cannot have the force of an independent fact to serve as a substantial makeweight against counter-proof."]

(y) Sutton *v.* Sadler, 3 C. B. (N. S.) 87. See, also, accord. Symes *v.* Green, 1 Sw. & Tr. 401; [1 Jarman Wills (3d Eng. ed.), 30, note (c).] As to the onus of showing sanity at the time of mutilation, in order to set up a revocation, see Harris *v.* Berrall, 1 Sw. & Tr. 153; *post*, p. 42.

If a lunatic person have clear or calm intermissions (usually called lucid intervals), then during the time of such quietness and freedom of mind he may make his testament, appointing executors, and disposing of his goods at pleasure. (*z*) "If you can establish," said Sir Wm. Wynne, in the case of Cartwright *v.* Cartwright, (*a*) "that the party afflicted habitually by a malady of the mind has intermissions, and if there was an intermission of the

Will made during a lucid interval:

transfer in such case of *onus probandi.*

burden of proof is upon the person who has the benefit of that presumption; one side viewing it as a fallacy to require a party to give positive proof of the existence of a fact which the law would presume without proof; and the other regarding it next to a solecism that there could be a presumption of law in favor of a party who at the same time had and continued to have the burden of proof. So when it was settled in one court that there was a legal presumption of sanity in favor of the proponent, it followed quite logically that the burden of proof was on the contestant; and on the other hand, when it was settled in another court that the burden of proof in the issue of sanity was on the proponent, it followed equally logically that there could then be no legal presumption in his favor. This difficulty is avoided by treating the presumption as one of fact, making only a *primâ facie* case in favor of the proponent, without relieving him of the burden of proof, according to the rule stated in the text. If, however, there be any irreconcilable conflict, it must be left as we find it. On the trial of an issue of sanity, the party setting up the will, where the burden of proof is upon him, goes forward and has the opening and close. Boardman *v.* Woodman, 47 N. H. 120; Judge of Probate *v.* Stone, 44 N. H. 593, 602; Perkins *v.* Perkins, 39 N. H. 163, 167; Comstock *v.* Hadlyme, 8 Conn. 261; Brooks *v.* Barrett, 7 Pick. 96; Ware *v.* Ware, 8 Greenl. 42; Phelps *v.* Hartwell, 1 Mass. 71, 73, and note; Buckminster *v.* Perry, 4 Mass. 593; Potts *v.* House, 6 Geo. 324; Rigg *v.* Wilton, 13 Ill. 15; Kempsey *v.* McGinniss, 21 Mich. 123, 147; Aikin *v.* Weckerly, 19 Mich. 482; Williams *v.* Robinson, 42 Vt. 658; Robinson *v.* Adams, 62 Maine, 369; Taff *v.* Hosmer, 14 Mich. 310. But in Maryland, the party alleging the insanity of the testator, having the burden of proof in that state on that issue, has the opening and close. Brooke *v.* Townshend, 7 Gill, 24; Higgins *v.* Carlton, 28 Md. 143. So in Delaware, when the contestant does not deny the formal execution of the will, he has the opening and close. Chandler *v.* Ferris, 1 Harr. 460, 461; Bell *v.* Buckmaster and Cubbage *v.* Cubbage, Ib. notes. See Moore *v.* Allen, 5 Ind. 521. On an appeal from the ordinary in the court of common pleas in South Carolina, in the case of a will, the matter is not to be tried *de novo.* The appellee having the decision of the court below in his favor, his rights are held to be fixed. The appellant files a suggestion, setting forth the proceedings of the ordinary's court, and then assigns specifically the supposed errors in the judgment of that court. The appellant becomes the actor; he affirms the truth of the issues, whether on the question of sanity or otherwise, and has the opening and close in the evidence and argument. Southerlin *v.* M'Kinney, Rice, 35; Tillman *v.* Hatcher, Rice, 271.]

(*z*) Swinh. pt. 2, s. 3, pl. 3; Godolph. pt. 1, c. 8, s. 2; Wentw. c. 1, p. 33, 14th ed.; Hall *v.* Warren, 9 Ves. 610; Rodd *v.* Lewis, 2 Cas. temp. Lee, 176; [Brock *v.* Luckett, 4 How. (Miss.) 459; Symes *v.* Green, 1 Sw. & Tr. 401; Nichols *v.* Binns, 1 Sw. & Tr. 239.]

(*a*) 1 Phillim. 100. See the particulars of this case, *post*, 23.

disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it; but the effect of it is this, it inverts the order of proof and of presumption; for until proof of an habitual insanity is made, the presumption is that the party agent, like all human creatures, was rational; but where an habitual insanity, in the mind of the person who does the act, is * established, there the party who would take advantage of an interval of reason must prove it." (*b*)

What is sufficient proof of a lucid interval.

But although the law recognizes acts done during such intervals as valid, yet it is scarcely possible to be too strongly impressed with the great degree of caution necessary to be observed in the examining the proof of a lucid interval; (*c*) and such proof is matter of extreme difficulty, for this, among other reasons, viz, that the patient is, not unfrequently, rational to all outward appearance without any real abatement of his malady. (*d*) On the other hand, if the deceased was subject to attacks producing temporary incapacity, and was at other times in full possession of his mental powers, such attacks may naturally create in those who only happened to see him when subject to them a strong opinion of his permanent incapacity. (*d*[1])

(*b*) See, also, the same doctrine laid down by Lord Thurlow in Attorney General *v.* Parnther, 3 Bro. C. C. 443, and Sir W. Grant in Hall *v.* Warren, 9 Ves. 611. See, also, Swinb. pt. 2, s. 3, pl. 7, where it is said, that if it be proved that the testator was once mad, the law presumeth him to continue still in that case, unless the contrary be proved. See, also, Godolph. pt. 1, c. 8, s. 2; White *v.* Driver, 1 Phillim. 88; Groom *v.* Thomas, 2 Hagg. 434; Waring *v.* Waring, 6 Moore P. C. 341; S. C. 5 Notes of Cas. 296; 6 Notes of Cas. 388; Grimani *v.* Draper, 6 Notes of Cas. 418; Johnson *v.* Blane, 6 Notes of Cas. 422; Fowlis *v.* Davidson, 6 Notes of Cas. 461, 474. [The proof of intelligent action must be clear and satisfactory, in order to establish a will made during a lucid interval. Gombault *v.* The Public Administrator, 4 Bradf. Sur. 226; Lucas *v.* Parsons, 27 Geo. 593; Chandler *v.* Barrett, 21 La. An. 58; Puryear *v.* Reese, 6 Coldw. (Tenn.) 21; Halley *v.* Webster, 21 Maine, 461; Goble *v.* Grant, 2 Green Ch. 629; Boyd *v.* Eby, 8 Watts, 66; Harden *v.* Hays, 9 Penn. St. 151; Duffield *v.* Morris, 2 Harring. 375; Whitenach *v.* Stryker, 1 Green Ch. 8; Clark *v.* Fisher, 1 Paige, 171, 174; Jackson *v.* Vandusen, 5 John. 144, 159; Rush *v.* Megee, 36 Ind. 69; Gangwere's Estate, 14 Penn. St. 417; Hoge *v.* Fisher, 1 Peters C. C. 163; Cochran's Will, 1 Monroe, 263; Wood *v.* Sawyer, Phill. (N. Car.) Law, 251.] But where the attesting witnesses, disinterested medical men, speak strongly to sanity, the court will not set aside a will on proof by interrogatories, but without plea, that the deceased many years before had been under an insane delusion. Kemble *v.* Church, 3 Hagg. 273.

(*c*) By Sir John Nicholl in White *v.* Driver, 1 Phillim. 88.

(*d*) By Sir John Nicholl in Brogden *v.* Brown, 2 Add. 445, and in Ayrey *v.* Hill, 2 Add. 210.

(*d*[1]) [*Post*, 23, note (*f*[1]).]

These considerations, while they tend to reconcile the apparent contradictions of witnesses, render it necessary for the court to rely but little upon mere opinion, to look at the grounds upon which opinions are formed, and to be guided in its own judgment by facts proved, and by acts done, rather than by the judgments of others. (*e*)

* In Ex parte Holyland, (*f*) Lord Eldon observed, that in the case of the Attorney General *v.* Parnther, "Lord Thurlow said that where lunacy is once established by clear evidence, the party ought to be restored to as perfect a state of mind as he had before; and that should be proved by evidence as clear and satisfactory. I cannot agree to that proposition, either as to property or with reference to such a case as this; for suppose the strongest mind reduced by the delirium of a fever or any other cause, to a very inferior degree of capacity, admitting of making a will of personal estate (to which a boy of the age of fourteen is competent), the conclusion is not just that as that person is not what he had been he should not be allowed to make a will of personal estate." (*f*[1])

(*e*) By Sir John Nicholl in Kindleside *v.* Harrison, 2 Phillim. 459. See, also, expressions to the same effect by the same learned judge in Evans *v.* Knight, 1 Add. 239; Wood *v.* Wood, 1 Phillim. 363; Wheeler *v.* Alderson, 3 Hagg. 605; and by Tindal C. J. in Tatham *v.* Wright, 2 Russ. & M. 21, 22; and by Lord Langdale in Steed *v.* Calley, 1 Keen, 620.

(*f*) 11 Ves. 11.

(*f*[1]) [See Staples *v.* Wellington, 58 Maine, 453, 459, in which Appleton C. J. said: "If the delusion or the delirium is that caused by disease, it is obviously temporary in its character. It will continue only during the continuance of the fever in which it originated. If a fever is shown to exist at a given date, the law does not presume its continuance as in the case of fixed insanity. So there is no presumption of law as to the continuance of the temporary hallucination or delusion resulting from disease. . . . . It is undoubtedly true, that when an hallucination has become permanent, it is to be deemed insanity, general or particular, according to the nature of the delusion under which the patient labors." In Hix *v.* Whittemore, 4 Mct. 545, 546, Dewey J. in reference to this subject remarks, that "a careful analysis of the principles, upon which presumptions are allowed to have force and effect, will show that the proof of the insanity of an individual at a particular period does not necessarily authorize the inference of his insanity at a remote subsequent period, or even several months later. . . . . Neither observation nor experience shows us that persons who are insane from the effect of some violent disease, do not usually recover the right use of their mental faculties. Such cases are not unusual, and the return of a sound mind may be anticipated, from the subsiding or removal of the disease which has prostrated their minds. It is not, therefore, to be stated as an unqualified maxim of the law, 'once insane, presumed to be always insane;' but reference must be had to the peculiar circumstances connected with the insanity of an individual, in deciding upon its effect upon the burden of proof, or how far it may authorize the jury to infer that the same condition or state of mind attaches to the individual at a later period. There must

It must be observed that Sir W. Grant, in Hall *v.* Warren, (*g*) does not appear to have understood Lord Thurlow in the same sense as Lord Eldon did in the preceding remarks, nor indeed does the report in Brown of the Attorney General *v.* Parnther bear any such construction. "If general lunacy," said Sir W. Grant, "is established, they will be under the necessity of showing, according to the Attorney General *v.* Parnther, that there was not merely a cessation of the violent symptoms of the disorder but a restoration of the faculties of the mind sufficient to enable the party soundly to judge of the act."(*g*[1])

Proof of lucid interval arising from the act of making a rational will.

In the case of Cartwright *v.* Cartwright, (*h*) it appeared that the testatrix was early in life afflicted with the disorder of her mind. She afterwards was supposed to be perfectly recovered, and continued for several years to conduct a house and establishment of her own as a rational person; but her habit and condition of body, and her manner for several months before the date of her will, were those of a person afflicted with many of the worst symptoms of insan-

be kept in view the distinction between the inferences to be drawn from proof of an habitual or apparently confirmed insanity, and that which may be only temporary. The existence of the former, once established, would require proof from the other party to show a restoration or recovery; and in the absence of such evidence, insanity would be presumed to continue. But if the proof only shows a case of insanity directly connected with some violent disease with which the individual is attacked, the party alleging the insanity must bring his proof of continued insanity to that point of time which bears directly upon the subject in controversy, and not content himself merely with proof of insanity at an earlier period." See Swinburne Wills, pt. 2, s. 3; 1 Coll. Lunacy, 55; Shelf. Lunatics, 275; 1 Hale P. C. 30; Townshend *v.* Townshend, 7 Gill, 10. In Halley *v.* Webster, 21 Maine, 461, 463, Whitman C. J. said: "No position can be better established than that, if a testator, a short time before making his will, be proved to have been of unsound mind, it throws the burden of proof upon those who come to support the will to show the restoration of his sanity. This must be understood to mean a general and fixed insanity; and not a mere temporary delirium, such as takes place in a fit of intoxication. When a person is laboring under a typhus fever, which it would seem was the testator's disease, a suspension of the rational powers is often superinduced, of many days' duration. And if the proof were, as the tendency of the testimony would seem to have been, that the testator had arrived to that stage in the fever when such suspension had, to a greater or less extent, taken place, so as to incapacitate him to make a will, those who would undertake to establish a will, thereafter made during his sickness, should be holden to prove, that he had, at the moment of making his will, recovered the use of his reason." Harrison *v.* Rowan, 3 Wash. C. C. 586; McMasters *v.* Blair, 29 Penn. St. 298.]

(*g*) 9 Ves. 611.

(*g*[1]) [See Jenckes *v.* Probate Court, 2 R. I. 255; Boyd *v.* Eby, 8 Watts, 66.]

(*h*) 1 Phillim. 90.

ity, and continued so after making the will. She was attended by Dr. Battie, who desired the nurse and other servants to prevent * her from reading and writing, as such occupation might disturb her head, and in consequence thereof she was for some time kept from the use of books and writing materials. However, some time prior to writing the will, she became very importunate for the use of pen and paper, and frequently asked for them in a very clamorous manner. Dr. Battie, in order to quiet and gratify her, consented that she should have them, telling her nurse and another servant that it did not signify what she might write, as she was not fit to make any proper use of them. As soon as Dr. Battie had given permission, pen, ink, and paper were carried to her, and her hands, which had been for some time kept constantly tied, were let loose, and she sat down at her bureau and desired her nurse and servant to leave her alone while she wrote. They went into an adjoining room and watched her. At first she wrote upon several pieces of paper, and got up in a wild and furious manner and tore the papers and threw them into the fire one after another. After walking up and down the room many times in a wild and disordered manner, muttering to herself, she wrote the will. She inquired the day of the month, and an almanac was given to her by one of the nurses, and the day pointed out to her. She then called for a candle to seal the paper, which was given to and used by her for that purpose, although they used generally to be cautious not to trust her with a candle, and were forced to hold it at a distance from her if she read the newspaper. The survivor of the two witnesses to the transaction deposed that, in her opinion the testatrix had not then sufficient capacity to be able to know what she did, and that during the time she was occupied in writing, which was upwards of an hour, she by her manner and gestures showed many signs of insanity. The will was written in a remarkably fair hand, and without a blot or mistake in a single word or letter: *and it was a proper and natural will, and conformable to what her affections were proved to be at the time, and her executors and trustees were very discreetly appointed.* Two months after this writing of the will, in a conversation with * the mother of the parties benefited by the will, the testatrix mentioned that she had made such a will, and ordered her servant to bring it, and she then delivered it to the mother, observing that

there was no need of witnesses as the estate was all personal, and the will in her own handwriting. Sir Wm. Wynne pronounced the will to be the legal will of the deceased, and further said, that in his apprehension the forming of the plan, and pursuing and carrying it into effect with propriety and without assistance, would have been sufficient to have established an interval of reason if there had been no other evidence; but it was further affirmed, by the recognition and the delivery of the will. From this sentence an appeal was interposed to the high court of delegates — who affirmed the judgment of Sir Wm. Wynne. (*i*) That very eminent judge, in the course of giving sentence below, after remarking that the court did not depend on the opinions of the witnesses, but on the facts to which they deposed, (*i*[1]) delivered the following observations:

"The strongest and best proof that can arise as to a lucid interval is that which arises from the act itself of making the will. That I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done, the whole case is proved. What can you do more to establish the act? because, suppose you are able to show the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act, rationally done. (*k*) In my apprehension, where you are able *completely to establish that, the law does not require you to go farther; and the citation from Swinburne states it to be so. The manner he has laid it down is (it is in the part in which he treats of what persons may make a will: (*l*)

(*i*) 1 Phillim. 122.

(*i*[1]) [1 Greenl. Ev. § 440, and notes; Potts *v.* House, 6 Geo. 324; Baldwin *v.* State, 12 Missou. 223; Cilley *v.* Cilley, 34 Maine, 162; Roberts *v.* Trawick, 13 Ala. 68.]

(*k*) It is not, however, to be supposed that the learned judge here considers that every rational act rationally done is sufficient to prove a lucid interval. It is the particular manner in which the act was done in this case which leads the judge to the conclusion that there was a lucid interval. 2 Curt. 447, by Sir H. Jenner Fust, in Chambers *v.* The Queen's Proctor. In Bannatyne *v.* Bannatyne, 2 Roberts, 472, 501, Dr. Lushington, referring to the above passage in the judgment of Sir W. Wynne, said, "Though I cannot say I altogether agree to that *dictum*, still it is entitled to great weight, and, to a certain extent, a rational act done in a rational manner, though not, I think, 'the strongest and best proof' of a lucid interval, does contribute to the establishment of it." See, also, the observations of Sir C. Cresswell, in Nichols *v.* Binns, 1 Sw. & Tr. 239.

(*l*) Swinb. pt. 2, s. 3, pl. 14.

'The last observation is, If a lunatic person, or one that is beside himself at sometimes, but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of frenzy or folly can be gathered, it is to be presumed that the same was made during the time of his clear and calm intermissions, and so the testament shall be adjudged good, yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet nevertheless I suppose, that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament.' (*l*[1]) Unquestionably there must be a complete and absolute proof that the party who had so formed it did it without any assistance. If the fact be so, that he has done as rational an act as can be without any assistance from another person, what there is more to be proved I don't know, unless the gentleman could prove by any authority or law what the length of the lucid interval is to be, whether an hour, a day, or a month. I know no such law as that; all that is wanting is, that it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact, that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient." Accordingly, Sir John Nicholl, in Scruby *v.* Fordham, (*m*) lays it down as a general rule, that where a will is traced into the hands of a testator, whose sanity is fairly impeached, but of whose sanity * or insanity at the time of doing or performing some act with relation to the will there is no direct evidence, the agent is to be inferred rational, or the contrary, from the character, broadly taken, of his act. (*n*)

(*l*[1]) [As to the effect to be given, as proof of capacity, to the contents and character of the will itself, and the manner in which it was written and executed, see Couch *v.* Couch, 7 Ala. 519; Duffield *v.* Morris, 2 Harring. 375; Van Alst *v.* Hunter, 5 John. Ch. 148; Ross *v.* Christman, 1 Ired. (Law) 209; Munday *v.* Taylor, 7 Bush, 491; Davis *v.* Calvert, 5 Gill & J. 269, 301; Tomkins *v.* Tomkins, 1 Bailey, 92; Coleman *v.* Robertson, 17 Ala. 55; Roberts *v.* Trawick, 13 Ala. 68; Goble *v.* Grant, 2 Green Ch. 629, 635, 636; Stewart *v.* Lispenard, 26 Wend. 313; Baker *v.* Lewis, 4 Rawle, 356; Weir's Will, 9 Dana, 441; Howe *v.* Howe, 99 Mass. 90; Clark Fisher, 1 Paige, 171; Peck *v.* Cary, 27 N. Y. 9.]

(*m*) 1 Add. 90.

(*n*) See, also, Chambers *v.* Queen's Proctor, 2 Curt. 415, 451, accord. See, also, the address of Sir C. Cresswell to the jury in Nicholls *v.* Binns, 1 Sw. & Tr. 239.

In the case of M'Adam *v.* Walker, (*o*) Lord Chancellor Eldon mentioned that he had been concerned as counsel in a cause where a gentleman, who had been for some time insane, and who had been confined till the hour of his death in a madhouse, had made a will while so confined. The question was, whether he was of sound mind at the time of making this testament. It was a will of large contents, proportioning the different divisions with the most prudent and proper care, with a due regard to what he had previously done to the objects of his bounty, and in every respect pursuant to what he had declared, before his malady, he intended to have done. It was held, that he was of sound mind at the time.

In the cases above stated, the act was not only done and completed by the testator himself, *but the will was proper and natural.* In another case, Clarke *v.* Lear, (*p*) where the instrument, although written with great accuracy by the testator himself, was made in favor of a person to whom he had no good cause whatever to give a benefit, it was held that the act of framing such an instrument furnished no proof of the existence of a lucid interval. That was the case of a man who had been certainly disordered in his mind for a length of time. He went to Little Hampton to bathe in the sea, and there he saw a young woman at the house where he boarded, of whom he had no prior knowledge, and wanted to marry her, at a time when he was insane; and being brought to London in a straight waistcoat, he there wrote a paper, by way of codicil, giving her a legacy. (*q*)

Distinction as to proof of lucid interval between *delirium* and insanity.

* With respect to the comparative facility of proving a lucid interval, there is a great distinction to be observed, with respect to a case of delirium, set up in opposition to a will, as contradistinguished from fixed mental derangement, or permanent proper insanity. The reason for this is given with peculiar force and precision of language, by Sir John Nicholl, in Brogden *v.* Brown. (*r*) "In cases

(*o*) 1 Dow, 178.

(*p*) March, 1791, cited in 1 Phillim. 119, by Sir Wm. Wynne.

(*q*) See, also, the observations of Sir J. Nicholl, in Evans *v.* Knight, 1 Add. 237, 238; and for further cases as to the proof of the existence of lucid intervals at the time of doing testamentary acts, see Attorney General *v.* Parnther, 3 Bro. C. C. 441; Coghlan *v.* Coghlan, cited in 1 Phillim. 120; Williams *v.* Goude, 1 Hagg. 577; Borlase *v.* Borlase, 4 Notes of Cases, 106; and Lord Brougham's observations in Waring *v.* Waring, 6 Moore P. C. 351.

(*r*) 2 Add. 445.

of permanent proper insanity, the proof of a lucid interval is matter of extreme difficulty, as the court has often had occasion to observe, and for this, among other reasons, namely, that the patient so affected is not unfrequently rational to all outward appearance, without any real abatement of his malady: so that, in truth and substance, he is just as insane, in his apparently rational, as he is in his visible raving fits. But the apparently rational intervals of persons merely delirious for the most part are really such. Delirium is a fluctuating state of mind, created by temporary excitement, in the absence of which, to be ascertained by the appearance of the patient, the patient is, most commonly, really sane. Hence, as also, indeed, from their greater presumed frequency in most instances in cases of delirium, the probabilities, *à priori*, in favor of a lucid interval are infinitely stronger in a case of delirium than in one of permanent proper insanity; and the difficulty of proving a lucid interval is less, in the same exact proportion, in the former, than it is in the latter case, and has always been so held by this court. (*s*)

Partial insanity.

Dew v. Clark.

The great case of Dew *v.* Clark, (*t*) which obtained the most complete and solemn consideration, led to a full investigation of that which has often been called "partial insanity," * but which would, perhaps, be better described by the phrase "insanity, or unsoundness, always existing, although only occasionally manifest." (*u*) There the case pleaded by an only daughter in a responsive allegation in the prerogative court, in opposition to her father's will, was, that besides laboring under mental perversion in some other particulars, especially on religious subjects, the deceased had an *insane* aversion to his daughter, and was actuated solely by that illusion to dispose of his property in the manner in which it was purported to be conveyed by the contested will. This allegation was opposed as inadmissible, on behalf of residuary legatees named in the will. But Sir John Nicholl admitted it; and after remarking that the case set up was one of partial insanity — of insanity *quoad hoc*, upon a particular subject, or rather, perhaps *quoad hanc*, as to a particular person, —

(*s*) See, also, the observations of Dr. Lushington in Dimes *v.* Dimes, 10 Moore P. C. 422, 426; [Staples *v.* Wellington, 58 Maine, 453, 459, 460; *ante*, 23, note (*f*[1]).]

(*t*) 1 Add. 279; 3 Add. 79. See, also, Dr. Haggard's Report from the judge's notes.

(*u*) Waring *v.* Waring, 6 Moore P. C. 350, by Lord Brougham; [Potts *v.* House, 6 Geo. 324; Townshend *v.* Townshend, 7 Gill, 10.]

and that the possible occurrence of such a case of partial insanity, and the consequent invalidity of a will, which is fairly presumable to have been made under its operation, must be admitted on the authority of Greenwood's case; (*v*) the learned judge proceeded to observe, with respect to the daughter, "She must be apprised, however, as well that the burden of proof rests with her, as that this burden, in my judgment, is from the very nature of the case, a pretty heavy * one. The present, indeed, may be less difficult to make out than Greenwood's case, in one respect, as the delusion under which the deceased is charged to have labored towards the complainant is alleged to have been coupled with something of insane feeling in other particulars, especially on the subject of religion; although here, as in Greenwood's case, the general capacity is, in substance, unimpeached. But she must understand that no course of harsh treatment — no sudden bursts of violence — no display of unkind, or even unnatural feeling, merely, can avail in proof of her allegation — she can only prove it by making out a case of antipathy, clearly resolvable into mental perversion, and plainly evincing that the deceased was insane as to her, notwithstanding his general sanity." (*x*) After the evidence had been gone through on both sides, the same learned judge delivered his judgment: that the will being proved to be the direct unqualified offspring (*y*) of a morbid delusion, as to the character and

(*v*) The following statement of this case is to be found in Lord Erskine's speech on the trial of Hadfield: "The deceased, Mr. Greenwood, whilst insane, took up an idea that his brother had administered poison to him, and this became the prominent feature of his insanity. In a few months, however, he recovered his senses, and returned to his profession, which was that of a barrister, &c. but could never divest his mind of the morbid delusion that his brother had attempted to poison him; under the influence of which (so said) he disinherited him. On a trial in the court of king's bench upon an issue *devisavit vel non*, the jury found against the will; but a contrary verdict was had in the court of common pleas, and the suit ended in a compromise." See, also, Sir John Nicholl's statement of Greenwood's case, 3 Add. 96, 97, and Lord Eldon's in White *v.* Wilson, 13 Ves. 89, and the summing up of Lord Kenyon in 3 Curt. Appendix, pp. I.–XXXI. [Although a testator may entertain peculiar notions on certain subjects, and his will be unjust as to his surviving relatives, it may yet be held valid. Denson *v.* Beazley, 34 Texas, 191.]

(*x*) 1 Add. 284. See, also, Fulleck *v.* Allinson, 3 Hagg. 527; [Trumbull *v.* Gibbons, 2 Zabr. 117; Clapp *v.* Fullerton, 34 N. Y. 190.]

(*y*) It must, however, be observed, that the rule of law is that, in civil suits, it is not necessary to trace or connect the morbid imagination with the act itself. If the mind is unsound, the act is void. The law avoids every act of the lunatic *during the period of the lunacy*, although the act to be avoided cannot be connected with the influence of the insanity, and may be proper in itself. Groom *v.* Thomas, 2 Hagg. 436.

conduct of the daughter, being the very creature of that morbid delusion put into act and energy, the deceased must be considered insane at the time of making the will, and consequently that the will itself was null and void in law. (*z*) In the course of his judgment the learned judge made the following remarks, on the subject of partial insanity: "It was said that 'partial insanity' was unknown to the law. The observation could only have arisen from mistaking the sense in which the court used that term. It was not meant that a person could be partially insane and sane at the same * moment of time: to be sane, the mind must be perfectly sound; otherwise it is unsound. All that was meant was, that the delusion may exist only on one or more particular subjects. (*z*[1]) In that sense, the very same term is used by no less an authority than Lord Hale, who says, 'There is a partial insanity of mind and a total insanity. The former is either in respect to things *quoad hoc vel illud insanire*. Some persons, that have a competent use of reason in respect of some subjects, are yet under a particular *dementia* in respect of some particular discourses, subjects, or applications. Or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who, for the most part, discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for doubtless most persons that are felons of themselves, and others, are under a degree of partial insanity when they commit these offences. It is very difficult to define the invisible

What is meant by partial insanity.

(*z*) 3 Add. 208. This judgment was afterwards confirmed by the court of delegates. A commission of review was then applied for before the lord chancellor, but refused. See 5 Russ. 163; [Bitner *v.* Bitner, 65 Penn. St. 347; Seamen's Friend Society *v.* Hopper, 33 N. Y. 619; Denson *v.* Beazley, 34 Texas, 191. Partial insanity, or monomania, will render void a will which is produced by it. Trumbull *v.* Gibbons, 2 Zabr. (N. J.) 117; Denson *v.* Beazley, 34 Texas, 191; Duffield *v.* Morris, 2 Harring. 375; Gardner *v.* Lamback, 47 Geo. 133; Tawney *v.* Long (Penn.), 2 Am. L. T. Rep. (N. S.) 341; 2 Central Law Journ. 531. As to the proof required, see Mullins *v.* Cottrell, 41 Miss. 291. Eccentric habits, or a belief in witchcraft and a supernatural agency, are not sufficient evidence of insanity to invalidate a will. Lee *v.* Lee, 4 McCord, 183; Leech *v.* Leech, 21 Penn. St. 67, 69, 72; Dunham's Appeal, 27 Conn. 192; Robinson *v.* Adams, 62 Maine, 391.]

(*z*[1]) [See Concord *v.* Rumney, 45 N. H. 427, 428; Converse *v.* Converse, 21 Vt. 168; *post*, 33, note (*c*); Potts *v.* House, 6 Geo. 324; Boyd *v.* Eby, 8 Watts, 66; Seamen's Friend Society *v.* Hopper, 33 N. Y. 619; Lucas *v.* Parsons, 27 Geo. 593; Townshend *v.* Townshend, 9 Gill, 10.]

line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature; or, on the other side, too great an indulgence given to great crimes." (*a*)

* These doctrines, and the subject of "partial insanity" (or, as it has been more usually called of late, "monomania"), generally, were fully commented on and explained with great ability by Lord Brougham, in delivering the opinion of the privy council in Waring *v.* Waring. (*b*) His lordship, after demonstrating that no confidence can be placed in the acts, or any act, of a diseased

(*a*) Dr. Haggard's Report from the judge's notes, pp. 11, 12. The lord chancellor (Lyndhurst), on refusing a commission of review, thus commented upon the judgment of Sir John Nicholl: "In this case I do not find any error in law; I do not find any doubtful or important question of law, which requires to be decided in any solemn form. The only point of law which has been agitated has arisen out of an expression made use of by the learned judge in the court below. He speaks of *partial insanity;* and it was contended at the bar, that a case of partial insanity would not be a sufficient ground to lead a court to set aside, or to justify a court in setting aside a will; and that the doctrine of partial insanity is not known to the law of England. I think I am stating correctly the argument of counsel with respect to this point, according to the apprehension which I entertain of it, at the time when the term *partial insanity* was reiterated, over and over again, as expressing the ground of Sir John Nicholl's judgment. But I think the argument, founded upon that phrase, proceeds upon a misapprehension of what was meant by the learned judge who occasionally used it. I have read his judgment with great attention, and I collect from it that his meaning is this: that there must be unsoundness of mind in order to invalidate a will, but that the unsoundness may be evidenced in reference to one or more subjects. 'It seldom happens,' he says, 'that a person who is insane displays that insanity with reference to every question and every subject; it shows itself with reference to particular subjects, and sometimes with reference to only one individual subject; it sometimes displays itself with reference to one subject very decidedly, and very generally, perhaps, with reference to other subjects.' All that the learned judge meant to convey was, that it was no objection to the imputation of unsoundness, that it manifested itself only, or principally, with reference to one particular question or one particular person; and he illustrates his position by a variety of cases, some of them of public notoriety and known to us all. This construction does not rest on any general reasoning, because, for the purpose of avoiding misapprehension, and as if his attention had been directed to the very point, he himself, in the course of his judgment, explains in distinct terms what he meant by the term *partial insanity.* (His lordship here read the passage above cited in the text, and then continued.) I think, therefore, the learned judge has sufficiently explained what he meant by the occasional use of the term *partial insanity;* and with the explanation he has thus in terms given, and with the whole of his argument, and the illustrations he has used, and the cases to which he has referred in support of that argument, I confess I entirely agree." 5 Russ. 166–167.

(*b*) 6 Moore P. C. 341; S. C. 6 Notes of Cas. 388.

mind, however apparently rational that act may appear to be, or may in reality be, proceeded to observe, that "we are wrong in speaking of partial unsoundness: we are less incorrect in speaking of occasional unsoundness; we should say that the unsoundness always exists, but it requires a reference to a peculiar topic, else it lurks and * appears not. But the malady is there; and as the mind is one and the same, it is really diseased, while apparently sound, and really its acts, whatever appearances they may put on, are only the acts of a morbid or unsound mind." Accordingly, it is now an established principle of law, that to show unsoundness of mind, it is not required that it should be general; it is sufficient if proved to exist on one or more points, though in all other respects the man may conduct himself with the utmost propriety. (*c*)

(*c*) Fowlis *v.* Davidson, 6 Notes of Cas. 473, 474, by Sir H. Jenner Fust. [See Duffield *v.* Morris, 2 Harring. 375; Dunham's Appeal, 27 Conn. 192. In the recent case of Banks *v.* Goodfellow, L. R. 5 Q. B. 549 (1870), in which the subject of partial insanity was discussed at considerable length, on facts requiring a decision of the point, it was held that partial unsoundness, not affecting the general faculties, and not operating on the mind of a testator in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will. The court having stated the facts of the case and the direction given to the jury, said: "It therefore becomes necessary to consider how far such a degree of unsonndness of mind as is involved in the delusions under which this testator labored would be fatal to testamentary capacity; in other words, whether delusions arising from mental disease, but not calculated to prevent the exercise of the faculties essential to the making of a will, or to interfere with the consideration of the matters which should be weighed and taken into account on such an occasion, and which delusions had in point of fact no influence whatever on the testamentary disposition in question, are sufficient to deprive a testator of testamentary capacity and to invalidate a will. . . . . The question . . . . presents itself here for judicial decision, so far as we are aware, for the first time. It is true that, in the case of Waring *v.* Waring, 6 Moore P. C. 341, the judicial committee of the privy council, and in the more recent case of Smith *v.* Tebbitt, L. R. 1 P. & D. 398, Lord Penzance, in the court of probate, have laid down a doctrine, according to which any degree of mental unsoundness, however slight, and however unconnected with the testamentary disposition in question, must be held fatal to the capacity of a testator. . . . . But neither in Waring *v.* Waring, nor in Smith *v.* Tebbitt, was the doctrine thus laid down in any degree necessary to the decision. Both these were cases of general, not of partial, insanity; in both the delusions were multifarious, and of the wildest and most irrational character, abundantly indicating that the mind was diseased throughout. In both there was an insane suspicion or dislike of persons who should have been objects of affection; and, what is still more important, in both it was palpable that the delusions must have influenced the testamentary dispositions impugned. In both these cases, therefore, there existed ample grounds for setting aside the will without resorting to the doctrine in question. Unable to concur in it, we have felt at liberty to consider for ourselves the

The following observations of Sir John Nicholl, made in the course of his judgment in Dew *v.* Clark, relating to the proper

principle properly applicable to such a case as the present. We do not think it necessary, to consider the position assumed in Waring *v.* Waring, *supra*, that the mind is one and indivisible, or to discuss the subject as matter of metaphysical or psychological inquiry. It is not given to man to fathom the mystery of the human intelligence, or to ascertain the constitution of our sentient and intellectual being. But whatever may be its essence, every one must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organization. The senses, the instincts, the affections, the passions, the moral qualities, the will, perception, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease and the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed; that while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions, which, though the offspring of mental disease and so far constituting insanity, yet leave the individual in all other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life." The court proceed to consider other English cases, advert to the Roman law, and the discussions of eminent and distinguished continental jurists, and then turn to the American cases, as to which they observe that "this part of the law has been extremely well treated in more than one case in the American courts," and, in support of the position taken, quote largely from the opinions delivered in Harrison *v.* Rowan, 3 Wash. C. C. 385; Den *v.* Vancleve, 2 South. 660; and Stevens *v.* Vancleve, 4 Wash. C. C. 267. The court then further remark: "No doubt, where the fact that the testator has been subject to an insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it. . . . . And the presumption against a will made under such circumstances becomes additionally strong where the will is, to use the term of the civilians, an inofficious one, that is to say, one in which natural affection and the claims of near relationship have been disregarded. But when in the result a jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect upon the will, we see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld. . . . . In the case before us two delusions disturbed the mind of the testator, the one that he was pursued by spirits, the other that a man long since dead came personally to molest him. Neither of these delusions — the dead man not having been in any way connected with him — had, or could have had, any influence upon him in disposing of his property. The will, though in one sense an idle one, inasmuch as the object of his bounty was his heir-at-law, and therefore would have taken the property without its being devised to her, was yet rational in this, that it was made in favor of a niece, who lived with him, and who was the object of his affection and regard. And we must take it in the finding of the jury that, irrespective of the question of these dormant delusions, the testator was in possession of his faculties when the will

test of the absence or presence of insanity, are so important and valuable, that it may be expedient to present them in the very

was executed. Under these circumstances we see no ground for holding the will to be invalid. . . . . For the reasons we have given in the course of this judgment, we are of opinion that a jury should be told, in such a case, that the existence of a delusion, compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it." See Denson *v.* Beazley, 34 Texas, 191; Broughton *v.* Knight, L. R. 3 P. & D. 64; Cotton *v.* Ulmer, 45 Ala. 378, 393; Crum *v.* Thornley, 47 Ill. 192; St. Leger's Appeal, 34 Conn. 434; Van Guysling *v.* Van Kuren, 35 N. Y. 70, 74; Delafield *v.* Parish, 25 N. Y. 9; Daniel *v.* Daniel, 39 Penn. St. 191, 208; Thompson *v.* Kyner, 65 Penn. St. 368, 378; Roe *v.* Taylor, 45 Ill. 485. So, in Boardman *v.* Woodman, 47 N. H. 120, it was decided that although the testator may have been under a delusion on one or more subjects, yet, if the will made by him, and its provisions, were not in any way the offspring or result of the delusion, and were not connected with or influenced by it, then the testator may be regarded as in law of sane mind for the purpose of making a will, and the will as valid. Sargent J. said: This is "in accordance with the great weight of authority, ancient and modern, English and American, medical and legal. . . . . The only opposing decision would seem to be Waring *v.* Waring, 6 Moore P. C. 349, but this has never been recognized as authority either in England or in this country." But see as to the recognition of the authority of Waring *v.* Waring, the case of Smith *v.* Tebbitt, L. R. 1 P. & D. 398. See Denson *v.* Beazley, 34 Texas, 191. The doctrine of Banks *v.* Goodfellow, *supra*, seems to have been cited with approbation in State *v.* Jones, 50 N. H. 396, 397, and it is there suggested that the opinion of the court in Boardman *v.* Woodman, *supra*, does not conflict with that doctrine. See Bell C. J. in Concord *v.* Rumney, 45 N. H. 423, 427, 428; Converse *v.* Converse, 21 Vt. 168; Pidcock *v.* Potter, 68 Penn. St. 342. In Harrison *v.* Rowan, 3 Wash. C. C. 585, the law was thus laid down by the presiding judge: "As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms. In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property. For most men, at different periods of their lives, have meditated upon the subject of the disposition of their property by will, and when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions than they would in comprehending business in some measure new." In the case of Den *v.* Vancleve, 2 South. 660, the law was thus stated: "By the terms, 'a sound and disposing mind and memory,' it has not been understood that a testator must possess these qualities of the mind in the

Criterion of insanity.

words in which they have been reported. (*d*) "The first point for consideration, and which should be distinctly

highest degree; otherwise, very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done; for even this would disable most men in the decline of life. The mind may have been in some degree debilitated; the memory may have become in some degree enfeebled; and yet there may be enough left clearly to discern and discreetly to judge of all those things and all those circumstances, which enter into the nature of a rational, fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of a sound and disposing mind and memory." In the subsequent case of Stevens *v.* Vancleve, 4 Wash. C. C. 267, it is said: "The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory; a man in whom the faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had been before asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator, as this, Had he a disposing memory? was he capable of recollecting the property he was about to bequeath; the manner of distributing it, and the objects of his bounty? To sum up the whole in the most simple and intelligible form, Were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?" This view of the law is fully adopted by the court in Sloan *v.* Maxwell, 2 Green (N. J.) Ch. 563, and is there stated to have been approved by Chancellor Vroom in a case as to the will of Tace Wallace, which, however, is not reported. It appears to have had the sanction of Chancellor Kent, in Van Alst *v.* Hunter, 5 John. Ch. 159. In the case of Banks *v.* Goodfellow, L. R. 5 Q. B. 569, it is significantly asked by Cockburn C. J. why the standard of capacity applied in the above cases to impaired mental power should not also be applicable to mental unsoundness produced by mental disease? See Boyd *v.* Eby, 8 Watts, 70; Shropshire *v.* Reno, 5 J. J. Marsh. 91; McTaggart *v.* Thompson, 14 Penn. St. 149; Brown *v.* Torrey, 24 Barb. 583; Delafield *v.* Parish, 25 N. Y. 9, 22; Den *v.* Johnson, 2 South. 454. On the other hand, however, when the will appears to have been the direct result of partial insanity under which the testator was laboring, it should be regarded as invalid, though his general capacity be unimpeached. Denson *v.* Beazley, 34 Texas, 191; Trumbull *v.* Gibbons, 2 Zabr. (N. J.) 117; Bitner *v.* Bitner, 65 Penn. St. 347. The fact that a testator entertains a notion which leads him to disinherit for slight and insufficient reasons does not prove a want of testamentary capacity, if the notion is not insane. Clapp *v.* Fullerton, 34 N. Y. 190; Hall *v.* Hall, 38 Ala. 131; Trumbull *v.* Gibbons, 2 Zabr. (N. J.) 117; Boardman *v.* Woodman, 47 N. H. 138, 139.] See, further, on this subject, Smith *v.* Tebbitt, L. R. 1 P.

(*d*) Dr. Haggard's Report, from the judge's notes, pp. 5–10.

ascertained, as far as it can be fixed, is, what is the test and criterion of unsound mind, and where eccentricity or caprice ends, and derangement commences. Derangement assumes a thousand different shapes as various as the shades of human character. It shows itself in forms very dissimilar both in character and in degree. It exists in all imaginable varieties, from the frantic maniac chained down to the floor, to the person apparently rational on all subjects and in all transactions save one; and whose disorder, though latently perverting the mind, yet will not be called forth except under particular circumstances, and will show itself only occasionally. We have heard of persons at large in Bedlam, acting as servants in the institution, showing other maniacs and describing their cases, yet being themselves essentially mad. We have heard of the person who fancied himself Duke of Hexham, yet acted as agent and steward to his own committee. It is further observable, that persons under disorder of mind have yet the power of *restriction from respect and awe. Both towards their keepers and towards others in different relations they will control themselves. There have been instances of extraordinary cunning in this respect, so much as even to deceive the medical and other attendants, by persons who, on effecting their purpose, have immediately shown that their disorder existed undiminished.

"It has probably happened to most persons who have made a considerable advance in life, to have had personal opportunities of seeing some of these varieties, and these intermediate cases between eccentricity and absolute frenzy, — maniacs who, though they could talk rationally, and conduct themselves correctly, and reason rightly, nay, with force and ability, on ordinary subjects, yet on others were in a complete state of delusion, — which delusion no arguments or proofs could remove. In common parlance, it is true, some say a person is mad when he does any strange or absurd act, others do not conceive the term 'madness' to be properly applied unless the person is frantic.

"As far as my own observations and experience can direct me, aided by opinions and statements I have heard expressed in society, guided also by what has occurred in these and in other courts of justice, or has been laid down by medical and legal writers, the true criterion is, where there

Absence or presence of delusion the true test. (e)

& D. 398; Banks *v.* Goodfellow, L. R. 5 Q. B. 549.

(e) See Wheeler *v.* Alderson, 3 Hagg. 598, acc. But see, also, the observations

is delusion of mind there is insanity; that is, when persons believe things to exist which exist only, or at least in that degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, they are of unsound mind; (e^1) or, as one of the counsel accurately expressed it, 'It is only the belief of facts which no rational person would have believed that is insane delusion.' (f) This delusion may sometimes exist on one * or two particular subjects, though generally there are other concomitant circumstances — such as eccentricity, irritability, violence, suspicion, exaggeration, inconsistency, and other marks and symptoms which may tend to confirm the existence of delusion and to establish its insane character. (f^1)

"Medical writers have laid down the same criterion by which insanity may be known. Dr. Battie, in his celebrated Treatise on Madness, (g) thus expresses it. After stating what is not properly madness, though often accompanying it, namely, either too lively or too languid a perception of things, he proceeds:

"'But *qui species alias veris capiet commotus habebitur;* and this by all mankind, as well as the physician; no one ever doubting whether the perception of objects not really existing, or not really corresponding to the senses, be a certain sign of madness: therefore "deluded imagination" is not only an indisputable but an essential character of madness.' (h)

"Deluded imagination, then, is insanity.

"Mr. Locke, who practised for a short time as a physician,

of Sir H. Jenner Fust in Chambers *v.* The Queen's Proctor, 2 Curt. 448, 449; [Boardman *v.* Woodman, 47 N. H. 120, 136–139, and cases cited; State *v.* Jones, 50 N. H. 369, 395; Banks *v.* Goodfellow, L. R. 5 Q. B. 549.]

(e^1) [See Seamen's Friend Society *v.* Hopper, 33 N. Y. 619.]

(f) This passage was cited with approbation by Sir H. Jenner Fust in Frere *v.* Peacocke, 1 Robert. 444. But Lord Brougham remarked, in Waring *v.* Waring, 6 Moore P. C. 353, that perhaps, in a strictly logical view, the definition is liable to one exception, or at least exposed to one criticism, viz, that it gives a consequence for a definition, and that it might be more strictly accurate to term "delusion" and belief of things as realities, which exist only in the imagination of the patient. "The frame or state of mind," said his lordship, "which indicates his incapacity to struggle against such an erroneous belief constitutes an 'unsound frame of mind.'" See, further, as to the different kinds of insane delusion, the judgment of Dr. Lushington, in Prinsep *v.* Dyce Sombre, 10 Moore P. C. 232, 247; S. C. Dea. & Sw. 22; [Seamen's Friend Society *v.* Hopper, 33 N. Y. 619, 620–637; Duffield *v.* Morris, 2 Harring. 375; Robinson *v.* Adams, 62 Maine, 391.]

(f^1) [See Bitner *v.* Bitner, 65 Penn. St. 347; Boyd *v.* Eby, 8 Watts, 66; M'Masters *v.* Blair, 30 Penn. St. 298, 302.]

(g) London, 1758.

(h) S. 1, p. 5.

though more distinguished as a philosopher, thus expresses himself in his highly esteemed work on the Human Understanding: 'Madmen having joined together some ideas very wrongly, mistake them for truths. By the violence of their imaginations, having taken their fancies for realities, they make right deductions from them.' Hence it comes to pass, that a man who is of a right understanding in all other * things, may, in one particular, be as frantic as any in Bedlam. 'Madmen put wrong ideas together, and so make wrong propositions, but argue and reason right from them.' (*i*)

"Here, again, the putting wrong ideas together, mistaking them for truths, and mistaking fancies for realities, is Mr. Locke's definition of madness; and he states that insane persons will reason rightly at times, and yet still are essentially mad; and that they may be mad on one particular subject only.

"I shall only refer to one other medical authority; but he is a person of great name as connected with mental disorder — I mean Dr. Francis Willis. In a recent publication by this gentleman, there occur passages not undeserving of my attention. The work is entitled A Treatise on Mental Derangement, being the substance of the Gulstonian Lecture delivered before the College of Physicians in the year 1822, and published in the month of March, 1823. Preceding his work, he gives a list of authors whom he has consulted, and he seems to have referred to almost every writer on the subject, ancient and modern. He also has personally had great practice in the particular disorder, as well as the advantage of acquiring much knowledge from the distinguished experience of his family. I will refer to a passage where he points out the difference between an unsound mind and a weak mind.

"'A sound mind is one wholly free from delusion. Weak minds, again, only differ from strong ones in the extent and power of their faculties; but unless they betray symptoms of delusion, their soundness cannot be questioned. An unsound mind, on the contrary, is marked by delusion, by an apparent insensibility to, or perversion of, those feelings which are peculiarly characteristic of our nature. Some lunatics, for instance, are callous to a just sense of affection, decency, or honor; (*i*[1]) they hate those without a cause who were formerly * most dear to them: others take

(*i*) Locke on the Human Understanding, bk. 2, c. 11, s. 13.

(*i*[1]) [Bitner *v.* Bitner, 65 Penn. St. 347.]

delight in cruelty; many are more or less offended at not receiving that attention to which their delusions persuade them they are entitled. (i^2) Retention of memory, display of talents, enjoyment in amusing games, and an appearance of rationality, on various subjects, are not inconsistent with unsoundness of mind: hence, sometimes, arises the difficulty of distinguishing between sanity and insanity.'" (k)

Case of a will "sounding to folly."

Although in the case of a person who is sometimes sane, and sometimes insane, if there is no direct proof of his state when he wrote his will, and there be in it a mixture of wisdom and folly, it is to be presumed that the same was made during the testator's frenzy, even if there be but one word "sounding to folly;" (l) yet the court of probate will not at once reject an allegation propounding a will, which even strongly "sounds to folly," when facts are pleaded, showing that the deceased up to his death conducted himself in the ordinary concerns of life as a sane man. (m)

A will may be pronounced

In a case where a woman made a will, under a power authorizing her to dispose of certain property by a will attested by two witnesses, the will was pronounced for, though

(i^2) [See Trumbull *v.* Gibbons, 2 Zabr. 117; Bitner *v.* Bitoer, 65 Penn. St. 347; Boyd *v.* Eby, 8 Watts, 66.]

(k) See the judgment of Sir H. Jenner Fust, in Mudway *v.* Croft, 3 Curt. 671, as to the criteria by which to test and ascertain whether natural or innate eccentricity has exceeded the bounds of legal testamentary capacity. See, also, Austen *v.* Graham, 8 Moore P. C. 493.

(l) Swinb. pt. 2, s. 3, pl. 15. See In the Goods of Watts, 1 Curt. 594.

(m) Arbery *v.* Ashe, 1 Hagg. 214. [Where the testamentary capacity required is that the testator "shall be of sound and disposing mind, and capable of making a valid deed or contract," it is understood that he must have sufficient capacity, at the time of executing his will, to make a disposition of his estate with judgment and understanding in reference to the amount and situation of his property, and the relative claims of the different persons who should be the objects of his bounty. But under this rule a jury is not bound to reject a will because in their opinion its provisions are unjust and injudicious, but they may be considered by the jury in determining the capacity of the testator. Higgins *v.* Carlton, 28 Md. 118; Munday *v.* Taylor, 7 Bush (Ky.), 491. It is not sufficient to avoid a will, that its dispositions are imprudent and unaccountable. Higgins *v.* Carlton, *supra;* Ross *v.* Christman, 1 Ired. 209; Davis *v.* Calvert, 5 Gill & J. 269, 300; Greenwood *v.* Greenwood, 3 Curt. Appdx. i.; Roberts *v.* Trawick, 13 Ala. 68; Kenworthy *v.* Williams, 5 Ind. 375; Addington *v.* Wilson, 5 Ind. 137; Denson *v.* Beazley, 34 Texas, 191; Reynolds *v.* Root, 62 Barb. 250; Lynch *v.* Clements, 9 C. E. Green, 431; Boylan *v.* Meeker, 4 Dutcher (N. J.), 274; Harrel *v.* Harrel, 1 Duvall (Ky.), 203; Barker *v.* Comins, 110 Mass. 477; Munday *v.* Taylor, 7 Bush, 491; *ante*, 26, and note (l^1); Peck *v.* Cary, 27 N. Y. 9; Potts *v.* House, 6 Geo. 324. But the will may, upon its face, present undoubted proof of its being the product of an unsound mind. Boylan *v.* Meeker, 4 Dutcher (N. J.), 274.]

both the witnesses deposed to the deceased's incapacity.(*n*)

for, though both the attesting witnesses depose to the testator's incapacity.

The presumption of law is, that a verdict of a jury under a commission of lunacy, that the party, the subject of the commission, is of unsound mind, is well founded, and if the commission remained unsuperseded, that the party continued a lunatic to his death. Such presumption, however, may be rebutted and displaced by positive proof of entire recovery or possession of a lucid interval when a testamentary instrument was executed. (*o*)

Effect of commission of lunacy.

* By the Roman law testaments might be set aside as being *inofficiosa*, deficient in natural duty, if they totally passed by (without assigning a true and sufficient reason) any of the children of the testator; though if the child had any legacy, however small, it was a proof the testator had not lost his memory or his reason, which otherwise the law presumed. But the law of England makes no such constrained suppositions of forgetfulness or insanity; and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosa* to set aside such testament. (*p*) The court of probate, however, will require evidence of full and entire capacity in the testator to support a will which is not an "*officious*" one, *i. e.* consonant with the testator's natural affection and moral duties; (*q*) and

Inofficious testaments.

(*n*) Le Breton *v.* Fletcher, 2 Hagg. 558; S. P. in K. B. Lowe *v.* Jolliffe, 1 W. Bl. 365. See Starnes *v.* Marten, 1 Curt. 294; *post*, § II.; [Otterson *v.* Hofford, 7 Vroom, 129; In re Will of Eliza Ware, 25 N. Y. 425; Higgins *v.* Carlton, 28 Md. 118; Perkins *v.* Perkins, 39 N. H. 168, 169; Bell *v.* Clark, 9 Ired. 279; Whitaker *v.* Salisbury, 15 Pick. 544; Jauncey *v.* Thorne, 2 Barb. Ch. 40, 52, 53; Auburn Theological Seminary *v.* Calhoun, 25 N. Y. 428; Orser *v.* Orser, 24 N. Y. 51; Isham J. in Dean *v.* Dean, 27 Vt. 746; Bowman *v.* Christman, 4 Wend. 277; Nelson *v.* McGiffert, 3 Barb. Ch. 158.]

(*o*) Prinsep *v.* Dyce Sombre, 10 Moore P. C. 232, 239, 244, 245; [In re Taylor, 1 Edm. (N. Y.) Sel. Cas. 375. The fact, that a person is under guardianship as a lunatic, is *primâ facie* evidence of incapacity, but it is open to explanation by other proof. 1 Greenl. Ev. § 690; Hamilton *v.* Hamilton, 10 R. I. 538, 542; Stone *v.* Damon, 12 Mass. 488; Crowninshield *v.* Crowninshield, 2 Gray, 531; Breed *v.* Pratt, 18 Pick. 115; Lucas *v.* Parsons, 27 Geo. 593; In re Burr, 2 Barb. Ch. 208. Such a person may make a valid will, if he is in fact of sound mind at the time of its execution. Breed *v.* Pratt, 18 Pick. 115; Stone *v.* Damon, 12 Mass. 488; Groom *v.* Groom, 2 Hagg. 449; Shelford Lunacy, 296; Hall *v.* Warren, 9 Ves. 605; Re Watts, 1 Curt. 594; Snook *v.* Watts, 11 Beav. 105; Cooke *v.* Cholmondely, 2 Mac. & G. 22; Bannatyne *v.* Bannatyne, 16 Jur. 864.]

(*p*) 2 Bl. Com. 503; Wrench *v.* Murray, 3 Curt. 623.

(*q*) Montefiore *v.* Montefiore, 2 Add. 361, 362. And see Dew *v.* Clark, 3 Add. 207, 208.

where the capacity is at all doubtful, and the will "inofficious," it has been said that there must be *direct* proof of instructions. (*r*) But the modern doctrine requires only that there should be satisfactory proof of some kind of the testator's knowledge and approval of the contents of the will. (*s*.)

Persons who from old age or other causes have outlived their understanding.

Besides the two classes of persons *non compotes mentis* (*s*[1]) already mentioned, viz, idiots and lunatics, Lord Coke mentions two more classes, viz, those who were of good and sound memory, and by the visitation of God have lost it; and those who have become *non compotes* by their own act, as drunkards. (*t*) In the former of these two latter classes must be reckoned, those who, from sickness, grief, accident, or old age, have lost their reason, who are not like those classed by Lord Coke as "*lunatici*," sometimes having their understanding and sometimes not; but whose understandings are defunct; who have survived the period that Providence has assigned to the stability of their minds. (*u*)

* But old age alone does not deprive a man of the capacity of making a testament; (*x*) for a man may freely make his testament

(*r*) Brogden *v.* Brown, 2 Add. 449.

(*s*) See *post*, pt. I. bk. IV. ch. III. § 5. [See Goble *v.* Grant, 2 Green Ch. 629.]

(*s*[1]) [As to the meaning of this term, see the remarks of Appleton C. J. in Hovey *v.* Chase, 52 Maine, 314–317; Stewart *v.* Lispenard, 26 Wend. 255.]

(*t*) 4 Co. 124 *b*.

(*u*) Ex parte Cranmer, 12 Ves. 452, by Lord Erskine; Sherwood *v.* Sanderson, 19 Ves. 283. See, also, Ridgway *v.* Darwin, 8 Ves. 66. [The term *non compos mentis* implies a total want of mind; and a person to whom it properly applies cannot make a valid will, however just and reasonable it may appear to be. Potts *v.* House, 6 Geo. 324. But neither age, nor sickness, nor extreme distress, nor debility of body, will disqualify a person for making a will, if sufficient intelligence remain. Higgins *v.* Carlton, 28 Md. 115; Van Alst *v.* Hunter, 5 John. Ch. 148, 158; Crolius *v.* Stark, 64 Barb. 112; Wood *v.* Wood, 4 Brewst. (Pa.) 75.]

(*x*) Swinb. pt. 2, s. 5, pl. 1; Godolph. pt. 1, c. 8, s. 4; Bird *v.* Bird, 2 Hagg. 142; Lewis *v.* Pead, 1 Ves. jun. 19; [Re Woodfall, 1 Pa. Leg. Gaz. Rep. 66; Reynolds *v.* Root, 62 Barb. 250; Shailer *v.* Bumstead, 99 Mass. 112; Potts *v.* House, 6 Geo. 324; Kirkwood *v.* Gordon, 7 Rich. (S. Car.) 474; Browne *v.* Molliston, 3 Whart. 129; Sloan *v.* Maxwell, 2 Green Ch. 581; Whitenach *v.* Stryker, 1 Green Ch. 8, 12; Creely *v.* Ostrander, 3 Bradf. Sur. 107; Carroll *v.* Norton, 3 Bradf. Snr. 291. In Collins *v.* Townley, 21 N. J. Ch. 353, the will was sustained, where the testatrix was ninety-eight years old. In Lowe *v.* Williamson, 1 Green Ch. 82, a will was sustained, although the testator was eighty years of age, very deaf, and his eyesight was defective when he made his will. In Reed's Will, 2 B. Mon. 79, the testator was eighty years of age, and was afflicted with the palsy so that he could neither read nor feed himself, and his will was held valid. See, also, Watson *v.* Watson, 2 B. Mon. 74; Andress *v.* Weller, 2 Green Ch. 605; Stevens *v.* Vancleve, 4 Wash. C. C. 262; Nailing *v.* Nailing, 2 Sneed (Tenn.), 630; Moore *v.* Moore, 2 Bradf.

how old soever he be; since it is not the integrity of the body, but of the mind, that is requisite in testaments. (x^1) Yet if a man in his old age becomes a very child again in his understanding, or rather in the want thereof, or by reason of extreme old age, or other infirmity, is become so forgetful, that he knows not his own name, he is then no more fit to make his testament than a natural fool, or a child, or lunatic person. (y)

Sur. 261; Higgins *v.* Carlton, 28 Md. 115; Secrest *v.* Edwards, 4 Met. (Ky.) 163; Elliott's Will, 2 J. J. Marsh. 340. In the case of Harrel *v.* Harrel, 1 Duvall (Ky.), 203, it appeared that the testator was, at the time of making his will, about seventy years of age, was confined to his bed by an inflammatory disease, which appeared very distressing, and made him frequently both "drowsy" and "flighty," and of which he died about two days after the attestation; and there was also evidence that for several years his second wife, who was not the mother of his children, had often importuned him to make such a will as the one propounded, grossly unequal and with no satisfactory reason for its provisions, and the testator had constantly resisted her, declaring that the law made the fairest disposition of the estates of persons deceased, and he would die intestate. The court refused to uphold the will.] Extreme old age raises some doubt of capacity, but only so far as to excite the vigilance of the court. Kindleside *v.* Harrison, 2 Phillim. 461, 492. And in cases where no insanity has either existed or been supposed to exist, the inquiry as to capacity simply is, whether the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done. But when lunacy or unsoundness of mind has previously existed, the investigation is of a totally different character. Per Dr. Lushington, in Prinsep *v.* Dyce Sombre, 10 Moore P. C. 278; Banks *v.* Goodfellow, L. R. 5 Q. B. 549; [Higgins *v.* Carlton, 28 Md. 115. In Van Alst *v.* Hunter, 5 John. Ch. 148, 158, the testator was between ninety and a hundred years of age when he made his will. Chancellor Kent remarked: "The law looks only to the competency of the understanding." "The failure of memory is not sufficient to create the incapacity, unless it be quite total, or extends to the testator's immediate family or property." "The want of recollection of names is one of the earliest symptoms of a decay of memory; but this failure may exist to a very great degree, and yet the solid power of understanding remain." As a fortunate circumstance attending this power of the aged to dispose of their property, the learned chancellor added: "It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities. The will of such an aged man ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent acts, but contains those very dispositions which the circumstances of his situation and the course of the natural affections dictated."]

(x^1) [See Higgins *v.* Carlton, 28 Md. 115; Van Alst *v.* Hunter, 5 John. Ch. 148, 158.]

(y) Swinb. *ubi supra;* Godolph. *ubi supra.* See, also, Griffiths *v.* Robins, 3 Madd. 191; Mackenzie *v.* Handaside, 2 Hagg. 211. [The testator in a will and codicil was eighty years of age; neither of the subscribing witnesses, who were the same to each instrument, testified to the mental capacity of the testator at the time when the instruments were executed; and one of them expressed an opinion that the testator was not of sound mind at the time of the execution of either paper, the first being executed in April and the second in

If no suspicion of fraud exists, a will, consistent with previous affections and declarations, and supported by recognitions and circumstances showing volition and capacity, is valid, though made *in extremis*, and though the instructions were conveyed through the party benefited. (*z*)

Will made *in extremis.*

"It is not necessary," observed Lord Chief Baron Eyre, in Mountain *v.* Bennett, (*a*) "to go so far as to make a man absolutely insane, so as to be an object for a commission of lunacy, in order to determine the question, whether he was of a sound and disposing mind, memory, and understanding. A man, perhaps, may not be insane, and yet not equal to the important act of disposing of his property by will." (*a*[1])

Weakness of understanding.

So it was agreed by the judges in Combe's case, (*b*) that * sane memory for the making a will is not at all times when the party can

June following. It appeared that in the succeeding autumn the testator failed to know and to recognize his children, and inquired how many he had, and could only name some of them. The surrogate refused to admit the instrument to probate, and his decision was affirmed. Dumond *v.* Kiff, 7 Lansing, 465.]

(*z*) Ross *v.* Chester, 1 Hagg. 227; Martin *v.* Wotton, 1 Cas. temp. Lee, 130. [In Downey *v.* Murphey, 1 Dev. & Bat. 82, where this subject was carefully discussed, it was held that a will written for a testator *in extremis*, by one standing in a confidential relation to him, and who took a benefit under it, was not invalid by a conclusion of law unless read over to the testator or its contents otherwise made known to him. But these facts must be left to the jury, and from them fraud may be inferred unless repelled by proof of *bona fides*. See Crispell *v.* Dubois, 4 Barb. 393; Seamen's Friend Society *v.* Hopper, 33 N. Y. 619; Harvey *v.* Sullens, 46 Missou. 147. Where there is an entire revolution in the character and conduct and testamentary intention of a person of weak mind, while in the care of those benefited by the change, and under circumstances of suspicion, the law requires strong proof of both volition and capacity. Lucas *v.* Parsons, 27 Geo. 593; Walker *v.* Hunter, 17 Geo. 364. So, where the person procuring or writing the will derives an unequal advantage under it. Harvey *v.* Sullens, 46 Missou. 147. And if, in such case, the will is unjust towards the relatives of the testatrix, and would not have been executed but for the influence of the party principally benefited by it, the jury may properly be instructed that it cannot be supported. Harvey *v.* Sullens, 46 Missou. 147.]

(*a*) 1 Cox, 356.

(*a*[1]) [Mental imbecility arising from advanced age, or produced permanently or temporarily by excessive drinking, or any other cause, may destroy testamentary power. 1 Jarman Wills (3d Eng. ed.), 29; Forman *v.* Smith, 7 Lansing, 443. In Foot *v.* Stanton, 1 Deane, 19, the will of a person subject to epileptic fits was admitted to probate, although there was no evidence that the testatrix knew its contents, the memory of the attesting witnesses failed, and a third person declared that she was unfit to make a will. See Banks *v.* Goodfellow, L. R. 5 Q. B. 549, 552; Reynolds *v.* Root, 62 Barb. 250; McTaggart *v.* Thompson, 14 Penn. St. 149; Rambler *v.* Tryon, 7 Serg. & R. 94; Leech *v.* Leech, 21 Penn. St. 67, 69, 72.]

(*b*) Moor, 759; Vin. Abr. tit. Devise, A. 22; 4 Burn E. L. 49.

speak "yea or no," or had life in him, nor when he can answer to anything with sense; but he ought to have judgment to discern, and to be of perfect memory. And it is said by Lord Coke, in the Marquis of Winchester's case, (*c*) that it is not sufficient that the testator be of memory when he makes his will to answer familiar and usual questions, but he ought to have a disposing memory so as to be able to make a disposition of his property with understanding and reason; and that is such a memory which the law calls sane and perfect memory. (*d*) So it is laid down by Erskine J. in delivering the opinion of the judicial committee of the privy council, in Harwood *v.* Baker, (*e*) that in order to constitute a sound disposing mind the testator must not only be able to understand that he is by his will giving the whole of his property to the objects of his regard, but must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his will, he is excluding from participation in that property. (*f*)

(*c*) 6 Co. 23 *a*; 4 Burn E. L. 49.

(*d*) See, further, Herbert *v.* Lowns, 1 Ch. Rep. 24; Dyer, 27 *a*, in marg.; Right *v.* Price, 1 Dougl. 241; Ball *v.* Mannin, 3 Bligh N. S. 1; S. C. 1 Dow & Cl. 380; M'Diarmid *v.* M'Diarmid, 3 Bligh N. S. 374; [Delafield *v.* Parish, 25 N. Y. 9, 22; Den *v.* Johnson, 2 South. 454; Boyd *v.* Eby, 8 Watts, 71; Clark *v.* Fisher, 1 Paige, 171; Shropshire *v.* Reno, 5 J. J. Marsh. 91.] See, also, the judgment of Sir John Nicholl, in Marsh *v.* Tyrrell, 2 Hagg. 122, as to the rules by which the competency of the mind must be judged; and see, further, the judgment of the same learned judge in Ingram *v.* Wyatt, 1 Hagg. 401, where some valuable remarks on the subject of imbecility of mind will be found. [In re Welsh, 1 Redf. Sur. 238.] For an instance where weakness of mind and forgetfulness will not constitute incapacity, see Constable *v.* Tufnell, 4 Hagg. 465; affirmed on appeal, 3 Knapp, 122.

(*e*) 3 Moore P. C. C. 282, 290.

(*f*) See, also, Sefton *v.* Hopwood, 1 Fost. & F. 578; Swinfen *v.* Swinfen, 1 Fost. & F. 584; [*ante*, 33, note (*c*); Bates *v.* Bates, 27 Iowa, 110; Forman *v.* Smith, 7 Lansing, 443; Converse *v.* Converse, 21 Vt. 168; Stancell *v.* Kenan, 33 Geo. 56; Beaubien *v.* Cicotte, 12 Mich. 459; Aikin *v.* Weckerly, 19 Mich. 482; Bundy *v.* McKnight, 48 Ind. 502; Delafield *v.* Parish, 25 N. Y. 9; Kinne *v.* Johnson, 60 Barb. 69; Reynolds *v.* Root, 62 Barb. 250, 252; Harper *v.* Harper, 1 N. Y. Sup. Ct. 351, 354; Parish *v.* Parish, 42 Barb. 274; Higgins *v.* Carlton, 28 Md. 118; Tringley *v.* Cowhill, 48 Misson. 291; Roe *v.* Taylor, 45 Ill. 485; Horne *v.* Horne, 9 Ired. 99; Wood *v.* Wood, 4 Brewst. (Pa.) 75; Horbach *v.* Denniston, 3 Pittsb. (Pa.) 49; Sutton *v.* Sadler, 3 C. B. N. S. 87, 102, 103; Harrison *v.* Rowan, 3 Wash. C. C. 585; Den *v.* Vancleve, 2 South. 660; Stevens *v.* Vancleve, 4 Wash. C. C. 267; Tawney *v.* Long (Penn.), 2 Central Law Journ. 531. The question is, whether the testator had the ability to comprehend, in a reasonable manner, the nature of the affair in which he participated. Lozear *v.* Shields, 8 C. E. Green (N. J.), 509; Harrison *v.* Rowan, 3 Wash. C. C. 585; Hovey *v.* Chase, 52 Maine, 304; Crolius *v.* Stark, 7 Lansing, 311. Testamentary capacity means a sound disposing mind, viz, a power of understanding the nature of the property and the effect of the will. Sefton *v.* Hop-

On the other hand it must be observed, that mere *weakness* of understanding is no objection to a man's disposing of his estate by will; for courts cannot measure the size of people's understandings and capacities, nor examine into the wisdom or prudence of men in disposing of their estates. (*g*) * "If a man," says

wood, 1 Fost. & F. 578; Bates *v.* Bates, 27 Iowa, 110. In St. Leger's Appeal, 34 Conn. 434, 448, 449, it was held to be a correct direction to the jury, that a testator "had sufficient capacity to make a will if he understood the business in which he was engaged, and the elements of it, namely, if he recollected and understood, or, in other words, comprehended, the nature and condition of his property, the persons who were or should be the natural objects of his bounty, and his relations to them, the manner in which he wished to distribute it among or withhold it from them, and the scope and bearing of the provisions of the will he was making." "We are not aware," Butler J. remarked, "that any better or safer and more just guide for the jury has been or can be adopted." See Kinne *v.* Kinne, 9 Conn. 102; Comstock *v.* Hadlyme, 8 Conn. 254. In order that the testator shall be able to comprehend and appreciate the claims to which he ought to give effect, it is essential that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made. Cockburn C. J. in Banks *v.* Goodfellow, L. R. 5 Q. B. 549, 565. See the very important and valuable observations on this subject in the judgment of the court, in Smith *v.* Tebbitt, L. R. 1 P. & D. 398, 400.]

(*g*) Osmond *v.* Fitzroy, 3 P. Wms. 129; [Duffield *v.* Morris, 2 Harring. 379; Elliott's Will, 2 J. J. Marsh. 340; Dorrick *v.* Reichenback, 10 Serg. & R. 84; Newhouse *v.* Godwin, 17 Barb. 236; Bundy *v.* McKnight, 48 Ind. 502. See the remarks of Appleton C. J. in Hovey *v.* Chase, 52 Maine, 304, 314, 315; Clark *v.* Fisher, 1 Paige, 171; Patterson *v.* Patterson, 6 Serg. & R. 56; Tomkins *v.* Tomkins, 1 Bailey, 92; Jamison *v.* Jamison, 3 Houston (Del.), 108. The remarks of Mr. Justice Washington, upon this point, in Stevens *v.* Vancleve, 4 Wash. C. C. 262, are worthy of consideration. "He (the testator) must have memory. A man in whom this faculty is wholly extinguished cannot be said to possess an understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; he may at times ask idle questions, and repeat those which had before been asked and answered; and yet his understanding be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigor of intellect to make and digest all the parts of a contract, and yet be competent to direct the distribution of his property by will." See Comstock *v.* Hadlyme, 8 Conn. 264; Rambler *v.* Tryon, 7 Serg. & R. 95; Kinne *v.* Kinne, 9 Conn. 105; Converse *v.* Converse, 21 Vt. 168; Kirkwood *v.* Gordon, 7 Rich. (S. Car.) 474; Davis *v.* Calvert, 5 Gill & J. 269, 299, 300; Coleman *v.* Robertson, 17 Ala. 84; Minor *v.* Thomas, 12 B. Mon. 106. "This is a subject which he may possibly have often thought of; and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator, as this: Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath, the

Swinburne, (*h*) "be of a mean understanding (neither of the wise sort nor the foolish), but indifferent as it were, betwixt a wise man and a fool, yea, though he rather incline to the foolish sort, so that for his dull capacity he might worthily be termed *grossum caput*, a dull pate, or a dunce, such a one is not prohibited from making his testament." (*i*)

As to the last of the classes of *non compotes* mentioned by Lord Coke: "He that is overcome by drink," says Swinburne, (*k*) "during the time of his drunkenness is compared to a madman, (*l*) and therefore, if he make his testament at that time, it is void in law, (*l*[1]) which is to be understood, when he is so excessively drunk that he is utterly deprived of the use of reason and understanding; otherwise, albeit his understanding is obscured, and his memory troubled, yet he may make his testament, being in that case." (*m*) In a case where it appeared that

Persons drunk.

manner of distributing it, and the objects of his bounty? To sum up the whole in its most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged, at the time when he executed his will?" 4 Wash. C. C. 262. See Converse *v.* Converse, 21 Vt. 168; Horne *v.* Horne, 9 Ired. 99; per Lord Kenyon, addressing the jury in Greenwood *v.* Greenwood, 3 Curt. App. ii.; Thompson *v.* Kyner, 65 Penn. St. 368; Bitner *v.* Bitner, 65 Penn. St. 347; Bundy *v.* McKnight, 48 Ind. 502; Morris *v.* Stokes, 21 Geo. 552. The standard of testamentary capacity laid down by Mr. Justice Washington, in the above case of Stevens *v.* Vancleve, and in Harrison *v.* Rowan, 3 Wash. C. C. 385, 386, has frequently been referred to with approval in other cases. See Lowe *v.* Williamson, 1 Green Ch. 82, 85; Sloan *v.* Maxwell, 2 Green Ch. 563; Andress *v.* Weller, 2 Green Ch. 604; Hall *v.* Hall, 18 Geo. 40; Kinne *v.* Kinne, 9 Conn. 105; Comstock *v.* Hadlyme, 8 Conn. 265; Verplank, Senator, in Stewart *v.* Lispenard, 26 Wend. 255, 306, 311, 312; Brown *v.* Torrey, 24 Barb. 583; McMasters *v.* Blair, 29 Penn. St. 298; Converse *v.* Converse, 21 Vt. 168; Tomkins *v.* Tomkins, 1 Bailey, 93; Kachline *v.* Clark, 4 Whart. 319, 320; Strong J. in Newhouse *v.* Godwin, 17 Barb. 236; Moore *v.* Moore, 2 Bradf. Sur. 261; Cordrey *v.* Cordrey, 1 Houston (Del.), 269; Duffield *v.* Morris, 2 Harring. 379; Sutton *v.* Sutton, 5 Harring. 461; Morris *v.* Stokes, 21 Geo. 552; Crolius *v.* Stark, 64 Barb. 112; S. C. 7 Lansing, 311.]

(*h*) Pt. 2, s. 4, pl. 3.

(*i*) See, also, Harrod *v.* Harrod, 1 Kay & J. 4; [Potts *v.* House, 6 Geo. 324, 336.]

(*k*) Pt. 2, s. 6.

(*l*) See Gore *v.* Gibson, 13 M. & W. 623.

(*l*[1]) [Duffield *v.* Morris, 2 Harring. 375, 383; Barrett *v.* Buxton, 2 Aiken, 167; Peck *v.* Carey, 27 N. Y. 9; S. C. 38 Barb. 77; Julke *v.* Adam, 1 Redf. Sur. 454.]

(*m*) See, also, Godolph. pt. 1, c. 8, s. 5; [Gardner *v.* Gardner, 22 Wend. 526; Brush *v.* Holland, 1 Bradf. Sur. 461; Barrett *v.* Buxton, 2 Aiken, 167; Peck *v.* Cary, 27 N. Y. 9; McSorley *v.* McSorley, 2 Bradf. Sur. 188; Lowe *v.* Williamson, 1 Green Ch. 85, 87, 88; Burritt *v.* Silliman, 16 Barb. 198; Whitenach *v.* Stryker, 1 Green Ch. 12; Gibson *v.* Gibson, 24 Misson. 227; Starrett *v.* Douglass, 2 Yeates, 48. The burden is on the party alleging the invalidity of the will in con-

the testator was a person not properly insane or deranged, but habitually addicted to the use of spirituous liquors, under the actual excitement of which he talked and acted in most respects like a madman, it was held that as the testator was not under the excitement of liquor, he was not to be considered as insane at the time of making his will; and the will itself was accordingly established: (*n*) and the court pointed out the difference between the present case and one of actual insanity; inasmuch as insanity may often be *latent*, whereas there can scarcely be such a thing as latent ebriety; and consequently, in a case like the one under consideration, all which requires to be shown is, the absence of the excitement at the time of the act done, or at least the *absence of excitement in any such degree as would vitiate the act done. (*o*)

Habitual drunkenness.

If a will be executed by a testator of sound mind at the time of execution, and be afterwards wholly or partially defaced by him, while of unsound mind, such will is to be pronounced for as it existed in its integral state, that being ascertainable. (*p*) Accordingly, where a testatrix having duly executed her will, subsequently became insane, and shortly before her death it was discovered that the will had been

A will defaced by the testator while *non compos.*

sequence of the intoxication of the testator, to show its existence at the time of executing the will. Andress *v.* Weller, 2 Green Ch. 604, 608.] The following authorities on the subject of deeds obtained from a party under intoxication may be applicable in principle. Cooke *v.* Clayworth, 18 Ves. 12; Butler *v.* Mulvihill, 1 Bligh, 137; Say *v.* Barwick, 1 Ves. & B. 185; Pitt *v.* Smith, 3 Campb. 33; M'Diarmid *v.* M'Diarmid, 3 Bligh N. S. 374; Gore *v.* Gibson, 13 M. & W. 623.

(*n*) Ayrey *v.* Hill, 2 Add. 206. See, also, Billinghurst *v.* Vickers, 1 Phillim. 191; Handley *v.* Stacey, 1 Fost. & F. 574. [The mere facts, that the testator was addicted to drinking, and had had an attack of *delirium tremens* a few days before executing the will, are immaterial, if he was able to understand it at the time of executing it. Handley *v.* Stacey, *supra;* Duffield *v.* Morris, 2 Harring. 375, 383, 384. But where the understanding of a party is destroyed and gone by reason of habitual intoxication, he can make no valid will. Starrett *v.* Douglass, 2 Yeates, 48; Temple *v.* Temple, 1 Hen. & Munf. 476; Duffield *v.* Morris, *supra;* Gardner *v.* Gardner, 22 Wend. 526. As to persons found habitual drunkards, by inquest, Leckey *v.* Cunningham, 56 Penn. St. 370; Lewis *v.* Jones, 50 Barb. 645.]

(*o*) 2 Add. 210. See, also, Wheeler *v.* Alderson, 3 Hagg. 602, 608; [Starrett *v.* Douglass, 2 Yeates, 48; Black *v.* Ellis, 3 Hill (S. Car.), 68.] In the case of Rex *v.* Wright, 2 Burr. 1099, a rule was obtained to show cause why a criminal information could not be exhibited against certain persons for a misdemeanor in using artifices in order to obtain a will from a woman addicted to, and almost destroyed by, liquor.

(*p*) Scruby *v.* Fordham, 1 Add. 74; In the Goods of Brand, 3 Hagg. 754; [Batton *v.* Watson, 13 Geo. 63.]

mutilated by her, but it was proved to have been in her custody for a short time subsequent as well as prior to her insanity; it was held by Sir C. Cresswell that the *onus* of showing her to have been of sound mind when she mutilated it was on the party alleging the revocation. (*q*)

Onus of showing sanity at the time of mutilation.

Part of a will may be established, and part held not entitled to a probate, if actual incapacity be shown at the time of the execution of the latter part. (*r*) So where a will was executed on the 21st of January, containing a just and proper distribution of the testator's property, and on the 24th, only three days after, a codicil thereto was signed and executed, the effect of which would have been to leave the eldest son nearly destitute; the will was held valid, and probate refused to the codicil, on the ground that the deceased was not in possession of a sound and disposing memory at the time of making the latter. (*s*)

Part of a will established, and part not, on the ground of incapacity.

* It will hereafter appear, (*t*) that with respect to a will made before January 1, 1838 (and on which, therefore, the statute 1 Vict. c. 26, s. 9, does not operate), mere instructions for a will, if reduced into writing before the death of the testator, may operate as a will. And it has been held, that a will executed in conformity to instructions may be established, though the testator became incapable before the will was read over to him. (*u*) So in the case of Garnet *v.* Sellars, (*v*) the only questions were whether the deceased was in his senses when he gave instructions for his will, and whether the will was reduced into writing before he was dead; and the court being satisfied on those two points, pronounced for the will, without inquiring whether he remained in his senses during the time the will was writing. So a will of personalty only, agreeable to long entertained opinions, prepared two months before, and execution merely delayed for want of witnesses, would be valid, it should seem, as an unexecuted paper, even though the execution finally took place during supervening insanity. (*x*)

Insanity supervening between the instructions for a will and its execution.

(*q*) Harris *v.* Berrall, 1 Sw. & Tr. 153.

(*r*) Billinghurst *v.* Vickers, 1 Phillim. 187; Wood *v.* Wood, Ib. 357. See, also, Trimlestown *v.* D'Alton, 1 Dow (New Series), 85; Haddock *v.* Trotman, 1 Fost. & F. 31; [Morris *v.* Stokes, 21 Geo. 552; *post*. 45, 48.]

(*s*) Brounker *v.* Brounker, 2 Phillim. 57.

(*t*) *Infra*, 70, 71.

(*u*) Moore *v.* Hacket, 2 Cas. temp. Lee, 147.

(*v*) Cited by Sir G. Lee, 1 Cas. temp. Lee, 186.

(*x*) Fulleck *v.* Allinson, 3 Hagg. 527.

Again, it has been held not necessary that a testator should be in his senses at the time alterations are made in his will, provided he was so when he directed the alterations. (*y*) With respect, however, to wills made on or after January 1, 1838, since the stat. 1 Vict. c. 26, requires that their execution or alteration shall be attended with certain formalities, it is obvious that no will can be made or altered, unless the testator be of sound mind at the time when he complies with them.

Letters written to testator not evidence of his sanity.

It was decided by the house of lords in the great case of Doe dem. Tatham *v.* Wright, (*z*) that letters written *to* the testator, and not acted upon, or indorsed, or answered by him, are not evidence of his sanity.

* SECTION II.

Persons incapable from Want of Liberty or Free-will.

Such persons as are intestable for want of liberty or freedom of will are, by the civil law, of various kinds, as prisoners, captives, and the like. (*a*) But the law of England does not make such persons absolutely intestable, but only leaves it to the discretion of the court to judge upon the consideration of their particular circumstances of duress, whether or no such persons could be supposed to have *liberum animum testandi*. (*b*)

Will obtained by force:

If it can be demonstrated that actual force was used to compel the testator to make the will, there can be no doubt that although all formalities have been complied with, and the party perfectly in his senses, yet such a will can never stand. (*c*)

by fear:

So, if there were, at the time of bequeathing, a fear upon the testator, it could not be, as it ought, *libera voluntas*. (*d*) Yet it must be understood, that "it is not every fear, or a vain fear, that will have the effect of annulling the will; but a just fear, that is, such as that indeed without it the testator had

(*y*) Seeman *v.* Seeman, 1 Cas. temp. Lee, 180.

(*z*) 4 Bing. N. C. 489; [Wright *v.* Tatham, 5 Cl. & Fin. 670.] See Rosc. Evid. 453, 5th ed.

(*a*) Swinb. pt. 2, s. 8; Godolph. pt. 1, c. 9.

(*b*) 2 Bl. Com. 497.

(*c*) Mountain *v.* Bennet, 1 Cox, 355, by Eyre C. B.

(*d*) Godolph. pt. 3, c. 25, s. 8; Swinb. pt. 7, s. 2, pl. 1.

not made his testament at all, at least not in that manner. (*e*) A vain fear is not enough to make a testament void; but it must be such a fear as the law intends, when it expresses it by a fear that may *cadere in constantem virum*: (*f*) as the fear of death, or of bodily hurt, or of imprisonment, or of loss of all or most part of one's goods, or the like: (*g*) whereof no certain rule can be delivered, (*g*[1]) but it is left to the discretion of the judge, who ought not only to consider the quality of the threatenings, but also the persons as well threatening as threatened; in the * person threatening, his power and disposition; in the person threatened, the sex, age, courage, pusillanimity, and the like." (*h*)

by fraud:

Fraud is no less detestable in law than open force. Wherefore, when the testator is circumvented by fraud, the testament is of no more force than if he were constrained by fear. (*i*) With regard to what deceit shall annul a testament on the ground of fraud, as in the case of a will made under fear, it is left to the discretion of the judge, comparing the deceit to the capacity or understanding of the person deceived to discern whether it be such as may overthrow the testament or not. (*k*) If a part of a will has been obtained by fraud, probate, it should seem, ought to be refused as to that part, and granted as to the rest. (*l*)

(*e*) Godolph. pt. 3, c. 25, s. 8.

(*f*) Godolph. pt. 3, c. 25, s. 8; Swinb. pt. 7, s. 2, pl. 7.

(*g*) Swinb. pt. 7, s. 2, pl. 7.

(*g*[1]) [Small *v.* Small, 4 Greenl. 222.]

(*h*) Swinb. pt. 7, s. 2, pl. 7. See Nelson *v.* Oldfield, 2 Vern. 76.

(*i*) Swinb. pt. 7, s. 3, pl. 1; [Davis *v.* Calvert, 5 Gill & J. 269; Harvey *v.* Sullens, 46 Misson. 147; Clark *v.* Fisher, 1 Paige, 171; Forman *v.* Smith, 7 Lansing, 443; Rollwagen *v.* Rollwagen, 5 N. Y. Sup. Ct. 402; Delafield *v.* Parish, 25 N. Y. 9, 35, 36; Tyler *v.* Gardiner, 35 N. Y. 559, 592, 593; Nexsen *v.* Nexsen, 2 Keyes, 229, 233; Lee *v.* Dill, 11 Abb. Pr. 214; Marvin *v.* Marvin, 5 N. Y. Sup. Ct. 429, note.] Fraud and imposition upon weakness is a sufficient ground to set aside a will of real, much more of personal estate, though such weakness is not sufficient to ground a commission of lunacy. By Lord Hardwicke, in Lord Donegal's case, 2 Ves. sen. 408.

(*k*) Swinb. pt. 7, s. 3, pl. 3. See, also, the cases cited by Lord Lyndhurst, in Allen *v.* McPherson, 1 H. L. Cas. 207, 208, of wills obtained by false representations. [Howell *v.* Troutman, 8 Jones Law (N. Car.), 304; Rollwagen *v.* Rollwagen, 5 N. Y. Sup. Ct. 402; Kelly *v.* Theules, 2 Ir. Ch. 510; Gaines *v.* Chew, 2 How. U. S. 619, 645.]

(*l*) Allen *v.* McPherson, 1 H. L. Cas. 191. Trimlestown *v.* D'Alton, 1 Dow N. S. stated, *post*, 48; [Morris *v.* Stokes, 21 Geo. 552; In re Welsh, 1 Redf. Sur. 238; Florey *v.* Florey, 24 Ala. 241; Hippesley *v.* Homer, T. & R. 48, note; Lord Guillamore *v.* O'Grady, 2 J. & L. 210; Haddock *v.* Trotman, 1 Fost. & F. 31; *ante*, 42. In Bent's Appeal, 35 Conn. 523, it was held that a decree of the court of probate approving a will containing void be-

It is now settled that a will, whether of personal or real property, cannot be set aside *in equity* (l^1) on the ground that the will was obtained by fraud and imposition, because a will of personal estate may be annulled for fraud in the court of probate, and a will of real estate may be set aside at law ; (l^2) for in such cases, as the *animus testandi* is wanting, it cannot be considered as a will. (*m*)

quests, is not erroneous because it is general and does not limit its approval to the valid bequests. S. C. 38 Conn. 26, 34. Nor are the void bequests rendered valid by the decree approving the will, though not appealed from. Bent's Appeal, 35 Conn. 523. If a will may take effect in any part, although indefinite in others, it may properly be approved. George *v.* George, 47 N. H. 27, 46.]

(l^1) [In re Broderick's Will, 21 Wallace, 509, Bradley J. said, "Whatever may have been the original ground of this rule [that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof], the most satisfactory ground for its continued prevalence is, that the constitution of a succession to a deceased person's estate partakes, in some degree, of the nature of a proceeding *in rem*, in which all persons in the world who have any interest are deemed parties, and are concluded as upon *res adjudicata* by the decision of the court having jurisdiction. The public interest requires that the estates of persons deceased, being deprived of a master, and subject to all manner of claims, should at once devolve to a new and competent ownership; and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with least chance of injustice and fraud; and that the result attained should be firm and perpetual. The courts invested with this jurisdiction should have ample powers both of process and investigation, and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud, or illegality. . . . . And one of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is, that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief." See Benoist *v.* Murrin, 48 Missou. 48.]

(l^2) [In re Broderick's Will, 21 Wallace, 503; Townsend *v.* Townsend, 4 Coldw. (Tenn.) 70; Gaines *v.* Chew, 2 How. U. S. 619.]

(*m*) Bennet *v.* Vade, 2 Atk. 324 ; Anon. 3 Atk. 17 ; Kenrick *v.* Bransby, 3 Bro. P. C. 358; S. C. 8 Vin. Abr. 168, tit. Devise, Z. 2, pl. 11; S. C. *nomine* Herridge *v.* Bransby, 2 Cas. temp. Lee, 563; Webb *v.* Claverden, 2 Atk. 424 ; Jones *v.* Jones, 3 Meriv. 161 ; S. C. 7 Price, 663; Jones *v.* Frost, Jacob, 466; S. C. 3 Madd. 1; Gingell *v.* Horne, 9 Sim. 539 ; Allen *v.* M'Pherson, 1 H. L. Cas. 191. [See Vicery *v.* Hobbs, 21 Texas, 570; Meluish *v.* Milton, L. R. 3 Ch. D. 27.] In some earlier cases we find the court of chancery distinctly asserting its jurisdiction to relieve against fraud in obtaining wills, as in Maunday *v.* Maunday, 1 Ch. Rep. 123; Welby *v.* Thornagh, Prec. Chanc. 123; Goss *v.* Tracy, 1 P. Wms. 287; S. C. 2 Vern. 700; in other cases, disclaiming such jurisdiction, though the fraud was gross and palpable; as in Roberts *v.* Wynn, 1 Ch. Rep. 236; S. C. *nomine* Bodmin *v.* Roberts, cited by Powell B. 3 Ch. Cas. 61 ; Archer *v.* Mosse, 2 Vern. 8; and in other cases, steering a middle course, by declaring the party who practised the fraud a trustee for the party prejudiced by it; Herbert *v.* Lowns, 1 Ch. Rep. 22 ; Thynn *v.* Thynn, 1 Vern. 296 ; Devenish *v.* Bains, Prec. Ch. 3 ; Barnesly *v.* Powel, 1 Ves. sen. 287 ; Marriot *v.* Marriot, Stra. 666 ; 1 Fonbl. Treat. Eq. b. 1, c. 2, s. 3, note (*u*) ; [Dowd *v.* Tucker, 14

*If a man (said Rolle C. J. at a trial at bar) makes a will in his sickness, by the over-importunity of his wife, to the end he may be quiet, this shall be said to be a will made by constraint, and shall not be a good will. (*n*) by importuity:

Importunity, in its correct legal acceptation, must be in such a degree as to take away from the testator free agency; it must be such importunity as he is too weak to resist; such as will render the act no longer the act of the deceased, — not the free act of a capable testator, — in order to invalidate the instrument. (*o*)

A will made by interrogatories is valid; but undoubtedly when a will is so made, the court must be more on its guard against importunity, more jealous of capacity, and more strict in requiring proof of spontaneity and volition than it would be in an ordinary case. (*p*)

With respect to a will obtained by influence, it is not unlawful for a man, by honest intercession and persuasion, to procure a will in favor of himself or another person: (*q*) by influence.

Am. Law Reg. N. S. 477, and cases in note *ad finem; post,* 552, note (*s*); Williams *v.* Fitch, 18 N. Y. 547.] This doctrine will be discussed, *post,* pt. I. bk. VI. ch. I. together with the subject of the jurisdiction of the court of chancery to relieve in cases where *probate* has been obtained by fraud *on the next of kin.*

(*n*) Hacker *v.* Newborn, Styles, 427; [Taylor *v.* Wilburn, 20 Misson. 306; Marshall *v.* Flinn, 4 Jones (Law), 199; Davis *v.* Calvert, 5 Gill & J. 301, 302; Miller *v.* Miller, 3 Serg. & R. 267; Lowe *v.* Williamson, 1 Green Ch. 82; Potts *v.* House, 6 Geo. 324; Clark *v.* Fisher, 1 Paige, 171; Harrel *v.* Harrel, 1 Duvall (Ky.), 203; Small *v.* Small, 4 Greenl. 220; Lide *v.* Lide, 2 Brevard, 403.] See, also, Moneypenny *v.* Brown, 8 Vin. Abr. 167, tit. Devise, Z. 2, pl. 7; Lamkin *v.* Babb, 1 Cas. temp. Lee, 1. See, also, Harwood *v.* Baker, 3 Moore P. C. 282.

(*o*) By Sir John Nicholl, in Kindleside *v.* Harrison, 2 Phillim. 551, 552; [Baldwin *v.* Parker, 99 Mass. 84, 85; Davis *v.* Calvert, 5 Gill & J. 269; Clark *v.* Fisher, 1 Paige, 171.]

(*p*) Green *v.* Skipworth, 1 Phillim. 58.

(*q*) Swinb. pt. 2, s. 4, pl. 1; [Howe *v.* Howe, 99 Mass. 88, 99; Higgins *v.* Carlton, 28 Md. 118; Robb *v.* Graham, 43 Ind. 1; Hazard *v.* Hazard, 5 N. Y. Sup. Ct. 79; Clapp *v.* Fullerton, 34 N. Y. 197; Dean *v.* Negley, 41 Penn. St. 312. Tyler *v.* Gardiner, 5 N. Y. Sup. Ct. 79, 81; 35 N. Y. 559; O'Neall *v.* Farr, 1 Rich. (S. Car.) 80; Walker *v.* Hunter, 17 Geo. 264; Newhouse *v.* Godwin, 17 Barb. 236; Harrison's Will, 1 B. Mon. 351; McDaniel *v.* Crosby, 19 Ark. 533.] It is no part of the testamentary law of this country, that the making a will *must originate* with a testator; [Jones *v.* Jones, 14 B. Mon. 464;] nor is it required that proof should be given of the commencement of such a transaction, provided it be proved that the deceased completely understood, adopted, and sanctioned the disposition proposed to him, and that the instrument itself embodied such disposition. By Sir J. Nicholl, in Constable *v.* Tufnell, 4 Hagg. 477; affirmed on appeal, 3 Knapp, 122. See, also, Wise *v.* Johnson, 1 Cas. temp. Lee, 600.

*neither is it to induce the testator, by fair and flattering speeches; (*r*) for though persuasion may be employed to influence the dispositions in a will, this does not amount to influence in the legal sense; (*r*[1]) and whether or not a capricious partiality has

(*r*) Swinb. pt. 7, s. 4, pl. 1; [Potts *v.* House, 6 Geo. 324; Small *v.* Small, 4 Greenl. 220; Woodward *v.* James, 3 Strobh. Law, 552. If, however, such fair and flattering speeches were addressed to a mind that has lost its self-direction, and become reduced to unresisting imbecility, they would render void the will obtained by them. See Martin *v.* Teague, 2 Spears, 268, 269; O'Neall *v.* Farr, 1 Rich. (S. Car.) 80; Lowe *v.* Williamson, 1 Green Ch. 82; Trumbull *v.* Gibbons, 2 Zabr. 117; Thompson *v.* Farr, 1 Spears, 93; Newhouse *v.* Godwin, 17 Barb. 236. See the difference noted between the effects of influence exerted by the wife of the testator and that exercised by a woman holding merely an adulterous relation to him. Kessinger *v.* Kessinger, 37 Ind. 341; Dean *v.* Negley, 41 Penn. St. 312; Monroe *v.* Barclay, 17 Ohio St. 302; Farr *v.* Thompson, Cheves, 37; Denton *v.* Franklin, 9 B. Mon. 28; Nussear *v.* Arnold, 13 Serg. & R. 323; Monroe *v.* Barclay, 17 Ohio St. 302.]

(*r*[1]) [Miller *v.* Miller, 3 Serg. & R. 267; Small *v.* Small, 4 Greenl. 220; Chandler *v.* Ferris, 1 Harring. 454; Denslow *v.* Moore, 2 Day, 12; Stackhouse *v.* Horton, 15 N. J. Ch. 202; Gardner *v.* Gardner, 22 Wend. 526; Trumbull *v.* Gibbons, 2 Zabr. (N. J.) 117; Martin *v.* Teague, 2 Spears, 268, 269; Robinson *v.* Adams, 62 Maine, 369. Neither advice, nor argument, nor honest and moderate intercession or persuasion, or flattery unaccompanied by fraud or deceit, would vitiate a will made freely and from conviction, though such will might not have been made but for such influences. Chandler *v.* Ferris, 1 Harring. 454, 464; Davis *v.* Calvert, 5 Gill & J. 301; Miller *v.* Miller, 3 Serg. & R. 267; Small *v.* Small, 4 Greenl. 220; Denslow *v.* Moore, 2 Day, 12. There may, however, be overruling importunity and undue influence without fraud, which, when proved, may, and ought to have, effect (under circumstances) to avoid a will or testament; Brown *v.* Moore, 6 Yerger, 272; such as the immoderate, persevering, and begging importunities of a wife who will take no denial, pressed upon an old and feeble man, which can be better imagined than described; or dominion obtained over the testator under the influence of fear, produced by threats, violence, or ill treatment. In neither of those instances may there be any direct fraud; but an overruling influence upon the mind and feelings of a testator according to the degree of his judgment and firmness. Buchanan C. J. in Davis *v.* Calvert, 5 Gill & J. 301, 302. Some of the cases have held that the influence, to avoid a will, must have been consciously exercised, with a view to produce the unlawful result. Martin *v.* Teague, 2 Spears, 268; Small *v.* Small, 4 Greenl. 220. Great indulgence has generally been allowed to the influence or importunity of a wife, child, or other intimate relation or friend, if exerted in a fair and reasonable manner, and without imposition or deception, and while the testator was in a condition, and had capacity to deliberate and estimate the inducements offered, although the influence or importunity were successful in securing a will more favorable to such party than would otherwise have been obtained. Small *v.* Small, 4 Greenl. 220; Miller *v.* Miller, 3 Serg. & R. 267; Elliott's Will, 2 J. J. Marsh. 340; Moritz *v.* Brough, 16 Serg. & R. 403; Harrison's Will, 1 B. Mon. 351; O'Neall *v.* Farr, 1 Rich. (S. Car.) 80; Thompson *v.* Farr, 1 Spears, 93; Farr *v.* Thompson, Cheves, 37; Lide *v.* Lide, 2 Brevard, 403; Zimmerman *v.* Zimmerman, 23 Penn. St. 375; Wier *v.* Fitzgerald, 2 Bradf. Sur. 42.]

been shown, the court will not inquire. (r^2) But where persuasion is used to a testator on his death-bed, when even a word distracts him, it may amount to force and inspiring fear. (s)

The sort of influence which will invalidate a will is thus described by Eyre C. B. in Mountain, *v.* Bennett: (t) "There is another ground, which though not so distinct as that of actual force, nor so easy to be proved, yet if it should be made out, would certainly destroy the will; that is, if a dominion was acquired by any person over a mind of sufficient sanity *to general purposes*, and of sufficient soundness and discretion to regulate his affairs *in general;* yet if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind.' (t^1) [In this case, the will was attempted to be invalidated on the ground that it was obtained by the undue influence of the testator's wife, whom he had married from an inferior station; but the will was finally supported, amidst much conflicting testimony as to the state of the testator's mind, principally on the evidence of the attesting witnesses, who were persons of high character and respectability, and were unanimous as to the testator's sanity and freedom from control. (t^2)]

But the influence to vitiate an act must amount to force and coercion, destroying free agency. (t^3) It must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be

(r^2) [See Ross *v.* Christman, 1 Ired. (Law) 209.]

(s) By Sir Wm. Wynne, in Dickinson *v.* Moss, Prerog. T. 1790, MS., 4 Burn, 58; Tyrwhitt's ed.; Higginson *v.* Colcot, 1 Cas. temp. Lee, 138; [Potts *v.* House, 6 Geo. 324; Harrel *v.* Harrel, 1 Duvall, 203; Morris *v.* Stokes, 21 Geo. 552; Davis *v.* Calvert, 5 Gill & J. 301, 302. And where the lawful influence is purposely carried so far as to procure an unjust will, it cannot be supported. Taylor *v.* Wilburn, 20 Misson. 306; Marshall *v.* Flinn, 4 Jones (Law), 199; Martin *v.* Teague, 2 Spears, 268, 269.]

(t) 1 Cox, 355; [Reynolds *v.* Root, 62 Barb. 250, 254, 255.]

(t^1) [Marshall *v.* Flinn, 4 Jones (N. Car.), 199; O'Neall *v.* Farr, 1 Rich. (S. Car.) 80–84.]

(t^2) [1 Jarman Wills (3d Eng. ed.), 30.]

(t^3) [Thomas *v.* Kyner, 65 Penn. 368; Lynch *v.* Clements, 24 N. J. Eq. 431; Turner *v.* Cheesman, 2 McCarter (N. J.), 243, 265; Trumbull *v.* Gibbons, 2 Zabr. (N. J.) 117; In re Will of Jackman, 26 Wisc. 104; Tyson *v.* Tyson, 37 Md. 567; O'Neall *v.* Farr, 1 Rich. (S. Car.) 80–84; Morris *v.* Stokes, 21 Geo. 552; Duffield *v.* Morris, 2 Harring. 375; Dickie *v.* Carter, 42 Ill. 376; Roe *v.* Taylor, 45 Ill. 485; Turley *v.* Johnson, 1 Bush (Ky.), 116.]

proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace; so that the motive was tantamount to force and fear. (*u*) [In Davis *v.* Calvert, (*u*[1]) it was said by Buchanan C. J. that "a testator should enjoy full liberty and freedom in the making of his will, and possess the power to withstand all contradiction and control. That degree, therefore, of importunity or undue influence, which deprives a testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act, is sufficient to invalidate it; (*u*[2]) not in relation to the person alone, by whom it is so procured, but as to all others, who are intended to be benefited by the undue influence." (*u*[3])

* In two important modern cases, in the prerogative court, wills made by persons of sufficient capacity, but of weak minds, have been set aside on the ground of improper influence. (*u*[4]) The

(*u*) Williams *v.* Goude, 1 Hagg. 581; [Cordrey *v.* Cordrey, 1 Houston (Del.), 269; Tawney *v.* Long (Penn.), 2 Am. L. T. Rep. (N. S.) 341; 2 Central Law Journ. 531; Tyson *v.* Tyson, 37 Md. 567, 582; Davis *v.* Calvert, 5 Gill & J. 302; Duffield *v.* Morris, 2 Harring. 384; Witman *v.* Goodhand, 26 Md. 95; Higgins *v.* Carlton, 28 Md. 118; Brown *v.* Molliston, 3 Whart. 137, 138; Lynch *v.* Clements, 9 C. E. Green, 431; Robb *v.* Graham, 43 Ind. 1; Berry *v.* Hamilton, 10 B. Mon. 129; Seguine *v.* Seguine, 4 Abb. (N. Y.) App. Dec. 191; Small *v.* Small, 4 Greenl. 220; Trumbull *v.* Gibbons, 2 Zabr. 117; Blakey *v.* Blakey, 33 Ala. 611; Taylor *v.* Kelly, 31 Ala. 59; Dean *v.* Negley, 41 Penn. St. 312; Sutton *v.* Sutton, 5 Harring. 459; Gardiner *v.* Gardiner, 34 N. Y. 162; Leverett *v.* Carlisle, 19 Ala. 80; Floyd *v.* Floyd, 3 Strobh. 44; Clapp *v.* Fullerton, 34 N. Y. 190; Carroll *v.* Norton, 3 Bradf. Sur. 291, 320; Gardner *v.* Gardner, 22 Wend. 526; Bundy *v.* McKnight, 48 Ind. 502; Leeper *v.* Taylor, 47 Ala. 221; Tomkins *v.* Tomkins, 1 Bailey, 92; Potts *v.* House, 6 Geo. 324; Sechrest *v.* Edwards, 4 Metc. (Ky.) 163; Miller *v.* Miller, 3 Serg. & R. 267; Marshall *v.* Flinn, 4 Jones (N. Car.), 199; Gilbert *v.* Gilbert, 22 Ala. 529–532; Taylor *v.* Kelly, 31 Ala. 59–70; Robinson *v.* Adams, 62 Maine, 369.] And see Bird *v.* Bird, 2 Hagg. 142; Constable *v.* Tufnell, 4 Hagg. 485; Browning *v.* Budd, 6 Moore P. C. 430; Sefton *v.* Hopwood, 1 Fost. & F. 578; Lovett *v.* Lovett, 1 Fost. & F. 581; [Hoge's case, 2 Brewst. (Pa.) 450; Tingley *v.* Cowgill, 48 Missou. 291; Matter of Jackman, 26 Wisc. 104.] As to undue influence, dependent on religious feelings, see Norton *v.* Relly, 2 Eden, 286; Huguenin *v.* Baseley, 14 Ves. 273; [see Weir's Will, 9 Dana, 440; In re Welsh, 1 Redf. Sur. 238; Gass *v.* Gass, 3 Humph. 278; on spiritualism, Robinson *v.* Adams, 62 Maine, 369.]

(*u*[1]) [Davis *v.* Calvert, 5 Gill & J. 269, 302, 303.]

(*u*[2]) [Wampler *v.* Wampler, 9 Md. 540; Floyd *v.* Floyd, 3 Strobh. 44; Means *v.* Means, 5 Strobh. 167.]

(*u*[3]) [*Post*, 50, note (*c*[2]), and cases cited.]

(*u*[4]) [See Forman *v.* Smith, 7 Lansing, 443; Mowry *v.* Gilber, 2 Bradf. Sur. 133; Nexsen *v.* Nexsen, 3 Abb. (N. Y.) App. Dec. 360. Where doubt has been cast upon the testamentary capacity of a testator, less proof of undue influence is necessary

will, in one of these cases, was made in favor of the attorney and agent of the testator; (*x*) in the other, by a wife in favor of her husband. (*y*) And in another case in the house of lords, (*z*) on an appeal from the Irish chancery, it was held, that where undue influence is exercised over the mind of the testator in making his will, the provisions in the will in favor of the person exercising that influence, are void; (*z*[1]) but the will may be good, as far as respects other parties; so that a will may be valid as to some parts, and invalid as to others; may be good as to one party and bad as to another. (*a*)

on the part of those opposing the will. McKinley *v.* Lamb, 56 Barb. 284. As to illness and undue influence, see McSorley *v.* McSorley, 2 Bradf. Sur. 188; Brush *v.* Holland, 3 Bradf. Sur. 461; Clarke *v.* Sawyer, 2 N. Y. 498; intemperance and undue influence, see O'Neill *v.* Murray, 4 Bradf. Sur. 311.]

(*x*) Ingram *v.* Wyatt, 1 Hagg. 94. The judgment of Sir J. Nicholl in this celebrated case was reversed by the delegates; 3 Hagg. 466; not, however, on any point of law, but on a view of the evidence of the cause. The correctness of Sir J. Nicholl's judgment, so far as regards his exposition of the law on the subject of improper influence, was recognized by the judicial committee of the privy council in the case of Cockraft *v.* Rawles, 4 Notes of Cas. 237. [It was held in St. Leger's Appeal, 34 Conn. 434, that undue influence is presumed, where the relation of attorney and client subsists between the testator and one of the legatees at the time of making the will, and such legatee drew the will; and the absence of such influence in that case is to be shown by the party sustaining the legacy; but the presumption is one of fact and not of law, and may be rebutted by any proper evidence which satisfies the jury. There is no rule of law which requires the intervention of a third person. See Wilson *v.* Moran, 3 Bradf. Sur. 172. Where a will executed by an old man differs from his previously expressed intentions, and is made in favor of those who stand in confidential relationship to him, it raises a violent presumption of fraud and undue influence, which should be overcome by satisfactory testimony. Miller P. J. in Forman *v.* Smith, 7 Lansing, 443, 450; Lee *v.* Dill, 11 Abb. 214; Morris *v.* Stokes, 21 Geo. 552. And generally, relations of confidence or dependence have an important bearing in estimating the effect of influence exerted by a person toward whom the testator bears such relations. See In re Welsh, 1 Redf. Sur. 238; Kevill *v.* Kevill, Kentucky, 6 Am. Law Reg. N. S. 79; Griffiths *v.* Robins, 3 Madd. 19; Huguenin *v.* Baseley, 14 Ves. 287; Daniel *v.* Daniel, 39 Penn. St. 191; Harvey *v.* Sullens, 46 Misson. 147; Taylor *v.* Wilburn, 20 Missou. 306; Tyler *v.* Gardiner, 35 N. Y. 559; Marshall *v.* Flynn, 4 Jones (Law), 199; Boyd *v.* Boyd, 66 Penn. St. 283; Breed *v.* Pratt, 18 Pick. 115; Trumbull *v.* Gibbons, 2 Zabr. 117; Wilson *v.* Moran, 3 Bradf. Sur. 172.]

(*y*) Marsh *v.* Tyrrel, 2 Hagg. 84. In this case there was an appeal to the delegates; but the case was afterwards compromised. 3 Hagg. 471.

(*z*) Trimlestown *v.* D'Alton, 1 Dow & Cl. (N. S.) 85.

(*z*[1]) [See Turner *v.* Cheesman, 15 N. J. Ch. 243; Florey *v.* Florey, 24 Ala. 241.]

(*a*) [*Ante*, 42, 45, note (*l*); Morris *v.* Stokes, 21 Geo. 552; In re Welsh, 1 Redf. Sur. 238. If the undue influence or fraud affects the whole will, though exercised by one legatee only, the whole will is void. Florey *v.* Florey, 24 Ala. 241; Huguenin *v.* Baseley, 14 Ves. 289, 290; Lord Chief Justice Wilmot in Bridegroom *v.* Green, Wilm. 64; Bottoms *v.* Kent, 3 Jones (N.

The subject of undue influence has lately received full consideration in a still later case in the house of lords, (*b*) on which occasion Lord Cranworth made the following observations: "In a popular sense, we often speak of *a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by following the example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the person who has thus led him astray, were to make a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man so to dispose of his property: provided only, that in making such a will, the young man was really carrying into effect his own intention, formed without either coercion or fraud. I must further remark, that all the difficulties of defining the point at which influence exerted over the mind of a testator becomes so pressing as to be properly described as coercion are greatly enhanced when the question is one between husband and wife. The relation constituted by marriage is of a nature which makes it as difficult to inquire, as it would be impolitic to permit inquiry, into all which may have passed in the intimate union of affections and interests which it is the paramount purposes of that connection to cherish.

"In order therefore, to have something to guide us in our inquiries on this very difficult subject, I am prepared to say that influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an

Car.), 154.] See, further, on the subject of influence, Mynn *v.* Robinson, 2 Hagg. 179; in which case Sir John Nicholl held that when the will of a married woman, obtained while she was in an extremely weak state, nine days before death, by the active agency of the husband, the sole executor and universal legatee, wholly departed from a former will, deliberately made a few months before, the presumption was strong against the act; and the evidence not being satisfactory, the will was pronounced against, and the husband condemned in the costs. [Reynolds *v.* Root, 62 Barb. 250. See Taylor *v.* Wilburn, 20 Misson. 306.]

(*b*) Boyse *v.* Rossborough, 6 H. L. Cas. 6; [3 De G., M. & G. 817. See Parfitt *v.* Lawless, L. R. 2 P. & D. 462.]

influence exercised either by coercion or by fraud. (b^1) In the interpretation, indeed, of these words, some latitude must be allowed. In order to come to the conclusion that a will has been obtained by coercion, it is not necessary to establish that actual violence has been used, or even threatened. The conduct of a person in vigorous health towards one feeble in body, even though not unsound in * mind, may be such as to excite terror and make him execute as his will an instrument which, if he had been free from such influence, he would not have executed. Imaginary terrors may have been created sufficient to deprive him of free agency; a will thus made may possibly be described as obtained by coercion. So as to fraud, if a wife, by falsehood, raises prejudices in the mind of her husband against those who would be the natural objects of his bounty, and by contrivance keeps him from intercourse with his relatives, (b^2) to the end that these impressions, which she knows he had thus formed to their disadvantage may never be removed; such contrivance may, perhaps, be equivalent to positive fraud, and may render invalid any will executed under false impressions thus kept alive. (c) It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that, allowing a fair latitude of construction, they must range themselves under one or other of these heads — coercion or fraud."

After observing, that where it has been proved that a will has been duly executed by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it, (c^1)

(b^1) [See Baldwin *v.* Parker, 99 Mass. 79, 84, 85; Howe *v.* Howe, 99 Mass. 88, 99; Higgins *v.* Carlton, 28 Md. 118; Tyson *v.* Tyson, 37 Md. 567; Lynch *v.* Clements, 9 C. E. Green, 431; Seguine *v.* Seguine, 4 Abb. (N. Y.) App. Dec. 191; Gardiner *v.* Gardiner, 32 N. Y. 162; 34 N. Y. 155; Hazard *v.* Hefford, 9 N. Y. Sup. Ct. 445; Hazard *v.* Hazard, 5 N. Y. Sup. Ct. 79; Marshall *v.* Flinn, 4 Jones (N. Car.), 199; Stackhouse *v.* Horton, 15 N. J. Ch. 202. Whether the undue influence must have been fraudulently exerted, see Wampler *v.* Wampler, 9 Md. 540; Davis *v.* Calvert, 5 Gill & J. 269; Stackhouse *v.* Horton, 15 N. J. Ch. 202.]

(b^2) [See Marvin *v.* Marvin, 3 Abb. (N. Y.) App. Dec. 192; Dietrick *v.* Dietrick, 5 Serg. & R. 207; Tyler *v.* Gardiner, 35 N. Y. 559; Nussear *v.* Arnold, 13 Serg. & R. 323; Patterson *v.* Patterson, 6 Serg. & R. 633.]

(c) See acc. Allen *v.* McPherson, 1 H. L. Cas. 207, per Lord Lyndhurst; [Tyler *v.* Gardiner, 35 N. Y. 559;] White *v.* White, 2 Sw. & Tr. 505; in which last case Sir C. Cresswell held that a fraud of this kind could not be set up under a plea of undue influence.

(c^1) [In Baldwin *v.* Parker, 99 Mass. 79, 84, 85, this point was fully considered by Hoar J. who said, "The question is cer-

his lordship thus proceeded: "In order to set aside the will of a person of sound mind, it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence: it must be shown that they are inconsistent with a contrary hypothesis. The undue influence must be an influence exercised in a relation to the will itself, not an influence in relation to other matters or transactions. (c^2) But the principle must not be carried too far. Where a jury sees that, at and near the time when the will sought to be * impeached was executed, the alleged testator was, in other important transactions, so under the influence of the person benefited by

tainly not without difficulty, and the authorities upon it are very conflicting. . . . . The objection to a will, that it was obtained by undue influence, is not one which it is easy to define with precision. The term seems to include both fraud and coercion. Sir John Nicholl defines it to be that degree of influence which takes away from the testator his free agency; such as he is too weak to resist; such as will render the act no longer that of a capable testator. Kinleside *v.* Harrison, 2 Phillim. 551. Where influence has been exerted upon a person of feeble mind, or whose faculties are impaired by age or disease, it is not always easy to draw the line between the issues of sanity and of undue influence. So it is possible that in many cases the coercion might be such as to be available to set aside the will on the ground that it had not been executed by the testator. But where the issue of undue influence is a separate and distinct issue, involving proof that the testator, though of sound mind, and intending that the instrument which he executes with all the legal formalities shall take effect as his will, was induced to execute it by the controlling power of another, we think the weight of authority and the best reason are in favor of imposing upon the party who alleges the undue influence the burden of proving it. And we are inclined to think that this has been the general practice in this commonwealth. Glover *v.* Hayden, 4 Cush. 580." The most recent decision in the court of appeals in the state of New York upon the question is to the same effect. Tyler *v.* Gardiner, 35 N. Y. 559; Forman *v.* Smith, 7 Lansing, 449; McKeone *v.* Barnes, 108 Mass. 344, 346; In re Will of Jackson, 26 Wisc. 104; Taylor *v.* Wilburn, 20 Missou. 206. See Small *v.* Small, 4 Greenl. 224; Tyson *v.* Tyson, 37 Md. 567, 582, 583; Howe *v.* Howe, 99 Mass. 88; Bundy *v.* McKnight, 48 Ind. 502.]

(c^2) [It must be a present constraint, operating on the mind of the testator, in the very act of making the will. Threats and violence, or any undue influence long past and gone, and in no way shown to be connected with the testamentary act, are not evidence to impeach a will. Woodward J. in McMahon *v.* Ryan, 20 Penn. St. 329; Eckert *v.* Flowry, 43 Penn. St. 46; Thompson *v.* Kyner, 65 Penn. St. 368; Jencks *v.* Court of Probate, 2 R. I. 255; Batton *v.* Watson, 13 Geo. 63; Chandler *v.* Ferris, 1 Harring. 454. See Taylor *v.* Wilburn, 20 Misson. 306. But in Davis *v.* Calvert, 5 Gill & J. 269, 303, it is said that "to avoid a will or testament, it is not necessary that threats or violence should have been practised or resorted to, at the time of making it. But it is enough if the will was made at any time afterwards, under the general controlling and continuing influence of fear, or dominion over the testator, by the person who so put him in fear, though not immediately exercised in regard to that particular instrument."]

the will, that as to them he was not a free agent, but was acting under undue control, the circumstances may be such as fairly to warrant the conclusion, even in the absence of evidence bearing directly on the execution of the will, that in regard to that also the same undue influence was exercised."(*d*)

(*d*) See, further, as to undue influence, Hall *v.* Hall, L. R. 1 P. & D. 481; Smith *v.* Smith, L. R. 1 P. & D. 239; [Stulz *v.* Schaefle, 16 Jur. 909. In regard to the evidence to establish the charge of fraud and undue influence, it was said by Colt J. in Shailer *v.* Bumstead, 99 Mass. 121, "two points must be sustained: first, the fact of the deception practised, or the influence exercised; and next, that this fraud and influence were effectual in producing the alleged result, misleading or overcoming the party in this particular act. The evidence under the first branch embraces all those exterior acts and declarations of others used and contrived to defraud or control the testator; and under the last, includes all that may tend to show that the testator was of that peculiar mental structure, was possessed of those intrinsic or accidental qualities, was subject to such passion or prejudice, of such perverse or feeble will, or so mentally infirm in any respect, as to render it probable that the efforts used were successful in producing in the will offered the combined result. The purpose of the evidence in this direction is to establish that liability of the testator to be easily affected by fraud or undue influence which constitutes the necessary counterpart and complement of the other facts to be proved. Without such proof, the issue can seldom, if ever, be maintained. It is said to be doubtful whether the existence and exercise of undue influence does not necessarily presuppose weakness of mind, and whether the acts of one who was in all respects sound can be set aside on that ground in the absence of proof of fraud or imposition. And it is certain that however ingenious the fraud or coercive the influence may be, it is of no consequence, if there is intelligence enough to detect and strength enough to resist them. The inquiry is of course directed to the condition at the date of the execution of the will, but the entire moral and intellectual development of the testator at that time is more or less involved; not alone those substantive and inherent qualities which enter into the constitution of the man, but those less permanent features which may be said to belong to and spring from the affections and emotions, as well as those morbid developments which have their origin in some physical disturbance. All that is peculiar in temperament or modes of thought, the idiosyncrasies of the man, so far as susceptibility is thereby shown, present proper considerations for the jury. They must be satisfied by a comparison of the will, in all its provisions, and under all the exterior influences which were brought to bear upon its execution, with the maker of it as he then was, that such a will could not be the result of the free and uncontrolled action of such a man so operated upon, before they can by their verdict invalidate it. As before stated, the previous conduct and declarations are admissible; and so, by the weight of authority and upon principle, are subsequent declarations, when they denote the mental fact to be proved. For by common observation and experience, the existence of many forms of mental development, especially that of weakness in those faculties which are an essential part of the mind itself, when once proved, imply that the infirmity must have existed for some considerable time. The inference is quite as conclusive that such condition must have had a gradual and progressive development, requiring antecedent lapse of time, as that it will continue, when once proved, for any considerable period thereafter. The decay and loss of vigor which often accompany old

Wills of seamen:

Persons in the sea service are frequently under the pressure of urgent wants, and to procure an immediate supply of those wants (such as an outfit, or the like) they will,

age furnish the most common illustration of this. It is difficult to say that declarations offered to establish mental facts of this description are of equal weight, whether occurring before or after the act in question. But if they are equally significant and no more remote in point of time, they are equally competent, and may be quite as influential with the jury. . . . . The doctrines thus stated are maintained by the current of English and American authority." See Waterman *v.* Whitney, 1 Kernan, 157; Comstock *v.* Hadlyme, 8 Conn. 254; Moritz *v.* Brough, 16 Serg. & R. 402; McTaggart *v.* Thompson, 14 Penn. St. 149, 154; Robinson *v.* Hutchinson, 26 Vt. 47; Boylan *v.* Meeker, 4 Dutcher, 274; Patteson J. in Wright *v.* Tatham, 5 Cl. & Fin. 715; Reel *v.* Reel, 1 Hawks, 248; Howell *v.* Barden, 3 Dev. 442; Cawthorne *v.* Haynes, 24 Missou. 236; Reynolds *v.* Root, 62 Barb. 250. On the other hand, "a will made when fraud or compulsion is used may nevertheless be shown to be the free act of the party, by proof of statements in which the will and its provisions are approved, made when he is relieved of any improper influence or coercion. It is always open to inquiry whether undue influence in any case operated to produce the will; and as the will is ambulatory during life, the conduct and declarations of the testator upon that point are entitled to some weight. Indeed, the fact alone, that the will, executed with due solemnity by a competent person, is suffered to remain unrevoked for any considerable time after the alleged causes have ceased to operate, is evidence that it was fairly executed; to meet which, to some extent at least, statements of dissatisfaction with or want of knowledge of its contents are worthy of consideration and clearly competent, however slight their influence in overcoming the fact that there is no revocation." Colt J. in Shailer *v.* Bumstead, 99 Mass. 125, 126. The able opinion of the learned judge in this case will repay a careful and entire perusal of it. Direct proof of undue influence can never, or at least but rarely, be given, and ordinarily it must be established by circumstances and inferences, to be drawn from facts, and the character of the transaction. These facts would scarcely be known to the subscribing witnesses, who are simply called to attest to the execution, and not to prove what usually would be beyond their knowledge. Miller P. J. in Forman *v.* Smith, 7 Lansing, 443, 449, 450. See McKeone *v.* Barnes, 108 Mass. 344; In re Jackman, 26 Wisc. 104; Tingley *v.* Cowgill, 48 Missou. 291; Titlow *v.* Titlow, 54 Penn. St. 216; Kevil *v.* Kevil, 2 Bush (Ky.), 614; Jackson *v.* Jackson, 32 Geo. 325. So it was said in Beaubien *v.* Cicotte, 12 Mich. 459, that, as cases of this class are determined generally upon circumstantial evidence, a very wide range of inquiry is permitted into the whole chain of circumstances attending the preparation of the will, and where the fraud and undue influence are imputed to the wife of the testator, his statements that he regretted his marriage, that he was not master at home, that he was afraid of his wife, and was compelled to submit to her demands, or otherwise there would be trouble in the house, are admissible evidence. So, where a will, which disinherited the testator's relatives in favor of his wife, was assailed for undue influence and want of capacity, it was held competent to prove the wife's abuse of the husband's relatives, and her quarrel with him about a former will in which he had made provision for them. It is also admissible to prove that the testator made no complaint of any importunities on the part of his relatives, where it appeared that the wife had made charges of such importunities. Proof may also be given of former wills, and other pecuniary arrangements for the wife, as bearing upon the question whether the testator has understandingly and of

without thought, comply with almost any condition proposed to them. These temporary necessities have been considered to operate on them as a sort of duress, on the part of those who are to furnish the supply; and it is partly on this consideration that the policy of the law has been extended to guard the testamentary acts of this class of persons. (*e*)

By statute 9 & 10 Wm. 3, c. 41, s. 6 (now repealed, but re-enacted), (*f*) it is provided, "that no will of any seaman contained, printed, or written *in the same instrument, paper, or parchment, with a warrant or letter of attorney*, shall be good or available in law to any intent or purpose whatsoever." Soon after the passing of this statute, the case of Craig *v.* Lester was decided upon its construction. There Sir Charles Hedges held, and his sentence was confirmed by the delegates, that the will was invalid, though executed *on * a different instrument* from the power of attorney. (*g*) This decision, although it may not have gone beyond the spirit of the act, must, it should seem, be considered as a bold stretch of the words of it.

made on the same instrument with a warrant of attorney, invalid.

The case of Craig *v.* Lester has been followed by numerous others in the prerogative court, fully establishing that wills made by mariners as securities for debts are void. (*h*) But neither the statute nor these decisions must be understood as making the relation of agent and

Wills of seamen made as security for debt, invalid:

his own free will changed his settled views. Beaubien *v.* Cicotte, 12 Mich. 459. Whether a will made under undue and controlling influence may, when the influence has ceased to operate, be ratified and confirmed by subsequent recognition, see O'Neall *v.* Farr, 1 Rich. (S. Car.) 80; Lamb *v.* Girtman, 26 Geo. 625; Taylor *v.* Kelly, 31 Ala. 59. The exercise of undue influence to prevent a testator from revoking his will, is not sufficient ground for setting aside the will. Floyd *v.* Floyd, 3 Strobh. 44.]

(*e*) Zacharias *v.* Collis, 3 Phillim. 177.

(*f*) The stat. 9 & 10 W. 3, c. 41, s. 6, was repealed and re-enacted by the stat. 55 G. 3, c. 60, s. 4. The latter statute was itself repealed by the stat. 11 G. 4 and 1 W. 4, c. 20, which last act provides that no will of any petty officer, seaman, non-commissioned officer of marines, or marine, shall be deemed good or valid in law, to any intent or purpose, which shall be contained, printed, or written in the same instrument, paper, or parchment, with a power of attorney. A similar enactment is contained in stat. 28 & 29 Vict. c. 72, s. 4.

(*g*) Delegates, 11th June, 1714, cited by Sir John Nicholl, in Zacharias *v.* Collis, 3 Phillim. 189.

(*h*) Leake *v.* Harwood, 3 Phillim. 190; Anderson *v.* Ward, 3 Phillim. 190, cited by Sir John Nicholl; Moore *v.* Stevens, 3 Phillim. 190, in note (*a*); Zacharias *v.* Collis, 3 Phillim. 176; S. C. 1 Cas. temp. Lee, 409. See, also, Hay *v.* Mullo, 2 Cas. temp. Lee, 273; Ramsay *v.* Calcot, 2 Cas. temp. Lee, 322; Master *v.* Stone, 2 Cas. temp. Lee, 339.

seaman, or the circumstance of the seaman being indebted to his agent, an absolute defeasance to the will, so that it could, in no case, be valid. The proper result to be deduced is, that when the relation of agent and seaman exists, there must be clear proof, not only of the subscription of the deceased to the instrument, but also of his knowledge of its nature and effect: that wherever it is executed *merely* as a security for a debt, it shall not operate as a testamentary disposition of the whole property; but, on the other hand, though there may be a debt, yet if there be satisfactory evidence that the testator intended to dispose of his property by will, the instrument shall be valid. (*i*)

Secus, as to wills of other persons.

The equity of these statutes cannot be extended beyond the wills of mariners, so as to invalidate the wills of other persons given to secure debts. (*j*)

Feme covert:

With regard to *feme coverts*, our law differs still more materially from the civil. Among the Romans there was no distinction: a married woman was as capable of bequeathing as a feme sole. (*k*) But with us a married woman is

generally incapable of making a will:

not only * utterly incapable of devising lands (being excepted out of the statute of wills, 34 & 35 Hen. 8, c. 5), (*k*[1]) but also she is incapable of making a testament of *chattels*, without the license of her husband; and such a will, being considered a mere nullity, (*k*[2]) will not be admitted to probate in the court of probate: (*l*) for all her personal chattels are absolutely his and he may dispose of her chattels real, or shall have them to himself, if he survives her. (*l*[1]) It would there-

(*i*) Zacharias *v.* Collis, 3 Phillim. 202, 203, 204. See, also, Deardsley *v.* Fleming, 2 Cas. temp. Lee, 98.

(*j*) Floranee *v.* Florance, 2 Cas. temp. Lee, 87.

(*k*) 2 Bl. Com. 497.

(*k*[1]) [And the husband could not enable his wife, whilst covert, either by his assent or by any other means, to pass the legal title to her lands by devise. West *v.* West, 4 Rand. 380; Osgood *v.* Breed, 12 Mass. 525; Wakefield *v.* Phelps, 37 N. H. 295.]

(*k*[2]) [See Eastman J. in Wakefield *v.* Phelps, 37 N. H. 299; Osgood *v.* Breed, 12 Mass. 525; 2 Kent, 170; 4 Kent, 505; ewlin *v.* Freeman, 1 Ired. (Law) 514.]

(*l*) Steadman *v.* Powell, 1 Add. 58; Bransby *v.* Haines, 1 Cas. temp. Lee, 120; Tucker *v.* Inman, 4 M. & Gr. 1076.

(*l*[1]) [The law upon this subject, both as to the rights of a married woman in her property, real and personal, while living, and as to her power of disposing of it at her decease, has been very much changed in her favor by modern legislation in many of the American States. To keep pace with this legislation requires a careful attention to the statutes of each state, and from those only can the present state of the law be learned. This should be constantly borne in mind while seeking for the law regarding the testamentary power of married women. As to wills: A married woman in Massachusetts may

fore be extremely inconsistent to give her a power of defeating that provision of the law, by bequeathing those chattels to another. (*m*) The stat. 1 Vict. c. 26, has made no alteration in the law with respect to the testamentary capacity of a *feme covert;* for by sect. 8 it is provided and enacted, that "no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act." But this section does not exclude the wills of married women from the operation of the 24th section, (*n*) as to a will speaking, as to the real and personal estate comprised in it, as if executed immediately before the testator's death, (*o*) or of the 27th section, as to a general gift being an execution of a power. (*p*) [The disability of coverture differs materially from that of infancy, idiocy, or lunacy. It does not arise from natural infirmity, but is the creature of civil policy, and may be dispensed with at the pleasure of the contracting or disposing parties through whom the property is derived, so far, at least, as the *jus disponendi* is concerned, while the contrary has been decided with respect to infancy, which alone of the other enumerated disabilities could ad-

make a valid will of her real and separate personal estate in the same manner as if she were sole, but such will shall not operate to deprive her husband of more than one half of her personal property without his consent in writing, nor shall it operate to destroy or impair, or enable her to destroy or impair, his rights as tenant by curtesy in her real estate. Genl. Sts. c. 108, §§ 9, 10. With the husband's consent in writing a married woman's will is effectual to pass all her real and personal estate, including his right as tenant by curtesy. Silsby *v.* Bullock, 10 Allen, 94. The indorsement of the assent of the husband upon the will, during the lifetime of the wife, seems to be a condition precedent to the validity of the will, as a testamentary instrument. Smith *v.* Sweet, 1 Cush. 470. But notwithstanding the effect of this statute respecting the necessity of the husband's assent to the full action of his wife's will, it is settled that she has power to make a valid disposition of specific articles of her separate personal property by a *donatio causa mortis*, without the assent of her husband. Marshall *v.* Berry, 13 Allen, 43. By the present (1869) law of Maryland, a married woman has the power of devising in the same manner and with the same effect, as if she were single, all the property, real and personal, which belonged to her at the time of her marriage, if that took place since the adoption of the code (in 1860), and all the property which she may have acquired or received since that period by purchase, gift, grant, devise, bequest, or in course of distribution. Schull *v.* Murray, 32 Md. 9. See Buchanan *v.* Turner, 26 Md. 1. As to Pennsylvania, see Dickinson *v.* Dickinson, 61 Penn. St. 401. As to Tennessee, see Code, § 2168; Johnson *v.* Sharp, 4 Coldw. (Tenn.) 45.]

(*m*) Andrew Ognell's case, 4 Co. 51 *b;* 2 Bl. Com. 498.

(*n*) See *post,* pt. 1. bk. II. ch. IV. § II.; pt. III. bk. III. ch. IV. § VIII.

(*o*) Thomas *v.* Jones, 1 De G., J. & S. 63.

(*p*) Thomas *v.* Jones, 1 De G., J. & S. 63; Bernard *v.* Minshull, Johns. 276.

mit of any question being raised on the subject; (p^1) as, of course, any attempt to give a power of disposition to an idiot or lunatic would be abortive. (p^2)]

except of property to which she is entitled in *autre droit*, as executrix.

Since the husband has no beneficial interest in the personal estate which the wife takes in the character of executrix, and as the law permits her to take upon herself that office, it enables her, in exception to the general rule that a married woman cannot dispose of property, to make a will in this instance, without the consent of her husband; restricted, however, to those articles to which she is entitled as executrix. (q) The effect of such an instrument is merely * to pass, by a pure right of representation, to the testator or prior owner, such of his personal assets as remain outstanding, and no beneficial interest which the wife may have in any part of them: and with respect to the assets which may have been received by the feme executrix during the marriage, and not disposed of, they immediately become the husband's property, and are not affected by the will. (r)

Husband may assent to his wife's will:

As the husband may waive the interest which the law bestows on him, he may empower the wife to make a will to dispose of her personal estate. (r^1) Thus a husband may assent to his wife's will, and such assent entitles the wife's executor to claim such articles of her personal estate which would have been her husband's as her administrator. (s)

he must assent to the particular will:

But in order thus to establish a will, the general assent that the wife may make a will is not sufficient; it should be shown that he has consented to the particular will that she has made, (t) and his consent should be given when

(p^1) [Hearle *v.* Greenbank, 3 Atk. 897; 1 Ves. sen. 298. *Contra*, of a power simply collateral, Grange *v.* Tiving, Bridg. by Ban. 107; 2 Sug. Pow. App. (7th ed.).]

(p^2) [1 Jarman Wills (3d Eng. ed.), 33.]

(q) Scammell *v.* Wilkinson, 2 East, 552; 1 Roper on Husb. & Wife, 188, 189, 2d ed.; Tucker *v.* Inman, 4 M. & Gr. 1076; [Cutter *v.* Butler, 25 N. H. 353.]

(r) Hodsden *v.* Lloyd, 2 Bro. C. C. 534, 543; 2 East, 556, 557; 1 Roper on Husb. & Wife, 189, 2d ed.

(r^1) [Newlin *v.* Freeman, 1 Ired. (Law) 514; Cutter *v.* Butler, 25 N. H. 354, 355; Osgood *v.* Breed, 12 Mass. 525, 532; Holman *v.* Perry, 4 Met. 492; Morse *v.* Thompson, 4 Cush. 562; Fisher *v.* Kimball, 17 Vt. 323; Emery *v.* Neighbor, 2 Halst. 142; Heath *v.* Withington, 6 Cush. 497; Ex parte Fane, 16 Sim. 406. But see Hood *v.* Archer, 1 McCord, 225, 477; Newell's case, 2 McCord, 453. But not of her lands. See *ante*, 53, note (k^1).]

(s) 1 Roper on Husb. & Wife, 170, 2d ed.; Tucker *v.* Inman, 4 M. & Gr. 1076; [George *v.* Bussing, 15 B. Mon. 558.] As to what such articles are, see *post*, pt. II. bk. III. ch. I. § III.

(t) Rex *v.* Bettesworth, 2 Stra. 891;

it is proved. (*u*) He may, therefore, revoke his consent at any time during his wife's life, or after her death before probate. (*x*) But this consent may be implied from circumstances; (*x*[1]) and if after her death he acts upon the will, or once agrees to it, he is not, it seems, at liberty to retract his assent, and oppose the probate. (*y*) And when the will is * made in pursuance of an express agreement or consent, it is said that a little proof will be sufficient to make out the continuance of the consent after her death. (*z*)

what is sufficient assent:

This assent on the part of the husband is no more than a waiver of his rights as his wife's administrator. (*a*) It therefore can only give validity to the instrument, in the event of his being the survivor. Hence it follows, that if he die before his wife, her will is void against her next of kin, so far as it derived its effect from his consent; and it, therefore, does not pass the right to property bequeathed to her during the coverture. (*b*)

husband's assent only available if he survive.

If the circumstances take place before the first of January, 1838 (and consequently the case does not fall within the operation of the stat. 1 Vict. c. 26), a widow after the

A widow may by recognition

[Cutter *v.* Butler, 25 N. H. 357; George *v.* Bussing, 15 B. Mon. 558.]

(*u*) Henley *v.* Philips, 2 Atk. 49. [But see Smith *v.* Sweet, 1 Cush. 470, cited *ante*, 53, note (*l*).]

(*x*) Swinb. pt. 2, s. 9, pl. 10; 1 Roper on Husb. & Wife, 170, by Jacob; 4 Burn E. L. 52; Brook *v.* Turner, 1 Mod. 211; 2 Mod. 170; [George *v.* Bussing, 15 B. Mon. 558. It has been held, that the husband may revoke his assent to a will made by his wife of her personal property, provided it be done before probate, in Estate of Wagner, 2 Ashmead, 448.]

(*x*[1]) [Cutter *v.* Butler, 25 N. H. 357, 358; Grimke *v.* Grimke, 1 Desaus. 366; Smelie *v.* Reynolds, 2 Desaus. 66.]

(*y*) Roper, *ubi supra*. Accordingly, in Maas *v.* Sheffield, Prerog. M. T. 1845, 4 Notes of Cas. 350; S. C. 1 Robert. 364; it was held by Sir H. Jenner Fust, that if, after the death of the wife, the husband does assent to a particular will, he is bound by that assent. [Cutter *v.* Butler, 25 N. H. 357.] Where a wife made a will, disposing of a fund over which she had a power, and also of a fund over which she had no power, and made her husband her executor, and he proved her will generally, Sir L. Shadwell V. C. held that, as to the latter fund, the will was valid, as being made *ex assensû viri*. Ex parte Fane, 16 Sim. 406. [The decree of the probate court establishing the will of a married woman is conclusive of the validity of the will, and of course of her right to make it. Parker *v.* Parker, 11 Cush. 519; Poplin *v.* Hawke, 8 N. H. 124; Judson *v.* Lake, 3 Day, 318; Osgood *v.* Breed, 12 Mass. 531; Cutter *v.* Butler, 25 N. H. 343, 359; Ward *v.* Glenn, 9 Rich. (Law) 127.]

(*z*) Roper, *ubi supra*; Brook *v.* Turner, 2 Mod. 173. See, also, Mr. Fraser's note to Forse & Hembling's case, 4 Co. 61 *b*.

(*a*) 1 Roper on Husb. & Wife, 170; In the Goods of Smith, 1 Sw. & Tr. 127, per Sir C. Cresswell.

(*b*) Stevens *v.* Bagwell, 15 Ves. 156; Roper, *ubi supra*; Price *v.* Parker, 16 Sim. 198; Noble *v.* Phelps, L. R. 2 P. & D. 276–283.

set up her will made during coverture, or one made when a *feme sole.*

death of her husband may, without any formal republication, recognize her will made during her coverture; and the instrument, by such a recognition, will operate as a new will. (*c*) So (though if a will be made before marriage, and the wife survive the husband, the will does not revive by and upon the mere death of the husband), a woman by recognition, without any formalities, may republish, during her widowhood, a will that she made when a feme sole, and such will is then equally valid, as to personalty, as if made in her widowhood. (*d*) But by reason of the stat. 1 Vict. c. 26, no such recognition made on or after the 1st of January, 1838, can be effectual, notwithstanding the will itself were made before that date. (*e*)

Hitherto the subject has only been considered with respect *to cases of wills which are merely valid by the husband's consent to waive his rights as administrator. But it often occurs that the will of a married woman is made in pursuance of an agreement before marriage, or of an agreement made after marriage, for consideration. Wills of married women made under such circumstances fall under the same rules as those made by a *feme covert*, by virtue of a power; (*f*) concerning which it is thought more advisable to refer the reader to the several able treatises on that subject, than to enlarge this work by a farther discussion of it. (*g*) It must still be remarked, that although a different rule formerly prevailed, a testamentary appointment of such a nature by a wife cannot now be made available, either at law or equity, without probate. (*h*) The court of

Will of *feme covert* made in pursuance of agreement before marriage, or by virtue of a power:

not available without probate.

(*c*) Miller *v.* Brown, 2 Hagg. 209; Braham *v.* Burchell, 3 Add. 264.

(*d*) Long *v.* Aldred, 3 Add. 48.

(*e*) See *post*, pt. 1. bk. II. ch. IV. [The will of a married woman, otherwise invalid, in not rendered valid merely by reason of her husband's death in her lifetime; it must be republished. Re Wollaston, 12 W. R. 18.]

(*f*) 1 Roper on Husb. & Wife, 170; Tucker *v.* Inman, 4 M. & Gr. 1077. See, also, Ex parte Tucker, 1 M. & Gr. 519; Car. & M. 82; [2 Kent, 170, 171; Picquet *v.* Swan, 4 Mason, 455; Rich *v.* Cockell, 9 Ves. 369; *post*, 61, note (*z*[1]). As to the probate of such wills, see Goods of Thorild, 16 L. T. N. S. 853; of Fenwick, L. R. 1 P. & D. 319; of Morgan, L. R. 1 P. & D. 323; of Hallyburton, L. R. 1 P. & D. 90; Paglar *v.* Tongue, L. R. 1 P. & D. 158; Cutter *v.* Butler, 25 N. H. 343, 359.]

(*g*) 2 Roper, c. 19, s. 3; Sugden on Powers, ch. 3; as to the husband's right to administration, *cæterorum*, see *post*, pt. 1. bk. IV. ch. III. § VII.; bk. V. ch. II. § 1.

(*h*) Ross *v.* Ewer, 3 Atk. 160; Stone *v.* Forsyth, Dougl. 708; Jenkin *v.* Whitehouse, 1 Burr. 431; Rich *v.* Cockell, 9 Ves. 376; 2 Roper, 188, note (*d*), by Jacob;

probate, however, will allow such appointment to be proved without the husband's consent (the probate being limited to the property comprised in the power), (*i*) although its former practice was to require the husband's concurrence before it would admit the instrument to probate. (*k*) Formerly the court of probate did not take upon itself to enter with any great minuteness into the construction of the powers under which wills of this kind were executed, (*l*) or as to the due compliance * with their conditions. (*m*) But according to the modern practice, until the decision of the case of Barnes *v.* Vincent (hereafter mentioned), the court of probate considered itself bound to decide in the first instance, not only whether there was a power authorizing the testamentary act, but also whether the power had been duly executed, before it gave the instrument the sanction of its seal. (*n*) Yet if the court felt any real doubt on the point, it was always deemed the safer course to admit the paper to probate, inasmuch as the production of such a probate will not alone be sufficient to induce a court of equity to act upon it; for, with respect to other special circumstances which may be required to give the instrument effect as a valid appointment, viz, attestation, sealing, &c. the temporal courts have never been contented with the judgment of the spiritual court: (*o*) whilst on the other hand,

probate may be obtained of such a will without husband's consent:

Stevens *v.* Bagwell, 15 Ves. 139; Sugden on Powers, 332, 4th ed.; Tucker *v.* Inman, 4 M. & Gr. 1049; Tatnall *v.* Hankey, 2 Moore P. C. 342, 351; Goldsworthy *v.* Crossley, 4 Hare, 140; [Picquet *v.* Swan, 4 Mason, 443; Cutter *v.* Butler, 25 N. H. 353, 354; Newburyport Bank *v.* Stone, 13 Pick. 423; Osgood *v.* Breed, 12 Mass. 525; Holman *v.* Perry, 4 Met. 492, 498; Whitfield *v.* Hurst, 3 Ired. Eq. 242; Heath *v.* Withington, 6 Cush. 497, 500; West *v.* West, 3 Rand. 373.]

(*i*) See *post*, pt. I. bk. IV. ch. III. § VII.

(*k*) Tappenden *v.* Walsh, 1 Phillim. 352; Moss *v.* Brander, Ib. 254; Roper, *ubi supra*. See, also, Boxley *v.* Stubington, 2 Cas. temp. Lee, 540; Keller *v.* Bevoir, Ib. 563.

(*l*) It has been held that if the will be contested, the deed from which the power is derived must be pleaded in the allegation of the executor, and exhibited. Temple *v.* Walker, 3 Phillim. 394. So administration with the will of a married woman annexed, as executed in pursuance of a power, was refused, the power not being before the court. In the Goods of Monday, 1 Curt. 590.

(*m*) 1 Phillim. 353; Braham *v.* Burchell, 3 Add. 264; Draper *v.* Hitch, 1 Hagg. 675.

(*n*) Allen *v.* Bradshaw, 1 Curt. 110, 121; In the Goods of Biggar, 2 Curt. 336.

(*o*) Rich *v.* Cockell, 9 Ves. 376; 2 Roper on Husb. & Wife, 189; Price *v.* Parker, 16 Sim. 198. However, if the instrument has been admitted to probate, a court of equity is precluded from questioning it *as a will*; and the only office of that court is to see that it has been duly executed and attested according to the power. Douglas *v.* Cooper, 3 My. & K. 378; Whicker *v.*

if the court of probate should reject the paper, its decision would be final; as the court of construction will not proceed to the consideration of the effect of any testamentary paper, till it has been proved in the probate court. (*p*) But at last, in the case of Barnes *v.* Vincent, (*q*) it was held by the judicial committee of the privy council (reversing the decision of the prerogative court of Canterbury), that the proper course for the * ecclesiastical court is to grant probate wheresoever the paper professes to be made and executed under a power, and is made by one whose capacity and testamentary intention are clear, and no other objection occurs save those connected with the power (for example, no objection on the provisions of the wills act), and to leave the court which has to deal with the rights under that instrument, to decide whether or not it is authorized by that power and by its execution. Their lordships appear further to have been of opinion, that, on a power being alleged, the ecclesiastical court should grant probate, without going into any question as to the existence of the power. The decision in this case was declared by their lordships to be a restoration of "the ancient and laudable practice" of the ecclesiastical court.

without any decision as to whether it is authorized by the power and its execution.

It may be remarked that, in this case, the will had been executed in 1826, and, therefore, before the new statute of wills (1 Vict. c. 26) had come into operation. By the 10th section of that act the will of a married woman who has a right to make a will under a power must, in order to be valid, be executed in the same manner as is required by that statute in respect of all other wills; and if it be so executed, it is enacted that the will shall be a valid execution of the power (as far as respects the execution and attestation), notwithstanding the terms of the power require some addition or other form of execution or solemnity. It follows that some of the reasons of inconvenience, by which the court was influenced in this case of Barnes *v.* Vincent, apply with less force to the case of a will executed after the new statute began to operate. And on this account, in the subsequent case of Este *v.*

Hume, 7 H. L. Cas. 124, 144. But see Morgan *v.* Annis, 13 De G. & S. 461. [If no special formalities are prescribed, the decree of the ecclesiastical court granting probate is of course final. Ward *v.* Ward, 11 Beav. 377.]

(*p*) 1 Curt. 121, 122; In the Goods of Biggar, 2 Curt. 336. See *post*, pt. I. bk. IV. ch. III. § IX. But see, also, Goldsworthy *v.* Crossley, 4 Hare, 140, 145.

(*q*) 4 Notes of Cas. Suppl. XXI.; S. C. 5 Moore P. C. 201.

Este, (*r*) Sir H. Jenner Fust thought that the *dicta* in the privy council, above stated, leading to the conclusion that the ecclesiastical court has no right to look to the power, must be construed in reference to the law prior to the year 1838; and the learned judge held that an allegation propounding a will, dated in 1845, of a married * woman, and alleging it to have been made in pursuance of a deed of settlement, but without producing the deed, must be reformed by pleading and annexing that instrument. In the progress of the case, however, the same judge held that the court had no jurisdiction to try the *validity* of the power. With reference to the observations of Sir H. Jenner Fust, it may be remarked that the statute does not appear at all to affect the jurisdiction of the court of probate in these matters. It merely enacts that powers to be exercised by testamentary acts shall, as to the mode of execution, be the same as in ordinary testamentary instruments. The court of probate must decide whether this form of execution has been duly complied with. But its judgment is no more binding on a court of equity than before the statute. (*s*)

In these cases where a will is made by a married woman under a power, her executors do not take *jure representationis*, but merely under the power which she was authorized to exercise by making a will as to particular property. And, consequently, the title of her executors cannot extend beyond the property disposed of by her will. (*t*)

Executors of the will of a married woman made under a power take nothing *jure representationis.*

By rule 15, 1862, P. R. (non-contentious business), in granting probate of a married woman's will made by virtue of a power, or administration with such will annexed, the power under which the will purports to have been made must be specified in the grant.

By rule 15, 1862, grant of probate to specify the power.

The divorce act (1857), section 21, enacts, "that a wife who has obtained a protection order by reason of her husband having deserted her, shall, during the continuance thereof,

Will of *feme covert* of prop-

(*r*) 2 Robert. 351.

(*s*) Brenchley *v.* Lynn, 2 Robert. 461, per Dr. Lushington. See, also, De Chatelain *v.* De Pontigny, 1 Sw. & Tr. 411, in which case Sir C. Cresswell recognized and acted on the principle laid down in Barnes *v.* Vincent.

(*t*) Tugman *v.* Hopkins, 4 M. & Gr. 389; O'Dwyer *v.* Geare, 1 Sw. & Tr. 465. And, consequently, there is an intestacy as to property not disposed of by the power.

erty acquired after a protection order:

be and be deemed to have been, during such desertion of her, in like position in all respects, with regard to property, as *she would be if she had obtained a decree of judicial separation."

after a judicial separation.

And by the 25th section, referring to property acquired by the wife from the date of the sentence of judicial separation, it is provided that "such property may be disposed of by her in all respects as a *feme sole*, and on her decease the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead." Under these enactments, a woman, having been deserted by her husband, obtained a protection order by reason of his desertion. On her death, in the life of her husband, intestate, the court decreed letters of administration, limited to such personal property as she had acquired or become possessed of since the desertion, without specifying of what that property consisted, to be granted to one of her next of kin. (*u*)

Will unduly obtained or unduly destroyed by marital authority.

It need hardly be observed, that if a will of a married woman, made under a power, be obtained by the husband by undue influence and marital authority, contrary to her real wishes and intentions, such will not be admitted to probate. (*x*) So if a wife have power to dispose of property by her will, makes her will, and afterwards destroys it by the compulsion of her husband, it may be established, upon satisfactory proof of its having been so destroyed, and also of its contents and execution. (*y*)

Will of *feme covert* of personalty settled, or agreed to be settled, to her separate use:

Besides this case of a will, made by a married woman by virtue of a power, there are other circumstances under which a will made by her is valid without the assent of her husband, viz, where personal property is actually given or *settled, or is agreed to be given or settled, to the separate use of the wife. In such a case it has been

(*u*) In the Goods of Worman, 1 Sw. & Tr. 513. The requirement in the statute as to the entry of the protection order with the registrar is directory only. In the Goods of Faraday, 2 Sw. & Tr. 369. As to property to which the wife becomes entitled as executrix or administratrix since the sentence of separation or commencement of desertion, see stat. 21 & 22 Vict. c. 108, s. 7; Bathe *v.* Bank of England, 4 Kay & J. 564; *post*, pt. II. bk. IV. ch. II.

(*x*) Marsh *v.* Tyrrell, 2 Hagg. 84; Mynn *v.* Robinson, 2 Hagg. 179.

(*y*) Williams *v.* Baker, Prerog. Trin. Term, 1839.

established, since the case of Fettyplace *v.* Gorges, (*z*) that she may dispose of it as a *feme sole*, to the full extent of her interest, although no particular form to do so is prescribed in the instrument by which the settlement or agreement was made. (*z*[1]) The principle upon which that decision was founded is this: that when once the wife is permitted to take personal property to her separate use as a *feme sole*, she must so take it with all its privileges and incidents, one of which is the *jus disponendi*. (*a*) And it may be stated as a general rule, that personal property which has been acquired by a married woman under such circumstances that it became her separate estate, may be dealt with by her as if she were a *feme sole*. (*b*)

good, of property in reversion as well as possession.

(*z*) 1 Ves. jun. 46; S. C. 3 Bro. C. C. 8.

(*z*[1]) [2 Kent, 170, 171. It has recently been decided, that a married woman, when not restrained from alienation, has, as incident to her separate estate, and without any express power, a complete right of alienation of that estate by instrument *inter vivos* or will. Taylor *v.* Meads, 4 De G., J. & S. 597; Hall *v.* Waterhouse, 11 Jur. N. S. 361; 6 N. R. 20; 13 W. R. 633; Porcher *v.* Daniel, 12 Rich. Eq. 339; Pride *v.* Bubb, L. R. 7 Ch. Ap. 64; Cutter *v.* Butler, 25 N. H. 343; Caldwell *v.* Renfrew, 33 Vt. 213; Burton *v.* Holly, 18 Ala. 408; 2 Story Eq. Jur. § 1394 *et seq.*; Willard *v.* Eastham, 15 Gray, 328; La Touche *v.* Latouche, 3 H. & C. 576, and note at the end, in the Am. ed.; Bestall *v.* Bunbury, 13 Ir. Ch. Rep. 549; Johnson *v.* Gallagher, 3 De G., F. & J. 494, and note (2) to Am. ed.; Dewey J in Ela *v.* Edwards, 16 Gray, 91, 101. In such case, she may devise even an estate in fee. Taylor *v.* Meads, *supra*; Hall *v.* Waterhouse, *supra*; Pride *v.* Bubb, *supra*.]

(*a*) Peacock *v.* Monk, 2 Ves. sen. 191; Rich *v.* Cockell, 9 Ves. 369; Wagstaff *v.* Smith, 9 Ves. 520; 2 Roper on Husb. & Wife, 182. See, further, on this subject, Mr. Belt's note to Fettyplace *v.* Gorges; Hulme *v.* Tenant, 1 Bro. C. C. 16; Sockett *v.* Wray, 4 Bro. C. C. 487; Sturges *v.* Corp, 13 Ves. 192; Essex *v.* Atkins, 14 Ves. 542; Heatley *v.* Thomas, 15 Ves. 596; Dalbiac *v.* Dalbiac, 16 Ves. 116; Bullpin *v.* Clarke, 17 Ves. 365; Power *v.* Bailey, 1 Ball & Beatty, 49; Greatly *v.* Noble, 3 Madd. 94; Stuart *v.* Lord Kirkwall, Ib. 389; Aguilar *v.* Aguilar, 5 Madd. 418; Howard *v.* Damiani, 2 Jac. & W. 458; Acton *v.* White, 1 Sim. & Stu. 429; Braham *v.* Burchell, 3 Add. 263 (in Sir J. Nicholl's judgment), and Mr. Fraser's note to Forse & Hembling's case, 4 Co. 61 *b*. But if she dies intestate, the fund will belong to her husband *jure mariti*. Molony *v.* Kennedy, 10 Sim. 254; Lechmere *v.* Brotheridge, 32 Beav. 353.

(*b*) As to what shall be considered as such separate estate, see Haddon *v.* Fladgate, 1 Sw. & Tr. 48; In the Goods of Smith, Ib. 125; In the Goods of Crofts, L. R. 2 P. & D. 18. In Haddon *v.* Fladgate, *ubi supra*, the marriage took place in 1811, and in 1817 the husband and wife verbally agreed to separate and not to interfere with each other, and divided their then furniture and effects; and they never again cohabited, and the wife supported herself by her own industry and acquired property; it was held that such property had been acquired to the wife's separate use, and therefore the *jus disponendi* would attach to it. See, also, *post*, pt. II. bk. II. ch. II. § III. where the general subject of the separate property of a widow as against her husband's executors is considered.

And this rule prevails without regard to the *circumstance, whether the property be in possession or reversion, (*c*) and whether it be vested or contingent. (*d*) And when she has such a power over the principal, it extends also to its produce and accretions, *e. g.* the savings of her pin-money. (*e*) Nor does it make any difference whether the property be given to trustees for the wife's separate use, or, without the intervention of trustees, to the wife herself, for her own separate use and benefit; (*f*) for in the latter case a court of equity would decree the husband to stand as a trustee to the separate use of the wife. (*g*)

extends to accretions.

If a wife acquires any property after her husband's death, it cannot pass by a will made during her coverture, though by the consent of her husband; for at the time of making the will she was intestable as to that property. (*h*) And the law in this respect remains, it should seem, unaltered

Property acquired by the wife after husband's death.

(*c*) Sturgis *v.* Corp, 13 Ves. 190; Headen *v.* Rosher, 1 M'Cl. & Y. 89; 2 Roper on Husb. & Wife, 184.

(*d*) [Lechmere *v.* Brotheridge,] 32 Beav. 353.

(*e*) Gore *v.* Knight, 2 Vern. 535; Herbert *v.* Herbert, Prec. Ch. 44; 1 Eq. Ca. Abr. 66, 68; [Picquet *v.* Swan, 4 Mason, 454, 455; 2 Kent, 170, 171.] Accordingly, she may dispose by will, as against her husband, of the savings out of her alimony. Moore *v.* Barber, 34 L. J. N. C. Ch. 482; [11 Jur. N. S. 539;] *coram* Stuart V. C.

(*f*) See the judgment of Sir John Nicholl, in Braham *v.* Burchell, 3 Add. 263; [*ante*, 61, note (*z*[1]); Ela *v.* Edwards, 16 Gray, 91, 101. As to real estate, it has been a controverted point, whether any ante-nuptial contract made solely by the parties, without the intervention of a trustee, could be effectual to clothe the wife with the power of disposing of the same by will. But as to this, the case of Bradish *v.* Gibbs, 3 John. Ch. 523, where the whole subject was very fully considered by Chancellor Kent, is a very strong authority to the point that it is not necessary that the legal estate should be vested in a trustee, and that a mere agreement entered into before marriage by a *feme sole* with her intended husband, by which he stipulates that she shall have power to dispose of her real estate by will, confers upon her the power to do so. This doctrine has received the approbation of the supreme court of Pennsylvania. West *v.* West, 10 Serg. & R. 447. See Holman *v.* Perry, 4 Met. 492, 497; Ela *v.* Edwards, 16 Gray, 91, 101.]

(*g*) Tappenden *v.* Walsh, 1 Phillim. 352, and the authorities there cited; Rolfe *v.* Budder, Bunb. 187. See, also, Parker *v.* Brooke, 9 Ves. 583; Ib. 375. [Equity will carry into effect the will of a married woman disposing of her real estate in favor of her husband, or other persons than her heirs-at-law, provided the will be made in pursuance of a power reserved to her in and by the ante-nuptial agreement with her husband. 2 Kent, 172; Bradish *v.* Gibbs, 3 John. Ch. 523. See Holman *v.* Perry, 4 Met. 492, 495; Picquet *v.* Swan, 4 Mason, 443. Respecting the power of a married woman to devise her real estate to her husband, as affected by recent legislation, in New Hampshire, see Wakefield *v.* Phelps, 37 N. H. 295; Cutter *v.* Butler, 25 N. H. 352; Marston *v.* Norton, 5 N. H. 205; in Massachusetts, see Morse *v.* Thompson, 4 Cush. 563; Burroughs *v.* Nutting, 105 Mass. 228.]

(*h*) Scammell *v.* Wilkinson, 2 East, 556; Swinb. pt. 2, s. 9, pl. 5.

notwithstanding that, by the 24th section of the new statute of wills (1 Vict. c. 26), every will is to be construed to speak and take effect as if it had been executed immediately before the death of the testatrix, unless a contrary intention shall appear by the will; for the effect of that is not to make a will valid which was invalid in its inception, but to give a rule for the construction of a valid testamentary instrument. (*i*)

Will made by a wife before marriage.

If a *feme sole* makes her will, and afterwards marries, such subsequent marriage is a revocation, and entirely vacates the will; and although she should survive the husband, a will * made before marriage will not revive upon his death, without a republication. (*j*)

Will made by wife during marriage not revoked by her surviving her husband.

A will of a *feme covert*, made during coverture, in virtue of powers vested in her under her marriage settlement, is not revoked by her surviving her husband. (*k*)

A woman whose husband is banished, or convict.

A woman whose husband is banished by act of parliament may make a will, and act in every respect as a *feme sole*. (*l*) So where a married woman, whose husband was a convict, made a will, probate thereof was granted, on proof given that the property bequeathed was acquired by her subsequently to her husband's conviction, though he had received a conditional pardon from the governor of the colony whither he had been transported for life. (*m*)

The queen consort.

And the queen consort is an exception to the general rule; for she may dispose of her chattels by will without the consent of her lord. (*n*)

Will of married woman, native of, and domiciled in, a foreign country.

Where a married woman was a native of Spain, and domiciled there, and it appeared, upon affidavit, that, by the law of Spain, she had full power and authority to bequeath, as a *feme sole*, the property she brought her husband on her marriage, probate was granted of her will, made according to the law of that country. (*o*)

(*i*) Price *v.* Parker, 16 Sim. 198, 202.

(*j*) *Post*, pt. 1. bk. II. ch. III. § V.; [Wollaston, in re, 12 W. R. 18.]

(*k*) Morwan *v.* Thompson, 3 Hagg. 239; Trimmell *v.* Fell, 16 Beav. 537, 541.

(*l*) Portland *v.* Prodgers, 2 Vern. 104; Compton *v.* Collinson, 2 Bro. C. C. 385; [Cutter *v.* Butler, 25 N. H. 353.]

(*m*) In the Goods of Martin, 2 Robert. 405; In the Goods of Coward, 29 Jur. (O. S.) 569; S. C. 24 L. J. (N. S.) P., M. & A. 120.

(*n*) 2 Bl. Com. 498.

(*o*) In the Goods of Maraver, 1 Hagg. 498. See *post*, pt. 1. bk. IV. ch. IV § VI.

SECTION III.

Persons incapable from their Criminal Conduct.

Persons incapable of making testaments on account of their criminal conduct are, in the first place, all traitors and *felons, from the time of their conviction: for then their goods and chattels are no longer at their own disposal, but forfeited to the king. (q) Neither can a *felo de se* make a will of goods and chattels; for they are forfeited by the act and manner of his death; (r) although he may make a devise of his lands, for they are not subjected to any forfeiture. (s) But though the goods are forfeited so that the will cannot operate on them, it does not follow that he is incapable of making a will and appointing an executor; and in a late case Sir C. Cresswell granted probate of the will of a person who had been found *felo de se* by a coroner's inquest, acting, it should seem, on the distinction between the operative effect of a testamentary paper and its title to probate. (t) Indeed, probate may be requisite in such a case, not only for the purpose of passing property held by the deceased *in auter droit*, but also to enable the executor to exercise his undoubted right to traverse the inquisition. (u) And if a convict traitor or felon obtain the king's pardon, and be thereby restored to his former estate, then may he make his testament, as if he had not been convicted. (v)

Traitors and felons. (p)

And if he hath goods, as executor to another, the same are not forfeited by conviction: whence it follows, that of such goods he may make his will. (w)

(p) See stat. 33 & 34 Vict. c. 23.

(q) 2 Bl. Com. 499; Swinb. pt. 2, s. 12, 13; Godolph. pt. 1, c. 12. [As to forfeiture of estate under the laws of the United States and of the several states, see 2 Kent, 386. In Kentucky, a person under sentence of death may make a will; Rankin *v.* Rankin, 6 Monroe, 531; and this is doubtless true in other states.]

(r) 2 Bl. Com. 499; Swinb. pt. 2, s. 20. See *post*, pt. II. bk. III. ch. IV. as to the executors or administrators of the deceased traversing an inquisition or presentment of *felo de se*.

(s) 3 Inst. 55; 4 Burn E. L. 62.

(t) In the Goods of Bailey, 2 Sw. & Tr. 156.

(u) See *post*, pt. II. bk. III. ch. IV. as to the executors or administrators of the deceased traversing an inquisition or presentment of *felo de se*.

(v) Swinb. pt. 2, s. 12, pl. 3; Godolph. pt. 1, c. 12, pl. 1.

(w) Godolph. pt. 1, c. 12, s. 2; 4 Burn E. L. 61.

Outlaws, also, though it be but for debt, are incapable of making a will as long as the outlawry subsists; for their goods and chattels are forfeited during that time. (*x*) But a * man outlawed in a personal action may, it is said, in some cases make executors; for he may have debts upon contract which are not forfeited to the king; and those executors may have a writ of error to reverse the outlawry. (*y*)

Outlaws.

Before the stat. 53 Geo. 3, c. 127, there was some doubt whether an excommunicate person could make a will; (*z*) but, by that statute, excommunication is not to be pronounced except in certain cases; and by sect. 3, in those cases, parties excommunicated shall incur no civil incapacity whatever. As for persons guilty of other crimes short of felony, who are by the civil law precluded from making testaments (as usurers, libellers, and others of a worse stamp), by the common law their testaments are good. (*a*)

Persons excommunicate.

Persons guilty of crimes short of felony.

(*x*) 2 Bl. Com. 499; Godolph. pt. 1, c. 12, s. 8; Swinb. pt. 2, s. 21, pl. 4. But it seemeth, that he who is outlawed in an action personal may make his testament of his lands; for they are not forfeited. Swinb. pt. 2, s. 21, pl. 7.

(*y*) Shaw *v.* Cutteris, Cro. Eliz. 851; 4 Burn E. L. 62; Wentw. c. 1, p. 37, 14th ed.

(*z*) Swinb. pt. 2, s. 22; Wentw. c. 1, p. 38; 4 Burn E. L. 62.

(*a*) 2 Bl. Com. 499. [The execution of a will on Sunday is not within the statute of New Hampshire prohibiting all secular work, business, or labor on that day, and is therefore valid notwithstanding that statute. George *v.* George, 47 N. H. 27. So in Massachusetts, a will is valid though executed on the Lord's day. Bennett *v.* Brooks, 9 Allen, 118. So in Pennsylvania, being made while the testator was in danger, or while he had a well-founded belief that he was in danger, of immediate death. Weidman *v.* Marsh. 4 Pa. Law Jour. Rep. 401.]

* CHAPTER THE SECOND.

OF THE FORM AND MANNER OF MAKING A WILL OR CODICIL.

BEFORE the passing of the stat. 1 Vict. c. 26 (*Act for the Amendment of the Laws with respect to Wills*), no solemnities of any kind were necessary for the making of a will of personal estate. The fifth section of the statute of frauds, which required the formalities of signature and attestation for a devise of lands, did not extend to wills of personal property. The nineteenth section made it necessary that they should, generally speaking, be reduced *into writing* in the testator's lifetime; inasmuch as it was thereby enacted that no nuncupative will (where the estate thereby bequeathed exceeded the value of 30*l.*) should be good, except under certain circumstances which will be hereafter pointed out. (*a*) But no other formality whatever was necessary to give them effect and operation. Whence it often happened that a will, intending to dispose of both real and personal estate, was inoperative as to the former, and at the same time a perfect disposition of the latter.

The new statute repeals the statute of frauds so far as relates to wills (viz, ss. 5, 6, 12, 19, 20, 21, 22, and 23), and contains enactments, the result of which is, that, on or after the first day of January, 1838, the solemnities prescribed by the act are required to render valid any will or other testamentary disposition of every description of property without distinction; so that the same formalities of execution and attestation are necessary, whether the instrument disposes of real or of personal estate. (*a*[1])

1 Vict.

(*a*) *Post*, § VI.

(*a*[1]) [A will may be made to include the appointment of a guardian for one's minor children. The authority to make such appointment did not exist at common law. Wardwell *v.* Wardwell, 9 Allen, 518, 519. It was conferred in England by stat. 12 Car. 2, c. 24, s. 8, which has been quite extensively adopted in the American States. 2 Kent, 224, 225; Wardwell *v.* Wardwell, 9 Allen, 519; Balch *v.* Smith, 12 N. H. 440, 441; Noyes *v.* Barber, 4 N. H. 406; McPhillips *v.* McPhillips, 9 R. I. 536. Such guardianship is a

* These enactments are contained in the following sections of the statute of Victoria:

personal trust and not assignable. Eyre *v.* Countess of Shaftsbury, 2 P. Wms. 121; Gilchrist J. in Balch *v.* Smith, 12 N. H. 441. In general, the father only can appoint the guardian. Gilchrist J. in Balch *v.* Smith, 12 N. H. 441; Vanartsdalen *v.* Vanartsdalen, 14 Penn. St. 384; Holmes *v.* Field, 12 Ill. 424; Norris *v.* Harris, 15 Cal. 226; and he can appoint only for his own children. Brigham *v.* Wheeler, 8 Met. 127. Under the General Statutes of Massachusetts, c. 109, § 5, a testamentary guardian can only be appointed by a will executed in the manner provided for the execution of other wills. Wardwell *v.* Wardwell, 9 Allen, 518. But the expressed wish of the father in a paper, not entitled to probate as a will, is entitled to great regard in the matter of appointing a guardian for his children. Wardwell *v.* Wardwell, 9 Allen, 518, 524; Watson *v,* Warnock, 31 Geo. 716. So the expressed desire of a mother in her will that certain persons should be appointed guardians of her children where the father has expressed no wish, is deserving of great attention, although she may have no legal power to appoint guardians. In re Kaye, L. R. 1 Ch. Ap. 387; In the Matter of Turner, 4 C. E. Green (N. J.), 433. It has been held that the father's testamentary power does not extend to illegitimate children. Sleeman *v.* Wilson, L. R. 13 Eq. 36. See Goods of Parnell, L. R. 2 P. & D. 379. No particular form of words is necessary for the appointment of a guardian by testament. The manifestation of the intention of the testator by the will is all that is required. An assignment, which confers, expressly or by implication, a power extensive enough to include "custody and tuition," the statutory words, is enough. Swinb. pt. 3, § 12. Under a provision by which the profits of land devised to a boy by his father, were given to the boy's mother till his full age for his maintenance and education, it was said by Justices Wray and Southcote, that nothing was devised to the mother "but a confidence," and that she was "as guardian or bailiff to keep the infant." Leonard, pt. 2, p. 221. A devise that the son should be under the "care and direction" of two persons designated in the will, was held to constitute them testamentary guardians, in Bridges *v.* Hales, Moseley, 108. So, in Mendes *v.* Mendes, 3 Atk. 624, Lord Hardwicke thought that language, by which the testator gave to his wife a certain annual sum for the maintenance and education of his children whilst they should continue to live with their mother, and at her charge, amounted to "a devise of the guardianship" to the mother. In Miller *v.* Harris, 14 Sim. 540, where the testator directed the trustees of his will to procure a suitable house for the residence of his children, who were infants, and to engage a proper person for the purpose of taking the management and care of the house, and of his children during their minorities, and he requested his late wife's sister, if she should be alive at his decease, to take such management and care on herself, it was held that the testator had thus appointed his wife's sister guardian of his children. A direction, that during the minority of a daughter of the testator, the income of the estate which he bequeathed to her be paid to her mother for the support, maintenance, and education of the daughter, constitutes the mother testamentary guardian, and entitles her to receive the income. Macknet *v.* Macknet, 11 C. E. Green, 278. The general jurisdiction, in which resides the power of removing a guardian, is in general extended over guardians appointed by will as well as over those appointed by the court. McPhillips *v.* McPhillips, 9 R. I. 536; 2 Dan. Ch. Pr. (4th Am. ed.) 1352, note (5); In re Andrews, 1 John. Ch. 99; Ex parte Crumb, 2 John. Ch. 439; Wilcox *v.* Wilcox, 4 Kernan (14 N. Y.), 575; 2 Kent, 227. It is said by Chancellor Kent that a will merely appointing a testamentary

Every will shall be in writing and signed by the testator in the presence of two witnesses at one time:

Sect. 9. "No will [or codicil, or other testamentary disposition](*b*) shall be valid, unless it shall be in writing, and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator; (*b*[1]) but no form of attestation shall be necessary."

guardian need not be proved. 2 Kent, 255. But see Wardwell *v.* Wardwell, 9 Allen, 518.]

(*b*) See the interpretation clause, sect. 1, preface. See, also, 3 Curt. 478, 479.

(*b*[1]) [The general provision on the subject of the execution of wills throughout the American States is that the will of real estate must be in writing, and subscribed by the testator, or acknowledged by him in the presence of at least two witnesses, who are to subscribe their names as witnesses. The regulations in the several states differ in some unessential points; but generally they have adopted the directions given by the English statute of frauds. By the General Statutes of Massachusetts (Genl. Sts. c. 92, s. 6), wills, both of real and personal estate, are required to be in writing and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed in his presence by three or more competent witnesses. If the witnesses are competent at the time of attesting the execution of the will, their subsequent incompetency, from whatever cause it arises, shall not prevent the probate and allowance of the will, if it is otherwise satisfactorily proved. By the Revised Statutes of New York (vol. 2, p. 63, §§ 40, 41, and Blatchf. Genl. Sts. N. Y. p. 960, vol. 3, p. 144 (5th ed.), 1859), every last will and testament of real or personal property, or both, must be executed and attested in the following manner: 1. It shall be subscribed by the testator at the end of the will. 2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made, to each of the attesting witnesses. 3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament. 4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator. The Michigan statute seems to be copied from that of New York. See Cooley's Compiled Laws of Mich. vol. 2, p. 864, ed. 1857. Three witnesses, as in the statute of frauds, are required in Vermont, New Hampshire, Maine, Massachusetts, Rhode Island, Connecticut, Maryland, Georgia, Alabama, Mississippi, New Jersey, South Carolina, and Wisconsin. Two witnesses only are requisite in New York, Delaware, Virginia, Ohio, Illinois, Indiana, Iowa, Michigan, Missouri, Tennessee, North Carolina, Arkansas, Kentucky, and New Jersey. In re McElwaine, 3 Green (N. J.), 499; In re Boyens, 23 Iowa, 354. In Massachusetts, a will of real or personal estate made and executed in conformity with the law existing at the time of the execution thereof, shall be effectual to pass such estate; and a will made out of Massachusetts, which might be proved and allowed according to the laws of the state or country in which it was made, may be proved, allowed, and recorded in Massachusetts, and shall thereupon have the same effect as if it had been executed according to the laws of that

Sect. 11. "Provided always, and be it further enacted, that any soldier being in active military service, (*c*) or any mariner or seaman being at sea, (*d*) may dispose of his personal estate as he might have done before the making of this act." exceptions as to wills of soldiers and mariners:

The construction of this section will be considered hereafter, (*e*) together with the subject of nuncupative wills.

Sect. 13. "Every will executed in manner heretofore required, shall be valid without any other publication thereof." (e^1) publication not requisite.

state. Genl. Sts. c. 92, §§ 7, 8. In a holograph will, in some of the states, as Virginia, North Carolina, Kentucky, Tennessee, and Arkansas, no subscribing witnesses are required, but the handwriting of the testator must be proved; and in Arkansas, North Carolina, and Tennessee, by three witnesses. The will must also come from unsuspected custody, or be found among the testator's papers, in order to comply with the statutory provisions of the two latter states. The statute of Tennessee guards the case of such a will with very specific provisions. Crutcher *v.* Crutcher, 11 Humph. 377; Tate *v.* Tate, 11 Humph. 465. The laws of Mississippi (How. & Hutch. Laws, p. 386, ch. 36, § 2, ed. 1840) require three witnesses to a will of real, and one to a will of personal estate, unless the will is a holograph. See Kirk *v.* The State, 13 S. & M. 406. In North Carolina (1 Rev. Laws, N. C. pp. 619, 620, c. 122, § 1), however, it has been held, that where a will devising real estate appears to have been attested by two witnesses, and the certificate of probate states that it was proved by one, it will be intended that it was legally proved by him. University *v.* Blount, 2 Tayl. 12. In Tennessee, a will of personal property may be proved by one subscribing witness, where there is no contest as to its validity; and it being admitted that such will was so proven, the court will infer that such witness was a subscribing witness. Rogers *v.* Winton, 2 Humph. 178. So in Massachusetts, where there is no objection made or to be made, by any person interested, to the probate of a will, whether of real or personal estate, probate may be granted upon the testimony of one only of the subscribing witnesses. Genl. Sts. c. 92, § 20. So in Vermont. Dean *v.* Dean, 27 Vt. 746, 748; Comp. Sts. Vt. p. 329, § 18. The witnesses are generally required to sign in the testator's presence; but in Arkansas, Ark. Rev. Sts. 1837, c. 157, §§ 4, 5; in New York, Rev. Sts. vol. 2, p. 124 (3d ed.), and in New Jersey, Rev. Sts. 1846, tit. 22, c. 3, § 2, this is dispensed with, and the doctrine of constructive presence is thereby wisely rejected. 4 Kent, 515. In Pennsylvania, it is not necessary that a will of real estate should be subscribed by witnesses, nor that the proof of the will should be made by those who subscribed as witnesses, nor that all the subscribing witnesses should prove the will. Hight *v.* Wilson, 1 Dal. 94; Arndt *v.* Arndt, 1 Serg. & R. 256; Rohrer *v.* Stehman, 1 Watts, 463; Gray J. Chase *v.* Kittredge, 11 Allen, 62. It is only necessary that the will should be reduced to writing in pursuance of the testator's directions or instructions during his lifetime, and these facts proved by two witnesses; formal publication and attestation by subscribing witnesses are unnecessary. Ginder *v.* Farnum, 10 Penn. St. 100; Rossetter *v.* Simmons, 6 Serg. & R. 452; Lewis *v.* Lewis, 6 Serg. & R. 489.]

(*c*) See *post*, 116.

(*d*) See *post*, 117, 118.

(*e*) See *post*, 116 *et seq.*

(e^1) [*Post*, 89, note (*q*).]

The statute does not extend to wills made before Jan. 1, 1838.

It must, however, be observed, that this statute does not extend to any will made before January 1, 1838. (*f*) With respect, therefore, to wills made at an earlier date, and those within the exception as to soldiers and mariners, it is necessary to consider the law as established at the time of the passing of the act.

Presumption as to the time when a will without date was made.

It may here be remarked, that where a will without date (*f*[1]) is properly executed according to the former law, but not executed pursuant to the new act, and the case is altogether * bare of circumstances which can afford the court any information as to the time when the will was made, it has been held that the presumption is that it was made before the act came into operation; inasmuch as every one is presumed to know the law, and the court, in the absence of evidence tending to a contrary conclusion, is bound to presume that the will was executed according to the law as it stood at the time the instrument was written. (*g*)

SECTION I.

Of the Signature by the Testator.

1. As to wills made before Jan. 1, 1838: signature or seal by the testator not necessary:

The signature or seal of the testator is not necessary for the validity of a will of personalty, (*h*) if made before January 1, 1838, whether the instrument be in the handwriting of the testator, or in another man's hand.

If it be in the testator's own writing, though it has

(*f*) But every will reëxecuted or republished or revived by any codicil, is, for the purposes of the act, to be deemed to have been made at the time the same was so reëxecuted, republished, or revived. Sect. 34. [Whether the legality of the execution of a will is to be determined by the law as it stood when the will was executed, or at the death of the testator, see Mullen *v.* McKelvy, 5 Watts, 399; Crofton *v.* Ilsley, 4 Greenl. 134; Sutton *v.* Chenault, 18 Geo. 1. As to the effect upon the operation of a will, of a law respecting wills passed after the making of the will in question and before the death of the testator, see Brewster *v.* McCall, 15 Conn. 274; Carroll *v.* Carroll, 16 How. (U. S.) 275, 281; Van Kleeck *v.* Dutch Church, 20 Wend. 499; Hoffman *v.* Hoffman, 26 Ala. 535; Green *v.* Dikeman, 18 Barb. 535; Gable *v.* Daub, 40 Penn. St. 217; *ante*, 6, note (*d*).]

(*f*[1]) [If a will has no date, or has a wrong date, it may be established or corrected by parol evidence of the real time when it was executed. Wright *v.* Wright, 5 Ind. 389; Deakins *v.* Hollis, 7 Gill & J. 311.]

(*g*) Pechell *v.* Jenkinson, 2 Curt. 273. As to the presumption in the case of *alterations* appearing on the face of a will, see *post*, pt. I. bk. II. ch. III. § I.

(*h*) Godolph. pt. 1, c. 1, s. 7; Salmon *v.* Hays, 4 Hagg. 382.

neither his name or seal to it, it is good, provided sufficient proof can be had that it is his handwriting. (*i*) The presumption of law indeed (upon the principle hereafter to be mentioned, (*k*) respecting a will having an attestation *clause, and no witnesses' names subscribed) is *against* every testamentary paper not actually *executed* by the testator; against every one not *so* executed, as it is to be inferred, on the face of the paper, that the testator meant to execute it. (*l*) But if the paper be complete in all other respects, that presumption is slight and feeble, and one comparatively easy to be repelled; as by its being satisfactorily shown that the paper's non-execution may be justly ascribed to some other cause than any abandonment of the intentions therein expressed. (*m*) Thus the presumption may be rebutted (as in the case of an attestation clause without witnesses) by showing that the execution was prevented by the act of God; (*n*) or that the deceased regarded it as a *will*, and meant it to operate in its present state, and without doing any further act in order to give it a testamentary effect. (*o*)

presumption of law against a will not signed:

how rebutted:

(*i*) Godolph. pt. 1, c. 21, s. 2; Worlich *v.* Pollet, and other cases cited in Limbery *v.* Mason, Com. Rep. 452; 2 Bl. Com. 501; Rymes *v.* Clarkson, 1 Phillim. 22; [Leathers *v.* Greenacre, 53 Maine, 561.] In the Goods of Cosser, 1 Robert. 633, in which last case the name of the testator appeared in no part of the writing, but administration *cum testamento annexo* was granted, on proof of handwriting and custody, and on a proxy of consent. But it should seem that proof of handwriting alone is not sufficient to set up a disputed instrument, without some concomitant circumstance, as the place of finding, or the like. See Machin *v.* Grindon, 2 Cas. temp. Lee, 406; Constable *v.* Steibel, 1 Hagg. 60; Saph *v.* Atkinson, 1 Add. 213; Crisp *v.* Walpole, 2 Hagg. 531; Rutherford *v.* Maule, 4 Hagg. 213; Bussell *v.* Marriott, 1 Curt. 9; Wood *v.* Goodlake, 2 Curt. 82, 176, 180; Hitchings *v.* Wood, 2 Moore P. C. 335, 443, 444; *post*, pt. 1. bk. IV. ch. III. § V.

(*k*) *Post*, 85.

(*l*) Scott *v.* Rhodes, 1 Phillim. 19; Montefiore *v.* Montefiore, 2 Add. 357, 358; Bragg *v.* Dyer, 3 Hagg. 207; Abbott *v.* Peters, 4 Hagg. 380; [Murry *v.* Murry, 6 Watts, 353; Ex parte Henry, 24 Ala. 638; Waller *v.* Waller, 1 Grattan, 454; Tilghman *v.* Stuart, 4 Harr. & J. 156; Rochelle *v.* Rochelle, 10 Leigh, 125; Watts *v.* New York, 4 Wend. 168.] "A disposition of personal property in the handwriting of the deceased requires no formality to give it effect *if none is intended by the writer.*" By Sir John Nicholl, in Forbes *v.* Gordon, 3 Phillim. 628. See, also, the judgment of Lord Eldon C. in Coles *v.* Trecothick, 9 Ves. 249.

(*m*) Montefiore *v.* Montefiore, 2 Add. 357, 358; [Hill *v.* Bell, Phill. (N. Car.) Law, 122.]

(*n*) Scott *v* Rhodes, 1 Phillim. 20; Masterman *v.* Maberly, 2 Hagg. 247. In a late case it was held that supervening insanity is sufficient to account for the non-execution. Hoby *v.* Hoby, 1 Hagg. 146. See also Fulleck *v.* Allinson, 3 Hagg. 527; [Gaskins *v.* Gaskins, 3 Ired. 158; Rohrer *v.* Stehman, 1 Watts, 442.]

(o) Roose *v.* Mouldsdale, 1 Add. 131. [See Sarah Miles's Will, 4 Dana, 1.]

Again, if the will be read to and approved by the deceased, but he is prevented from executing it by the violence of those who are interested against its provisions, the law will consider the will as executed, although never actually signed. (*p*) References to modern decisions, in which testamentary effect has been given to *finished papers, unexecuted, will be found in the note below. (*q*)

Case of a will disposing of the real and personal estate:

It should here be observed, that the want of regular execution may lead to a presumption of a much stronger kind against the will, where it purports to dispose, not only of personal but of real property (as to which it clearly must be inefficient); (*r*) particularly if the disposition be blended. Thus where the unexecuted will creates a common fund of real and personal estate, the presumption is of the strongest kind, and can only be repelled by very clear evidence. (*s*)

where the disposition is blended.

And where the disposition of the real and personal estates is so blended that the realty and personalty are dependent on each other (as where the testator gives real property to A. because he has given personal property to B.), the court will not grant probate; for it would defeat the intention, and be injustice, to give effect to the one disposition unless it could be given to the other: though where it is clearly shown that the testator has finally made up his mind, and that the execution of the instrument is prevented by the act of God, and the devise of the realty is perfectly independent of the disposition of the personalty, the court will give effect to the unexecuted will, in order to carry the deceased's intention into effect *pro tanto*. (*t*)

Where the instrument is not in the

Though the instrument be written in another man's hand, and has never been signed by the testator, yet in

(*p*) L'Huille *v.* Wood, 2 Cas. temp. Lee, 22. So probate was granted of an unexecuted will, the intention of the deceased being clear, and the due execution of the instrument having been prevented by sudden incapacity superinduced by the violent conduct of his wife, who was interested in thwarting that intention. Lamkin *v.* Babb, 1 Cas. temp. Lee, 1.

(*q*) Scott *v.* Rhodes, 1 Phillim. 12; Read *v.* Phillips, 2 Phillim. 122; Thomas *v.* Wall, 3 Phillim. 23; Friswell *v.* Moore, 3 Phillim. 135; Warburton *v.* Burrows, 1 Add. 383; Masterman *v.* Maberly, 2 Hagg. 235; In the Goods of Lamb, 4 Notes of Cas. 561.

(*r*) In the Goods of Herne, 1 Hagg. 226.

(*s*) Douglas *v.* Smith, 3 Knapp, 1; Elsden *v.* Elsden, 4 Hagg. 183; Gillow *v.* Bourne, 4 Hagg. 291; *post*, pt. I. bk. II. ch. III. § II. See, also, Reynolds *v.* White, 2 Cas. temp. Lee, 214; Reeves *v.* Glover, 2 Cas. temp. Lee, 359.

(*t*) Tudor *v.* Tudor, 4 Hagg. 199, note (*a*). [See Guthrie *v.* Owen, 2 Humph. 202.]

many cases it will operate as a good testament of personal estate. (*u*) testator's writing.

Thus if a person gives instructions for a will, and dies before the instrument can be formally executed, the instructions, * though neither reduced into writing in his presence, nor ever read over to him, will operate as fully as a will itself. (*x*) And even unfinished instructions may be established, (*y*) under the circumstances which will be presently pointed out, when the testamentary effect of unfinished instruments, generally, is considered. Nor is it necessary that the instructions should be given to the drawer by the deceased; for they may be conveyed to him through the medium of a third person, although the court, in such a case, would be doubly on its guard. (*z*) Instructions for a will.

It is, however, essential that the instructions should be reduced into writing in the lifetime of the deceased; otherwise, it would be a mere nuncupative will, and then of no effect under the statute of frauds. (*a*) Thus in the case of Nathan *v.* Morse, (*b*) the testator died in the act of dictating instructions to his solicitor, in the presence of a third person, and had proceeded as far as the clause appointing an executor, when he was attacked by the seizure which terminated his existence. Immediately after his death, the third person, on hearing the instructions read over to him, observed to the solicitor that he had omitted a legacy which * the deceased had directed; upon which the solicitor, recollecting the fact, imme-

(*u*) Wentw. c. 1, p. 15, 14th ed.

(*x*) Carcy *v.* Askew, 2 Bro. C. C. 58; S. C. 1 Cox, 231; Goodman *v.* Goodman, 2 Cas. temp. Lee, 109; Robinson *v.* Chamberlayne, 2 Cas. temp. Lee, 129; Bowes *v.* Malpas, 2 Cas. temp. Lee, 358; Green *v.* Skipworth, 1 Phillim. 59; Wood *v.* Wood, 1 Phillim. 370, and the cases there cited by Sir John Nicholl; Huntington *v.* Huntington, 2 Phillim. 213; Langmead *v.* Lewis, 2 Phillim. 326; Sikes *v.* Snaith, 2 Phillim. 355; Lewis *v.* Lewis, 3 Phillim. 112; Allen *v.* Manning, 2 Add. 490, and see note (*a*) to that case, 2 Add. 494; In the Goods of Bathgate, 1 Hagg. 67; Burrows *v.* Burrows, 1 Hagg. 109; In the Goods of Taylor, 1 Hagg. 641; Masterman *v.* Maberly, 2 Hagg. 247; Viner Abr. Devise, A. 2, 4; Castle *v.* Torre, 2 Moore P. C. C. 133. [See Boofter *v.* Rogers, 9 Gill, 44, where it was held that a paper intended as instructions, or as a memorandum, to enable a scrivener to make a will, if the formal act be left unfinished, may be made a will by any act which the law pronounces to be the act of God, provided that up to the time of that act the same intent continued. See *post*, 75, note (*q*²).] As to copies of instructions, see Barrow *v.* Barrow, 2 Cas. temp. Lee, 335.

(*y*) Devereux *v.* Bullock, 1 Phillim. 72; Musto *v.* Sutcliffe, 3 Phillim. 105; Nathan *v.* Morse, 3 Phillim. 529; Castle *v.* Torre, 2 Moore P. C. C. 133, 156.

(*z*) Lewis *v.* Lewis, 3 Phillim. 109; and see Maclae *v.* Ewing, 1 Hagg. 317.

(*a*) Sikes *v.* Snaith, 2 Phillim. 355. See, also, Rockell *v.* Youde, 3 Phillim. 141.

(*b*) 3 Phillim. 529.

diately added the legacy. Sir John Nicholl said he had no doubt in pronouncing the instructions to be the will of the deceased as far as the appointment of the executor; but that as the last clause was not committed to writing during the lifetime of the testator, it could not be established, and must be struck out.

These principles must, *à fortiori*, apply to holograph or written instructions for a will or codicil, where the intentions expressed in such instructions are continued and adhered to, but the execution of the formal instrument prevented by the sudden death of the writer. (*c*)

However, a mere paper of instructions, even though holograph, and signed, cannot be sustained as testamentary, if there was no sudden death or other act of God to prevent the regular execution of the will or codicil by the deceased. (*d*)

In a case where the deceased, having an intention to alter his will, sent for one of his executors, and desired him to draw a codicil, and afterwards on the draft being shown to him, disapproved of several clauses in it, declaring that it was not drawn agreeably to his instructions, and refused to sign it, the judge (Sir G. Lee) was clearly of opinion that he could not pronounce for part of the legacies contained in it, and reject those clauses which the deceased objected to; for there might be other parts which he disliked, besides those he particularly mentioned. (*e*)

Testament found among testator's muniments.

If a testament be found in the testator's chest, or safely kept among other writings, which testament is neither written by the testator nor by him subscribed, but altogether of another man's hand, this writing shall not prevail as the last will and testament of the deceased, unless it be * proved that the same was written by the commandment of the testator; (*f*) or unless (it may be added) other satisfactory proof be given that the testator had recognized it distinctly as his will.

Distinction between an "imperfect" instrument.

Hitherto the subject has been confined to cases of testamentary instruments, which by reason of their being unexecuted or unattested, when the testator appeared, on the face of

(*c*) 2 Moore P. C. C. 157.

(*d*) Munro *v.* Coutts, 1 Dow P. C. 437. See, also, Dingle *v.* Dingle, 4 Hagg. 388; and the observations of Sir H. Jenner, in Torre *v.* Castle, 1 Curt. 313, 338; and of Bosanquet J. in 2 Moore P. C. C. 154, 155.

(e) Machin *v.* Grindon, 2 Cas. temp. Lee, 406.

(*f*) Swinb. pt. 4, s. 28, pl. 10.

them, to contemplate a signature or attestation, may in some degree be considered as imperfect. But the term "imperfect," as applied to a testamentary paper, is carefully to be distinguished from the word "unexecuted." Not every "imperfect" paper is "unexecuted;" nor is every "unexecuted" paper "imperfect;" except only in a certain sense of that term. (*g*) For example, a testamentary paper may be finished and complete, looking to the body of the instrument, as purporting to dispose of the testator's whole property, and so on; still, however, if unexecuted, as, for instance, by wanting the deceased's signature, it is in a certain sense of the word, though in a certain sense of the word only, an imperfect paper. But the word "imperfect," when applied technically to instruments of this nature, means that the document is, upon the face of it, manifestly in progress only, and unfinished and incomplete as to the body of the instrument. (*h*) And where a paper is imperfect in this sense of the word, not only, as in cases of unexecuted papers, must its being unfinished be shown to have been caused by the act of God, or to be justly ascribable to some reason other than any abandonment of intention by the testator, but it must also be clearly *proved* by the party setting up the instrument, upon a just view of all the facts and circumstances of the case, that the deceased had come to a *final* resolution in respect to it, as far as it goes. (*i*) Moreover, the presumption of law against such an instrument * instead of being slight, as in the case of a merely unexecuted paper, is very strong and hard to be repelled. (*k*) When there is a mere want of execu-

"imperfect" and "unexecuted" testamentary paper.

Rule as to imperfect papers.

(*g*) Montefiore *v.* Montefiore, 2 Add. 357.

(*h*) Montefiore *v.* Montefiore, 2 Add. 357.

(*i*) Montefiore *v.* Montefiore, 2 Add. 358. [See Waller *v.* Waller, 1 Grattan, 454; Adams *v.* Field, 21 Vt. 456; Patterson *v.* English, 71 Penn. St. 454; Claggett *v.* Hawkins, 11 Md. 381.]

(*k*) 2 Add. 358; Reay *v.* Cowcher, 2 Hagg. 255. The presumption varies in strength according to the state of maturity at which the instrument has arrived. 4 Hagg. 298. In some instances it is so completely a mere memorandum that proof of intention cannot be made but by strong extrinsic circumstances. In other cases it is so nearly perfect — it has on the face of it such strong indications of testamentary intention, that slight circumstances are sufficient to outweigh the presumption against it. Forbes *v.* Gordon, 3 Phillim. 628. [See Robeson *v.* Kea, 4 Dev. 301; Herrington *v.* Bradford, Walker, 520; Tucker *v.* Calvert, 6 Call, 90; Jacks *v.* Henderson, 1 Desaus. 554; Jackson *v.* Jackson, 6 Dana, 257; Brown *v.* Shand, 1 McCord, 409; Allison *v.* Allison, 4 Hawks, 141; Rohrer *v.* Stehman, 1 Watts, 442; Wheeler *v.* Durant, 3 Rich. Eq. 452; Symmes *v.* Arnold, 10 Geo. 506; Means *v.* Means, 5 Strobh. 167; Ragsdale *v.*

tion in a paper which is complete in other respects, the court will *presume* the testator's intention to be expressed in such a paper, on its being satisfactorily shown that the non-execution did not arise from abandonment of these intentions so expressed. (*l*) But where a paper is incomplete in the body of it, the court must be completely satisfied by proof: 1st, That the deceased had finally decided to make the disposition of his property expressed in the imperfect paper; (*l*[1]) 2dly, That he never abandoned that intention, and was only prevented by the act of God from proceeding to the completion of his will. (*m*) The principal modern cases, in which the principles above expressed, with regard to imperfect testamentary documents, have been laid down and acted upon, will be found collected in the note below. (*n*)

Booker, 2 Strobh. Eq. 348; Robinson *v.* Schly, 6 Geo. 515; Wikoff's Appeal, 15 Penn. St. 281–288; Witherspoon *v.* Witherspoon, 2 McCord, 520.]

(*l*) 2 Add. 358.

(*l*[1]) [See Rochelle *v.* Rochelle, 10 Leigh, 125; Murry *v.* Murry, 6 Watts, 353; Robeson *v.* Kea, 4 Dev. Law, 301.]

(*m*) Devereux *v.* Bullock, 1 Phillim. 73. It is now clearly settled, said Sir John Nicholl, in Johnston *v.* Johnston, 1 Phillim. 495, that in respect to an unfinished paper, though followed by sudden death, the interval must be accounted for; and it must be *shown* that the testator *adhered to the intention*, but was prevented from finishing it. Castle *v.* Torre, 2 Moore P. C. C. 156, per Bosanquet J. accord.; [Hocker *v.* Hocker, 4 Grattan, 377; Selden *v.* Coalter, 2 Virg. Cas. 553; Sharp *v.* Sharp, 2 Leigh, 249; Tilghman *v.* Stuart, 4 Harr. & J. 156; Public Administrator *v.* Watts, 1 Paige, 347; S. C. 4 Wend. 168; Morsell *v.* Ogden, 24 Md. 377; Plater *v.* Groome, 3 Md. 134.] See Fulleck *v.* Allinson, 3 Hagg. 527; *ante*, 43, as to the validity of a will as an unexecuted paper, in a case where insanity supervenes between the preparation and the execution.

(*n*) Brown *v.* Hallett, 2 Cas. temp. Lee, 418; Griffin *v.* Griffin, 4 Ves. 197, note to Matthews *v.* Warner; Sandford *v.* Vaughan, 1 Phillim. 48; Devereux *v.* Bullock, 1 Phillim. 60; Musto *v.* Sutcliffe, 3 Phillim. 104; Bayle *v.* Mayne, 3 Phillim. 504; Forbes *v.* Gordon, 3 Phillim. 614; Roose *v.* Moulsdale, 1 Add. 129; Lord John Thynne *v.* Stanhope, 1 Add. 52; Antrobus *v.* Nepean, 1 Add. 399; Montefiore *v.* Montefiore, 2 Add. 354; Jameson *v.* Cooke, 1 Hagg. 82; Cundy *v.* Medley, 1 Hagg. 140; 1 Hagg. 661; 1 Hagg. 671; In the Goods of Herne, 1 Hagg. 222; In the Goods of Broderip, 1 Hagg. 385; In the Goods of Wenlock, 1 Hagg. 551; In the Goods of Robinson, 1 Hagg. 643; Reay *v.* Cowcher, 2 Hagg. 249; Theakston *v.* Marson, 4 Hagg. 298; Castle *v.* Torre, 2 Moore P. C. C. 133. [See Barnes *v.* Syester, 14 Md. 507; Showers *v.* Showers, 27 Penn. St. 485; Ruoff's Appeal, 26 Penn. St. 219; Boofter *v.* Rogers, 9 Gill, 44; Aurand *v.* Wilt, 9 Barr, 54; Parkison *v.* Parkison, 12 Sm. & M. 673; Dunlop *v.* Dunlop, 10 Watts, 153; Stricker *v.* Groves, 5 Whart. 386, 395; Cavett's Appeal, 8 Watts & S. 21; Frierson *v.* Beale, 7 Geo. 438; Offut *v.* Offut, 3 B. Mon. 162; Mason *v.* Dunham, 1 Munf. 456; Gaskins *v.* Gaskins, 3 Ired. 158; Public Administrator *v.* Watts, 1 Paige, 347; S. C. 4 Wend. 168; Rohrer *v.* Stehman, 1 Watts, 442; Hock *v.* Hock, 6 Serg. & R. 47; Eyster *v.* Young, 3 Yeates, 511. If it is manifest that the testator intended that the paper as it stood should operate as his will, it is

* It should here be remarked, that although it is demonstrated by the foregoing doctrines that when an unfinished draft is propounded, it must be shown that the deceased was prevented by accident, necessity, or the act of God, from completing it, yet a man certainly may (in cases not within the operation of the new wills act), in the last moments of life, so recognize an imperfect testamentary paper, written at the distance of any number of years, as to give it effect and validity, without formal execution. (*o*)

Effect of recognition of imperfect paper.

The effect of unfinished testamentary papers, with regard to the total or partial revocation of prior existing wills, will be considered more conveniently hereafter, when the subject of revocation of wills, generally, occurs. (*p*)

Effect of unfinished papers as to revoking existing wills.

With respect to the signature of a will, made (or reëxecuted or republished) (*q*) on or after the first day of January, 1838, it is required by the stat. 1 Vict. c. 26, s. 9, that it "shall be signed at the foot or end (*q*[1]) thereof by the testator, or by some other person in his presence and by his direction." (*q*[2])

2. Signature of wills made after Jan. 1, 1838: 1 Vict. c. 26, s. 9:

properly admitted to probate, although there appear to be blank bequests in it. The existence of the blanks will not defeat the will, although the bequests being in blank would fail for uncertainty; the other bequests being clearly expressed and being in no manner connected with or dependent upon those in blank would have effect. Harris *v.* Pue, 39 Md. 536; Tilghman *v.* Stewart, 4 Harr. & J. 173; Patterson *v.* English, 71 Penn. St. 454.]

(*o*) 2 Moore P. C. C. 156. See *infra*, pt. 1. bk. II. ch. IV. § 1.

(*p*) See *post*, pt. 1. bk. II. ch. III. § II.

(*q*) See *supra*, 67, note (*f*).

(*q*[1]) [*Post*, 77, and notes (*x*[1]) and (*y*).]

(*q*[2]) [See McGee *v.* Porter, 14 Missou. 611. The signature of a will at the request of the testator by a third person as follows, "E. N. for R. D. at his request," is a sufficient execution in this respect. Vernon *v.* Kirk, 30 Penn. St. 218. See Abraham *v.* Wilkins, 17 Ark. 292. In Pennsylvania, a will must be signed by the testator at the end thereof, or by some person in his presence and by his express direction, unless the testator is prevented by the extremity of his last sickness; and in all cases it must be proved by the oaths of two or more competent witnesses. Act of 8th April, 1833; Stricker *v.* Groves, 5 Whart. 386. Under this it has been held necessary that each fact — (1) the inability of the testator to sign, (2) his inability to direct another to sign — must be proved by two witnesses, to bring the case within the exception. Ruoff's Appeal, 26 Penn. St. 219, 220. It has also been held that this saving clause operates only in favor of a will that is complete and ready for signing. Aurand *v.* Wilt, 9 Penn. St. 54. Where the testator, having given directions for drawing his will, and being just about to sign the same when drawn, and in the very act of signing, became suddenly unable to do so himself or to request another to do so for him, and immediately died, it was held that the will

signature by mark sufficient.

It seems clear that the making of a mark by the testator is a sufficient signing to satisfy the statute. (q^3) It was held by the court of queen's bench, in Baker *v.* Dening, (r) that under the statute of frauds (s. 6) the making of a mark by a devisor, to a will of real estate, is a sufficient signing; *and that is sufficient, without reference to any question whether he could write at the time.*

So, in Wilson *v.* Beddard, (s) on the trial of an issue *devisavit vel non*, directed by the court of chancery, Parke B. * said that it was necessary, under that statute, that the will should be signed by the testator, but not with his name, for his mark was sufficient if made by his hand, though that hand was guided by another person, (s^1) and Sir L. Shadwell V. C. afterwards held that this proposition was correct.

was within the exception and valid. Showers *v.* Showers, 27 Penn. St. 485. See Ruoff's Appeal, 26 Penn. St. 219. See Dunlop *v.* Dunlop, 10 Watts, 153; Cavett's Appeal, 8 Watts & S. 26, as to ratifying a will made and signed by another without such direction; and see, also, Roofter *v.* Rogers, 9 Gill, 44.]

(q^8) [Jackson *v.* Van Dusen, 5 John. 144; Upchurch *v.* Upchurch, 16 B. Mon. 102; Ray *v.* Hill, 3 Strobh. 297; Butler *v.* Benson, 1 Barb. 526; St. Louis Hospital *v.* Williams, 19 Missou. 609; In re Field, 3 Curt. (Prer.) 752; St. Louis Hospital *v.* Wegman, 21 Missou. 17; Flannery's Will, 24 Penn. St. 502; Pool *v.* Buffum, 3 Oregon, 438; Nickerson *v.* Buck, 12 Cush. 332. In Pennsylvania the testator must sign by his own proper signature, if he be able to do so; but if prevented from doing this by sickness or other incapacity, his name must be signed at the end of the instrument by some other person, in presence of the testator and by his express direction. The mark of the testator was held insufficient in Asay *v.* Hoover, 5 Penn. St. 21; Grayhill *v.* Barr, 5 Penn. St. 441. But see where testator's hand was guided by another person, Cozzen's Will, 61 Penn. St. 196. The mark of the testator affixed to a will previously signed by another in the name of the testator is not sufficient proof that the signature was made by the testator's express direction. Greenough *v.* Greenough, 11 Penn. St. 489; S. P. in Burwell *v.* Corbin, 1 Rand. 131, on a statute similar to that of Pennsylvania; Gibson C. J. 11 Penn. St. 498. See Cavett's Appeal, 8 Watts & S. 21; Vandruff *v.* Rinehart, 29 Penn. St. 232. See the remarks upon these cases in Vernon *v.* Kirk, 30 Penn. St. 218. See, also, Cozzen's Will, 61 Penn. St. 196. The same has been decided in Missouri. St. Louis Hospital Association *v.* Williams, 19 Missou. 609; St. Louis Hospital Association *v.* Wegman, 21 Missou. 17; Northcutt *v.* Northcutt, 20 Missou. 266. See, also, In re Will of Cornelius, 14 Ark. 675; Dunlop *v.* Dunlop, 10 Watts, 193. But see Upchurch *v.* Upchurch, 16 B. Mon. 102. Signing by mark is made sufficient by statute, in Delaware. Smith *v.* Dolby, 4 Harring. (Del.) 350. So now in Pennsylvania, by act of 1848. Purd. Dig. Brightly's ed. 1853, p. 844. See the decisions limiting the retroactive effect of this latter act; Shinkle *v.* Crock, 17 Penn. St. 159; Davies *v.* Morris, 17 Penn. St. 205; Burford *v.* Burford, 29 Penn. St. 221.]

(r) 8 Ad. & El. 94.

(s) 12 Sim. 28.

(s^1) [Vandruff *v.* Rinehart, 29 Penn. St. 232; Stevens *v.* Vancleve, 4 Wash. C. C. 262; Cozzen's Will, 61 Penn. St. 196.]

These decisions appear to be equally applicable to the statute of Victoria as to the statute of frauds, for the language of both acts in this respect is almost identical, the words of the latter being that all devises and bequests of lands shall be in "writing, and signed by the party so devising the same or by some other person in his presence and by his express directions, &c." (*t*) Accordingly it has been held in the construction of the statute of Victoria, that when, in the testator's presence, and by his directions, another person stamped the will, by way of signature, with an instrument on which the testator has had his usual signature engraved, so that it might be stamped on letters or other documents requiring his signature, this was a due execution of the will. (*u*)

Signature under an assumed name.

Again, wills have been admitted to probate which have been signed by the testator under an assumed name, the *court being of opinion that such assumed name might stand for, and pass as, the *mark* of the testator. (*v*)

Sealing not a sufficient signature.

In the construction of the statute of frauds, it was once considered that the putting of a seal by the testator was a sufficient signing; for that *signum* was no more than a mark, and sealing is a sufficient mark that it is his will. (*w*)

But this doctrine has been since overruled. (*x*) Whence it appears to follow, that sealing would not be regarded as a signing within the statute of Victoria.

The will is required by that act to be signed "*at the foot or end*

(*t*) See accord. In the Goods of Bryce, 2 Curt. 325, in which case a will made since January 1, 1838, was admitted to probate, on motion, the testatrix having signed it with a mark, and notwithstanding her name did not appear on the face of the instrument. See, also, In the Goods of Amiss, 2 Robert. 116; *post*, 94. So where one *Thomas* Douce put his mark to a testamentary paper in which he was described throughout as *John* Douce, the court, on being satisfied on affidavit that Thomas Douce duly executed the paper, granted probate thereof as his will. In the Goods of Douce, 2 Sw. & Tr. 593. Again, where a will purporting to be that of S. Clarke, and delivered by her as such, for safe custody, to one of her executors shortly before her death, was executed by mark against which appeared the name of S. Barrell (her maiden name), it was held that, there being no doubt of the identity of the testatrix, her execution by mark was not vitiated by another person having written the wrong name against it. In the Goods of Clarke, 1 Sw. & Tr. 22; [1 Jarman (3d Eng. ed.), 73.]

(*u*) Jenkins *v.* Gaisford, 3 Sw. & Tr. 93.

(*v*) In the Goods of Glover, 5 Notes of Cas. 553; In the Goods of Redding, 2 Robert. 339.

(*w*) Lemayne *v.* Stanley, 3 Lev. 1; S. C. 1 Freem. 538; [*ante*, 10, note (*x*).]

(*x*) Smith *v.* Evans, 1 Wils. 313; Grayson *v.* Atkinson, 2 Ves. sen. 459; Ellis *v.* Smith, 1 Ves. jun. 13, 15; Wright *v.* Wakeford, 17 Ves. 459; [Pollock *v.* Glassell, 2 Grattan, 439.]

thereof." (x^1) The statute of frauds merely requires that the will shall be "signed;" and it was held, that a will in the testator's own handwriting commencing, "I, John Styles, do declare this to be my last will, &c." was sufficiently "signed" within that statute, although not subscribed with his name. (y) With a view, perhaps, to prevent future controversy as to whether a will so signed is a complete and perfect instrument, the statute of Victoria required that the signature of the testator shall be at the foot or end of the will.

The signature under the wills act is required to be at the foot or end.

But questions of this kind do not appear to be altogether excluded by the operation of this enactment; and a new ground of contest arose out of it, as to what may be considered a signing of the will at the end or foot thereof.

Doubts arose whether a signature by the testator in the body of the testimonium or attestation clause was sufficient; and also, whether a signature below the latter clause, when it runs beneath

(x^1) [In Pennsylvania, New York, Ohio, and Arkansas, the testator is required to sign his name at the end of the will. *Ante*, 75; Rev. Sts. Ark. c. 157, § 4; Curwen's Laws of Ohio in Force, p. 1133, c. 575; Purdon's Dig. p. 843 (ed. 1853); Hays *v.* Harden, 6 Penn. St. 409; Stricker *v.* Groves, 5 Whart. 386; Watts *v.* New York, 4 Wend. 168; Lewis *v.* Lewis, 13 Barb. 17; McDonough *v.* Loughlin, 20 Barb. 238. So in New Jersey, as to a will of real estate, see Combs *v.* Jolly, 2 Green Ch. 625. In Cohen's Will, 1 Tuck. (N. Y. Sur.) 286, it was held sufficient subscription "at the end of the will," where an attestation clause was annexed, if the testator subscribed beneath the attestation clause, along with the attesting witnesses. In Ohio, where the statute requires that wills be "signed at the end thereof by the maker," and witnessed, a will signed but not witnessed, which the testator called for "to finish," and to which he then added a bequest, and which was then signed by witnesses, but not by the testator, was held invalid. Glancy *v.* Glancy, 17 Ohio St. 134.]

(y) Coles *v.* Trecothick, 9 Ves. 249. [In some of the American States, the former English rule, as it existed under the statute of frauds, still prevails. The place of the signature in or upon the will is not regarded as important, provided the signature, wherever it is affixed, is placed there for the purpose, and with the intention of authenticating the will. Sarah Miles's Will, 4 Dana, 1; Waller *v.* Waller, 1 Grattan, 454; Jackson *v.* Van Dusen, 5 John. 144; Rutherford *v.* Rutherford, 1 Denio, 33; Remsen *v.* Brinckerhoff, 26 Wend. 325; S. C. 8 Paige, 488; Dewey *v.* Dewey, 1 Met. 349; Hogan *v.* Grosvenor, 10 Met. 54; Hall *v.* Hall, 17 Pick. 373; Loy *v.* Kennedy, 1 Watts & S. 396; Ginder *v.* Farnum, 10 Penn. St. 100; Upchurch *v.* Upchurch, 16 B. Mon. 102; Armstrong *v.* Armstrong, 29 Ala. 538; Adams *v.* Field, 21 Vt. 256; Selden *v.* Coalter, 2 Virg. Cas. 553; Ramsey *v.* Ramsey, 12 Grattan, 664; In re Sophia Kirkpatrick's Will, 7 C. E. Green, 463. It has been considered in some of the cases that this purpose and intention must appear on the face of the will. See Waller *v.* Waller, 1 Grattan, 454; Ramsey *v.* Ramsey, *supra;* Jolly's Will, 1 Halst. Ch. 456; Ray *v.* Hill, 3 Strobh. 297; Heyer *v.* Berger, 1 Hoff. Ch. 1; Graham *v.* Graham, 10 Ired. 219; Denton *v.* Franklin, 9 B. Mon. 28; Rosser *v.* Franklin, 6 Grattan, 1.]

the conclusion of the will, was a compliance with the act. On the question, whether the will was well * executed, if there was a blank space between the conclusion of the will and the signature of the testator, a lamentably large number of points and decisions occurred. In the earlier cases Sir H. Jenner Fust put a very liberal construction on this part of the act. But afterwards that learned judge, in concurrence with the judicial committee of the privy council, (*z*) felt it necessary to take a more rigid view of this enactment, on the ground that it was intended to prevent any addition being made to the will after the deceased had executed it. And accordingly probate was refused in a great number of subsequent cases on this objection, and the intention of a great many testators unfortunately defeated.

This led to the passing of the stat. 15 Vict. c. 24, which, after reciting that, by the stat. 1 Vict. c. 26, it had been enacted that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction, proceeds to enact, by sect. 1, that "every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, (*a*) * that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will, and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature, or by the

Stat. 15 Vict. c. 24. When signature to a will shall be deemed valid.

(*z*) Willis *v.* Lowe, 5 Notes of Cas. 428; S. C. 1 Robert. 618, note (*b*); Smee *v.* Bryer, 6 Notes of Cas. 20, Suppl. xii.; S. C. 1 Robert. 616; 6 Moore P. C. 404.

(*a*) Where a will was written on a piece of parchment, and at one corner, at the bottom of the parchment, a piece of paper was pasted, and a stamp impressed on it, upon which paper the signatures of the testator and the attesting witnesses were subsequently made, it was held by Sir C. Cresswell that the signature must be accepted as a signature on part of the will, so as to be within the stat. 15 Vict. c. 24. In the Goods of Gausden, 2 Sw. & Tr. 362. And this decision was followed by a similar one in another case before the same judge, in Cook *v.* Lambert, 3 Sw. & Tr. 46. See, further, as to the construction of this enactment, In the Goods of Wright, 34 L. J., P. M. & A. 104; In the Goods of Birt, L. R. 2 P. & D. 214; In the Goods of Coombs, L. R. 1 P. & D. 302.

circumstance that the signature shall be placed among the words of the *testimonium* clause or of the clause of attestation, (*b*) or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses, * or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page, or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act or this act shall be operative to give effect to any disposition or direction which is underneath, (*c*)

Stat. 15 Vict. c. 24.

(*b*) It is to be observed that questions may still arise, as to the validity of a signature placed among the words of the testimonium clause, or the clause of attestation, where the testator has only written his name, without otherwise subscribing the will, so that it may be contended that it does not appear whether he intended it or not for his signature to the will. See, on this subject, In the Goods of Chaplyn, 4 Notes of Cas. 469; In the Goods of Davis, Ib. 522; In the Goods of Atkins, Ib. 564; In the Goods of Woodington, 2 Curt. 234; In the Goods of Gunning, 1 Robert. 459; S. C. 5 Notes of Cas. 75; In the Goods of Baskett, 6 Notes of Cas. 597; In the Goods of M'Cullum, 7 Notes of Cas. 125; In the Goods of Batten, 7 Notes of Cas. 228; In the Goods of Walker, 2 Sw. & Tr. 354; In the Goods of Casmore, L. R. 1 P. & D. 653; [In the Goods of Pearn, L. R. 1 P. & D. 70.] See, further, as to what is a sufficient execution within the stat. 15 Vict., In the Goods of Jones, 4 Sw. & Tr. 1; In the Goods of Powell, Ib. 34; In the Goods of Wright, Ib. 55; In the Goods of Williams, L. R. 1 P. & D. 4; In the Goods of Woodley, 3 Sw. & Tr. 429; [In the Goods of Huckvale, L. R. 1 P. & D. 375.] Where the will of the deceased had an imperfect attestation clause, and the name of the deceased appeared written beneath the signatures of the attesting witnesses, and the witnesses were both dead, and no evidence could be given as to the order in which the signatures were made, the court nevertheless decreed probate of the will. In the Goods of Puddephatt, L. R. 2 P. & D. 97. Where the will was in the handwriting of the testator and his name formed the concluding words of the last clause of the will, it was admitted to probate, the court (Sir C. Cresswell) being satisfied *that the name was intended to be a signature.* Trott *v.* Skidmore, 2 Sw. & Tr. 12. As to what the act means by "*among* the words of the testimonium clause," see In the Goods of Mann, 28 L. J., P. M. & A. 50.

(*c*) In the Goods of Dallow, L. R. 1 P. & D. 189; In the Goods of Kimpton, 3 Sw. & Tr. 427. Where, from the obvious sequence and sense of the context, it appears to the satisfaction of the court that the signature of the deceased really follows the dispositive part of a testamentary instrument, though it may occupy a place on the paper literally above the dispositive parts or part thereof, such testamen-

or which follows it, (*d*) * nor shall it give effect to any disposition or direction inserted after the signature shall be made." (*e*)

Stat. 15 Vict. c. 24.

Act to extend to certain wills already made.

Sect. 2. "The provisions of this act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the ecclesiastical courts, has not been possessed or enjoyed by some person or persons claiming

tary instrument will be entitled to probate. In the Goods of Kimpton, 3 Sw. & Tr. 427.

(*d*) In order to get rid of the objection that the will was not signed at the foot or end, the court has, in some cases, thought itself justified in regarding a portion running below the signature as forming no part of the will, and granting probate exclusive of that portion. See, on this subject, In the Goods of Howell, 2 Curt. 421; In the Goods of Davies, 3 Curt. 748; Keating *v.* Brooks, 4 Notes of Cas. 253, 260; In the Goods of Jones, 4 Notes of Cas. 532; S. C. 1 Robert. 424; In the Goods of Cotton, 6 Notes of Cas. 307; S. C. 1 Robert. 638; Topham *v.* Topham, 2 Robert, 189; S. C. 7 Notes of Cas. 272; In re Stanley, 7 Notes of Cas. 69; S. C. 1 Robert. 755; In the Goods of Amiss, 7 Notes of Cas. 274; S. C. 2 Robert. 116. But see Sweetland *v.* Sweetland, 4 Sw. & Tr. 6; Hunt *v.* Hunt, L. R. 1 P. & D. 209. Where in a testamentary paper executed by the deceased, the last sentence commenced immediately above the signature of the deceased, and was continued in three short lines to the left of it, the two last lines being somewhat below the signature, and this sentence was written before the deceased signed her name, it was held by Lord Penzance that under the above statute the execution was valid, and that the last sentence should be included in the probate. In the Goods of Ainsworth, L. R. 2 P. & D. 151. See, further, as to the construction of this statute, In the Goods of Arthur, L. R. 2 P. & D. 273. [In a late case in New York, Conboy *v.* Jennings, 1 N. Y. Sup. Ct. 622, it appeared that the testator wrote his will upon three pages of a sheet of paper. At the end of the second page he subscribed his name, and also at the end of the third page. At the end of the second page two persons subscribed their names as witnesses at the testator's request. The third page contained a conditional request or direction only. It was held, that the will was concluded at the end of the second page; the third page formed no part of such will and did not affect its validity. See McGuire *v.* Kerr, 2 Bradf. See 256.]

(*e*) Where the testator's signature was written partly across the last line but one of the will, and entirely above the last line, with the exception of one letter which touched the last line, it was held that the will was signed at the foot or end thereof. In the Goods of Woodley, 3 Sw. & Tr. 429. The same was held, under the stat. 15 Vict. c. 104, of a will made in France, and signed not at the end of the will, but at the end of a notarial minute which followed in the same sheet. Page *v.* Donovan, Dea. & Sw. 278. Where the testator, after signing his name to his will in the presence of two witnesses, added a clause to it, the writing being squeezed into the space above and beside the signature, and immediately afterwards the witnesses signed their names, the court held that the testator did not sign or acknowledge his signature to the will as containing such clause, and that probate should issue without it. In the Goods of Arthur, L. R. 2 P. & D. 273.

to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a court of competent jurisdiction, in consequence of the defective execution of such will.

Interpretation of "will."

Sect. 3. "The word 'will' shall, in the construction of this act, be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said act of the first year of the reign of her majesty Queen Victoria."

Short title of act.

Sect. 4. "This act may be cited as 'The Wills Act Amendment Act, 1852.'"

Blank spaces in *the body* of a will are unobjectionable.

It should be observed that there is no provision in either of these acts that the will shall be written continuously. * Therefore it has been held that if a will is otherwise duly executed, it is no objection that it contains blank spaces in the body of it. (*f*)

What is a sufficient signing by "some other person:"

The stat. 1 Vict. enacts that the will may be signed either by the testator, "or some other person in his presence and by his direction."

whether the signature for the testator may be by one of the attesting witnesses.

In the prerogative court, In the Goods of Bailey, (*g*) a question was raised, upon motion, on this clause of the act, whether a signature by the direction of the testator can well be made by a person who is one of the two subscribed witnesses to the will. The deceased died on the 30th of November, 1838. On the 8th of that month he executed his will in the manner following, viz, the name of the deceased was signed by Robert Harvey, one of the subscribed witnesses, at the foot or end, by the deceased's direction, and in his presence, and also in the presence of Matthew Smith, the other subscribed witness, who was present at the same time, and who, as well as Robert Harvey, attested the will in the presence of the deceased, Sir Herbert Jenner Fust was of opinion that there had been a compliance with the statute, and admitted the will to probate on the affidavit of Robert Harvey.

A contrary view of this point has been taken in an able trea-

(*f*) Corneby *v.* Gibbons, 6 Notes of Cas. 679; S. C. 1 Robert. 705, *coram* Dr. Lushington; In re Corder, 1 Robert. 669; In re Kirby, 6 Notes of Cas. 693, *coram* Sir H. J. Fust.

(*g*) 1 Curt. 914.

tise on this subject, (*h*) in which it is observed, that it could not be the intention of the legislature to require the testator to acknowledge the signature of his will by another person to the very person who had signed it for him.

However, in a late case, (*i*) Sir H. Jenner Fust adhered to the opinion he expressed In the Goods of Bailey, observing, that the witnesses in such a case attest the *direction* of the testator, and that direction amounts to an acknowledgment. (*i*[1])

Whether the person signing for the testator should sign his own name or that of the testator.

* A further question has arisen, as to whether, if the party signing for the testator, signs his own name, and not that of the testator, such signature is sufficient. In case upon motion in the prerogative court, (*k*) the testator died on June 4th, 1838. Being very ill, the vicar of the parish, by the deceased's request, signed the will for him, not in the testator's name, but his own; the attestation clause being as follows, "Signed on behalf of the testator by me, A. B., vicar of Warfield, Berks, which signature was made for and acknowledged by the testator, in the presence of us, who, in the presence of the testator, have hereunto set our hands and seals. C. D., E. F." *Per curiam* (Sir H. Jenner Fust): "The act allows the will to be signed by another person for the testator. Here, this gentleman, by the testator's request, signed the will for him, not in the testator's name, but using his own name. The act does not say that the testator's name must be used. I think this is sufficient under the act." Probate granted.

Whether the acknowledgment by the testator of a signature suffices, without showing who wrote it.

Where it is proved that the testator duly acknowledged a signature to the attesting witnesses, it has been considered sufficient, *primâ facie*, without proving that the signature is in his handwriting, or that it was made "by some other person in his presence and by his direction." (*l*)

(*h*) Sugden's Essay on the Law of Wills, p. 38.

(*i*) Smith *v.* Harris, 1 Robert. 262.

(*i*[1]) [Under the statute of Missouri, the person who at the request of the testator signs the testator's name, must himself attest to it, and state that fact, or the will is void. McGee *v.* Porter, 14 Missou. 611.]

(*k*) In the Goods of Clark, Prerog. 20 Feb. 1839; 2 Curt. 329. [Where the testator directed a person to sign the will for him, which that person did by writing at the foot, "this will was read and approved by C. F. B., by C. C. in the presence of, &c.," and then followed the signatures of the witnesses, the will was held good. Re Blair, 6 Notes of Cas. 528.]

(*l*) Gaze *v.* Gaze, 3 Curt. 456, per Sir H. Jenner Fust.

signature where the will consists of several sheets:

It is not necessary that all the sheets or papers of which a will consists should be signed by the testator: or that they should all be connected together: It is enough if they were in the same room where the execution took place; and it must be presumed, *primâ facie*, that they were so. (*m*)

or of several clauses written at several times.

So where a duly executed will, followed by several additions and alterations, at the end of which appeared the signature of the testator and attesting witnesses, it was held that the signature and attestation clause applied to all the * dispositive clauses written above them, although these had been apparently written at different times. (*n*)

SECTION II.

Of the Attestation of Wills and Codicils of Personal Estate.

It is proposed to consider this subject, 1st, with reference to wills and codicils made before January 1st, 1838, and to which consequently the new statute of wills does not extend; 2dly, with reference to wills and codicils made (or reëxecuted and republished) (*o*) on or after that date, and consequently within the operation of that statute.

First, As to wills and codicils made before January 1st, 1838.

1. As to wills made before Jan. 1, 1838: No witnesses to the execution or publication necessary:

Wills and codicils of personal estate need not any witness of their publication: (*p*) custody is a sufficient publication of them: (*q*) although it is safer and more prudent, and leaves less in the breast of the ecclesiastical judge, if they be published in the presence of witnesses. (*r*) Indeed, some of the older authorities have been supposed to lay it down, that such a publication before two sufficient wit-

(*m*) Gregory *v.* The Queen's Proctor, 4 Notes of Cas. 620, 639; *post*, 96, 97; Marsh *v.* Marsh, 1 Sw. & Tr. 528; [Ginder *v.* Farnum, 10 Barr, 98; Martin *v.* Hamblin, 4 Strobh. 188; Ela *v.* Edwards, 16 Gray, 91; Tonnele *v.* Hall, 4 Comst. 140; Wikoff's Appeal, 15 Penn. St. 281.]

(*n*) In the Goods of Cattrall, 4 Sw. & Tr. 419.

(*o*) See *ante*, 67, note (*f*).

(*p*) See Allan *v.* Hill, Gilb. Rep. 260; Wright *v.* Walthoe, and other cases cited in Limbery *v.* Mason, Com. Rep. 452; Cunningham *v.* Ross, 2 Cas. temp. Lee, 478.

(*q*) Miller *v.* Brown, 2 Hagg. 211. As to the effect of proof of handwriting alone, see *ante*, 68, note (*i*), and *post*, pt. 1. bk. IV. ch. III. § V.

(*r*) 2 Bl. Com. 502.

nesses is absolutely necessary. (*s*) But on a closer inspection of the passages cited, as containing such a doctrine, it should seem that in some, (*t*) such publication is only recommended; while in others (*u*) it is meant, not that the will must be proved by two witnesses present at its publication, but that two witnesses are necessary for the due proof of a testament, as they are for the proof of any other fact by the *rules of the civil law. (*x*) Still less are any *subscribing* witnesses necessary for the giving full force and effect to a mere testament. (*y*)

when there is an attestation clause, and no witnesses, the presumption is against the will.

But if there be an attestation clause at the foot of a testamentary paper, the natural inference is, that the testator meant to execute it in the presence of witnesses, and that it was incomplete in his apprehension of it, till that operation was performed; and consequently the presumption of law is *against* a testamentary paper, with an attestation clause, not subscribed by witnesses. (*z*) This presumption is held to be strengthened, when the instrument purports to dispose not only of personal, but also of real property. (*a*) It is true, that in Cobbold *v.* Baas, (*b*) the court of delegates was of opinion that a will, both of real and personal property, with an attestation clause unexecuted by witnesses, was, *reddendo singula singulis*, a perfect disposition of personal estate, and therefore a good will. But this decision may be considered as overruled by those of Mathews *v.* Warner (*c*) and Walker *v.* Walker. (*d*)

The presumption thus raised, however, is, generally speaking, slight, and may be repelled by slight circumstances; (*e*) yet slight as it is, it must be rebutted by *some* extrinsic evidence, either

(*s*) 1 Roberts on Wills, 183.

(*t*) Bracton, lib. 2, f. 61; Fleta, lib. 2, f. 125.

(*u*) Swinb. pt. 1, s. 3, pl. 13; Godolph. pt. 1, c. 21, s. 1.

(*x*) See *post*, pt. 1. hk. IV. ch. III. § V. as to the necessary proof of a will.

(*y*) Brett *v.* Brett, 3 Add. 224.

(*z*) Scott *v.* Rhodes, 1 Phillim. 19; Harris *v.* Bedford, 2 Phillim. 177; Beaty *v.* Beaty, 1 Add. 154; Mathews *v.* Warner, 4 Ves. 186; 5 Ves. 23; Walker *v.* Walker, 1 Meriv. 503; and see the note of the learned reporter, in 1 Add. 159, 160.

(*a*) See *ante*, 70; In the Goods of Reeve, Prerog. H. T. 1842; 1 Notes of Cas. 310.

(*b*) 4 Ves. 200, *in notis*.

(*c*) 4 Ves. 186; 5 Ves. 23.

(*d*) 1 Meriv. 503. See the note to Beaty *v.* Beaty, 1 Add. 159, 160. See, also, Jekyll *v.* Jekyll, 1 Cas. temp. Lee, 419.

(*e*) Stewart *v.* Stewart, 2 Moore P. C. C. 193; Bateman *v.* Pennington, 3 Moore P. C. C. 223; Harris *v.* Bedford, 2 Phillim. 178; Thomas *v.* Wall, 3 Phillim. 23; Buckle *v.* Buckle, 3 Phillim. 323; In the Goods of Jerram, 1 Hagg. 550; Doker *v.* Goff, 2 Add. 42. In the last case there was no regular attestation clause, but only

that the testator was prevented from finishing *the instrument by the act of God, or that he intended it to operate in its present form. (*f*) In the case of Buckle *v.* Buckle, (*g*) the fact of the testamentary paper being found sealed up at the death of the testator, with an appearance that he did not intend to open it again, was held sufficient to rebut the presumption, by showing that it was his intention it should operate in its present form. So a recognition of it as a will by the testator will suffice. (*h*.)

but this presumption is slight, and may be repelled by slight evidence.

By the different acts of parliament creating stock in the public funds and annuities attending thereon, it is provided that any person possessed of the stock may devise the same by writing, *attested by two witnesses*. But the result of several cases on these acts, which it will hereafter be necessary to notice, is, that a bequest of stock, whether attested by two witnesses or not (if made before January 1st, 1838), is effectual to pass the subject bequeathed to the legatee. (*i*)

Devise of stock in the public funds.

Secondly, As to the attestation of wills and codicils made on or after the 1st of January, 1838. The stat. 1 Vict. c. 26, s. 9, enacts, that no will (or testament or codicil, or any other testamentary instrument) shall be valid unless the *signature* shall be "made or acknowledged by the testator in the presence of two or more witnesses (i^1) present at the

2. As to wills, &c. made on or after Jan. 1, 1838:

the word "witnesses," which the court considered as raising an infinitely slighter presumption.

(*f*) Harris *v.* Bedford, 2 Phillim. 178; Beaty *v.* Beaty, 1 Add. 158; In the Goods of Hurrill, 1 Hagg. 252; In the Goods of Wenlock, 1 Hagg. 551; In the Goods of Thomas, 1 Hagg. 596; In the Goods of Edmonds, 1 Hagg. 698; Bragge *v.* Dyer, 3 Hagg. 207; Pett *v.* Hake, 3 Curt. 612.

(*g*) 3 Phillim. 323.

(*h*) In the Goods of Jerram, 1 Hagg. 550. See, also, In the Goods of Vanhagen, 1 Hagg. 478; In the Goods of Sparrow, Ib. 479, where there was an attestation clause in the plural number, and only one witness.

(*i*) Ripley *v.* Waterworth, 7 Ves. 440; Franklin *v.* Bank of England, 1 Russ. 589; *post*, pt. II. bk. III. ch. I.

(i^1) [As to the number of witnesses in the American States, see *ante*, 67, note (b^1). "It seems to have been generally considered" as observed in Jarman Wills (3 Eng. ed. pp. 104–106), "that this provision not only qualifies persons who have been rendered infamous by conviction for crime to be attesting witnesses (as it clearly does), but, that it even gives validity to the attesting act of an idiot or lunatic. This, however, seems very questionable. The signature, it will be observed, is required to be made or acknowledged by the testator in the presence of the witnesses; which would seem to imply that they should be mentally conscious of the transaction, according to the construction which was given to the same word occurring in the devise clause of the statute of frauds, which required that the attesting witnesses

same time, and such witnesses shall attest (i^2) and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

the *signature* must be made or acknowledged in the presence of two or more witnesses present at one time, and

The statute of frauds required, with respect to a will of * lands, that it should be "attested and subscribed in the presence of the devisor, by three or four credible witnesses." (i^3)

should subscribe in the testator's 'presence;' such requisition being held not to be satisfied in a case in which the testator fell into a state of insensibility, before the witnesses had subscribed their names to the memorandum of attestation." "Perhaps the point is not very likely to occur in practice; for no testator would think of choosing an idiot or lunatic as an attesting witness to his will, unless he were content to have his own sanity called in question. And here it may be observed, that the enlarged license now given, in regard to the qualification of witnesses to wills, will not induce any prudent person to abate one jot of scrupulous anxiety, that the duty of attesting a will be confided to persons whose character, intelligence, and station in society, afford the strongest presumption in favor of the fairness and proper management of the transaction, and preclude all apprehension in purchasers and others, as to the facility with which the instrument could be supported in a court of justice, against any attempt to impeach it; and now that the requisite number of witnesses is reduced to two, it is the more easy, as well as important, that the selection should be governed by a regard to such considerations. A devise or bequest to an attesting witness still, as under the old law, does not affect the validity of the entire will, but merely invalidates the gift to the witness, whose competency the legislature has established, by destroying his interest."]

(i^2) [As to the meaning involved in the word "attestation," see Swift *v.* Wiley, 1 B. Mon. 117; Griffith *v.* Griffith, 5 B. Mon. 511; Gerrish *v.* Nason, 22 Maine, 438; Sweet *v.* Boardman, 1 Mass. 258; Neil *v.* Neil, 1 Leigh, 6. In Missouri, the attesting witnesses are required by statute to attest, not only the formal execution of the will, but the sanity of the testator as well. Withington *v.* Withington, 7 Missou. 598. It does not, however, seem to be required that this should be stated in the attestation clause. Murphy *v.* Murphy, 24 Missou. 526. For the requirement as to attestation of sanity in Illinois, see Stat. Ill. p. 336, § 2. See, also, Heyward *v.* Hazard, 1 Bay, 335; 1 Greenl. Ev. § 292; 2 Greenl. Ev. § 691; Butler *v.* Benson, 1 Barb. 526; Nelson *v.* McGiffert, 3 Barb. Ch. 158; Lewis *v.* Lewis, 13 Barb. 17; Torry *v.* Bowen, 15 Barb. 304; Keeney *v.* Whitmarsh, 16 Barb. 141. In regard to the purpose and office of witnesses to wills, Rucker *v.* Lambdin, 20 Miss. 230.]

(i^3) [As to the number of witnesses required in the American States, see *ante*, 67, note (b^1). The statute of Massachusetts, extending and establishing the competency of witnesses to testify in civil and criminal proceedings, expressly excludes the application of it to the attesting witnesses to a will or codicil. St. 1870, c. 393, § 2. So in Maine. Rev. St. c. 82, § 80; McKeen *v.* Frost, 46 Maine, 248. In regard to the attestation of wills in Massachusetts, the statute (Genl. Sts. c. 92, § 6) provides that the witnesses shall be competent at the time of attestation, but their subsequent incompetency, from whatever cause it may arise, shall not prevent the probate and allowance of the will, if it is otherwise satisfactorily proved. See, to same effect, in New Hampshire, Rev. St. N. H. c. 157, § 12; Frink *v.* Pond, 46 N. H. 125. In Hawes *v.* Humphrey, 9 Pick. 356, 357, Wilde J. said: "The object of the statute was to prevent frauds as well as perjuries.

they shall attest and subscribe the will in testator's presence:

It will be observed, that besides the change from three to two in the number of witnesses, there are several important differences between the exigencies of the two statutes.

Wills are frequently made by a testator *in extremis*, or when he is greatly debilitated by age or infirmity, when frauds may be practised upon him with facility by the crafty and designing; and it was the intention of the statute to guard against such practices, and to protect the testator by surrounding him with disinterested witnesses at the critical and important moment when he is about to execute his will. They are to be disinterested and credible also, at the time of the attestation, because in some sense they are made the judges of the testator's sanity. It is their duty to inquire into this matter, and if they think the testator not capable, they should remonstrate and refuse their attestation." But see the remarks of Sargent J. upon this point, in Boardman *v.* Woodman, 47 N. H. 120, 134. See, also, Carlton *v.* Carlton, 40 N. H. 14. In Sullivan *v.* Sullivan, 106 Mass. 474, 475 (1871), Gray J. said: "By the law of this commonwealth, a will must be attested by three competent witnesses, that is to say, witnesses who at the time of attestation would be competent by the rules of the common law to testify concerning the subject-matter," and in this case it was held that a wife is not a competent attesting witness to a will which contains a devise to her husband, notwithstanding the provision of Genl. Sts. c. 92, § 10, that "all beneficial devises, legacies, and gifts, made or given in any will to a subscribing witness thereto, shall be wholly void, unless there are three other competent witnesses to the devise." See Fortune *v.* Buck, 23 Conn. 1. But see *contra* as to the effect of the section last above quoted, Winslow *v.* Kimball, 25 Maine, 493; Jackson *v.* Woods, 1 John. Cas. 163; Jackson *v.* Durland, 2 John. Cas. 314. In Sparhawk *v.* Sparhawk, 10 Allen, 155, it was held that an heir-at-law, who is disinherited, is a competent attesting witness in support of the will. The question of the competency of attesting witnesses to wills is fully discussed in this case by Bigelow C. J., who said in conclusion: "If, by the terms of the will, its admission to probate would operate favorably to the interests of the witness, he is incompetent to attest the execution of the instrument. He then has a direct pecuniary interest in the proof of the fact to which he is called to bear witness." See, as to competency of attesting witnesses, and what is meant by "credible witnesses," Higgins *v.* Carlton, 28 Md. 117; 2 Greenl. Ev. § 691; Shaffer *v.* Corbett, 3 Har. & M'H. 513; Carlton *v.* Carlton, 40 N. H. 14; Rucker *v.* Lambdin, 12 Sm. & M. 230; Gill's Will, 2 Dana, 447; Taylor *v.* Taylor, 1 Rich. (S. Car.) 531; Workman *v.* Dominick, 3 Strobh. 589; Hall *v.* Hall, 18 Geo. 40; Enstis *v.* Parker, 1 N. H. 273; Sears *v.* Dillingham, 12 Mass. 258; Amory *v.* Fellows, 5 Mass. 219; Hawes *v.* Humphrey, 9 Pick. 350; Warren *v.* Baxter, 48 Maine, 193; Allison *v.* Allison, 4 Hawks, 141; Sparhawk *v.* Sparhawk, 10 Allen, 156; Haven *v.* Hilliard, 23 Pick. 10, 17. A minor son of a legatee who is also named as executor, may be a witness to the will. Jones *v.* Tebbetts, 57 Maine, 572. See Harper *v.* Harper, 1 N. Y. Sup. Ct. 351, 359, 360. But it has been held in New Hampshire, that a person under the age of fourteen years is presumed to be incompetent, from defect of understanding, to attest the execution of a will, but this presumption may be rebutted; the witness is not required to have any other qualifications than those of ordinary testifying witnesses. Carlton *v.* Carlton, 40 N. H. 14. Mr. Justice Doe in this case said: "In proceedings in the probate court, whether the attesting witnesses of a will are then competent to testify, is a preliminary question concerning the admis-

what is a sufficient acknowledgment of the testor's signature to the witnesses:

The statute of frauds merely requires that the witnesses shall attest and subscribe *the will;* and it was held in the construction of this enactment, that it was unnecessary for the testator actually to *sign* his will in the presence of the three witnesses who subscribed the same; but that any acknowledgment before them, that it was his will, made their attestation and subscription complete. (*k*) It was further held, that it was sufficient if the testator acknowledged *in fact*, though not in words, to the witnesses that the instrument was his will, even though such acknowledgment conveyed no intimation whatever, or means of knowledge, either of the nature of the instrument or the object of signing; and, consequently, that if the witnesses subscribed their names as witnesses, at the testator's request, *without seeing his signature*, or being informed of the nature of the instrument, the statute was satisfied. (*l*) But the new

sion of evidence, to be determined before they are sworn; but whether they were competent attesting witnesses at the time of attestation, is a question concerning the due execution of the will, to be decided after they are sworn. . . . . If the will were to be proved before a court and jury, the qualifications at the time of the trial, of the persons offered to testify, would be passed upon by the court, and the qualifications, at the time of the execution of the will, of the persons who attested and subscribed it in the testator's presence, would be passed upon by the jury." 40 N. H. 20. "Those witnesses are credible, whom the law will trust to testify to a jury, who may afterwards ascertain the degree of credit they have." Parsons C. J. in Amory *v.* Fellowes, 5 Mass. 228, 229; Parker C. J. in Sears *v.* Dillingham, 12 Mass. 361; Carlton *v.* Carlton, 40 N. H. 14. But a wife is not a competent witness to her husband's will; Pease *v.* Allis, 110 Mass. 157; nor is a husband to his wife's will. Dickinson *v.* Dickinson, 61 Penn. St. 401. As to the competency of executors, see Wyman *v.* Symmes, 10 Allen, 153; Richardson *v.* Richardson, 35 Vt. 238; Gunter *v.* Gunter, 3 Jones, 441; Sears *v.* Dillingham, 12 Mass. 358; Dorsey *v.* Warfield, 7 Md. 65; Pruyn *v.* Brinkerhoff, 7 Abb. Pr. N. S. 400; Burnett *v.* Silliman, 13 N. Y. 93; Noble *v.* Burritt, 10 Rich. (S. Car.) 505; Murphy *v.* Murphy, 24 Missou. 526; 4 Kent, 308, note (*f*); Jones *v.* Larrabee, 47 Maine, 474; Snyder *v.* Bull, 17 Penn. St. 54; Loomis *v.* Kellogg, 17 Penn. St. 60; Richardson *v.* Richardson, 35 Vt. 238; Meyer *v.* Fogg, 7 Florida, 292. The competency of an attesting witness to a will is not to be determined upon the state of facts existing at the time the will is offered for probate, but upon the facts existing at the time of attestation. Patten *v.* Tallman, 27 Maine, 17; Morton *v.* Ingram, 11 Ired. 368; Sears *v.* Dillingham, 12 Mass. 358, 362; Doe *v.* Hersey, 4 Burn E. L. 88.]

(*k*) Ellis *v.* Smith, 1 Ves. jun. 11; Casement *v.* Fulton, 5 Moore P. C. 138, by Lord Brougham; [Holloway *v.* Galloway, 51 Ill. 159; Merchant's Will, 1 Tuck. (N. Y. Sur.) 151; Dewey *v.* Dewey, 1 Met. 349; Ela *v.* Edwards, 16 Gray, 91; Roberts *v.* Welch, 46 Vt. 164; Adams *v.* Field 21 Vt. 256; Rush *v.* Parnel, 2 Harring. 448; Welch *v.* Welch, 2 Monroe, 83; Dudleys *v.* Dudleys, 3 Leigh, 436; Beane *v.* Yerby, 12 Grattan, 239; Smith *v.* Jones, 6 Rand. 33.]

(*l*) White *v.* Trustees of the British Museum, 6 Bing. 310; S. C. 3 M. & P.

statute requires further, that the *signature* of the testator "shall be *made or acknowledged* (l^1) by the testator" in the presence of the two attesting witnesses. Soon after the act came into operation, a doubt appears to have been suggested, (m) whether an

689; Wright *v.* Wright, 7 Bing. 457; S. C. 5 M. & P. 316; Johnson *v.* Johnson, 1 Cr. & M. 140; S. C. 3 Tyrw. 73; [Dewey J. in Nickerson *v.* Buck, 11 Cush. 342; Ray *v.* Walton, 2 A. K. Marsh. 71; Jauncey *v.* Thorne, 2 Barb. Ch. 40; Huff *v.* Huff, 41 Geo. 696; Dickie *v.* Carter, 42 Ill. 376. It is not necessary that the witnesses should see the testator's signature on the paper, or know from him or any other source that the instrument which they attest is his will. Dewey *v.* Dewey, 1 Met. 349; Hogan *v.* Grosvenor, 10 Met. 56; Ela *v.* Edwards, 16 Gray, 92; Tilden *v.* Tilden, 13 Gray, 110, 114; Turner *v.* Cook, 36 Ind. 129; Brown *v.* McAllister, 34 Ind. 375. See Adams *v.* Norris, 23 How. (U. S.) 353; Tevis *v.* Pitcher, 10 Cal. 465; Jauncey *v.* Thorne, 2 Barb. Ch. 40; Leverett *v.* Carlisle, 19 Ala. 80; Dickie *v.* Carter, 42 Ill. 376. In Osborn *v.* Cook, 11 Cush. 532, no one of the witnesses knew that it was a will they were attesting. The will was in the testator's handwriting, and was sustained. In Hogan *v.* Grosvenor, 10 Met. 56, the will was in the handwriting of the testator. The testator took the paper from his desk, asked the witness to sign it, and pointed out the place where he wished him to put his name. The witness did so, not knowing what the paper was, and not noticing the signature of the testator on the paper. This was held a good attestation of the will. In Ela *v.* Edwards, 16 Gray, 91, proof was offered of the execution of a will in the handwriting of the testatrix and signed by her, to which three other persons had signed their names in the usual place for the signatures of witnesses, but without any attestation clause. The person whose name came first, testified: "She passed me a package of papers; asked me to sign my name as a witness; told me where to sign on the left side." The person whose name was last, testified: "She said she wanted me to witness a document; that she had been making a little disposition of her effects, and would like to have me sign it as a witness. She put her finger to the line where she wished me to sign." It appeared that the other person who signed as a witness was out of the jurisdiction of the court, but it was proved that the signature was genuine. It was held that this was sufficient proof, in the absence of any evidence or allegation of fraud, of a due execution of the will. Dewey J. said: "The fact that she was thus obtaining the attestation of witnesses, and the directions which she gave as to signing their names, furnish strong presumptive proof that she had signed it." See Dewey *v.* Dewey, 1 Met. 354. But when a will was attested by the three subscribing witnesses at different times, and one of them, though he signed in the presence of the testatrix, neither saw her sign nor heard her acknowledge her signature, it was held that the will was not proved. Tucker *v.* Oxner, 12 Rich. Law (S. Car.), 141. In Vermont it is held to be necessary that the witnesses to the will know the character of the act which they are called upon to perform, and that by affixing their names to the instrument they are thereby attesting the execution thereof by the testator. They must subscribe their names *animo testandi*, and in the presence of each other. Roberts *v.* Welch, 46 Vt. 164.]

(l^1) [The statutes of New York, Ohio, and Illinois provide in the same manner for the sufficiency of an acknowledgment by the testator of his signature. See Lewis *v.* Lewis, 13 Barb. 17; S. C. 1 Kernan, 220; Jauncey *v.* Thorne, 2 Barb. Ch. 40.]

(m) In the Goods of Regan, Prerog. Aug. 7, 1838; 1 Curt. 908. See, also, 3 Curt. 174.

acknowledgment of the signature was intended to be effectual in any other case than where the signature had been made "by some other person" by the direction of the testator; but Sir H. Jenner Fust was clearly of opinion, that the statute meant, that whether the signature be made by the testator, or by some other person, * if it be acknowledged by the testator in the presence of the two witnesses, the execution shall be good. A more difficult question hereupon arises, in cases where the signature is made by the testator, but not in the presence of the attesting witnesses, as to what shall be a sufficient acknowledgment of it by him in their presence. The result of the cases appears to be that where the testator produces the will, with his signature visibly apparent on the face of it, to the witnesses, and requests them to subscribe it, this is a sufficient acknowledgment of his signature: (*n*) but not

(*n*) Gaze *v.* Gaze, 3 Curt. 451; Blake *v.* Knight, 3 Curt. 547; Keigwin *v.* Keigwin, 3 Curt. 611; In re Davis, 3 Curt. 748; In re Ashmore, 3 Curt. 756. See, also, In the Goods of Warden, 2 Curt. 334; In the Goods of Philpot, 3 Notes of Cas. 2; In the Goods of Bosanquet, 2 Robert. 577; In the Goods of Dinmore, 2 Robert. 641. A different view seems to have been once taken of this subject. In the Goods of Rawlins, 2 Curt. 326; In the Goods of Harrison, 2 Curt. 863. It is not necessary that a testator should state to the witnesses that it is his signature. The production of a will by a testator, it having his name upon it, and a request to the witnesses to attest it, would be a sufficient acknowledgment of the signature under the statute. 3 Curt. 172, 175, per Sir H. Jenner Fust. See, also, 3 Curt. 563, 564; In the Goods of Thompson, 4 Notes of Cas. 643; Leech *v.* Bates, 6 Notes of Cas. 704, by Sir H. Jenner Fust; [Tilden *v.* Tilden, 13 Gray, 110; Dewey *v.* Dewey, 1 Met. 349; Osborn *v.* Cook, 11 Cush. 532, 533; Hall *v.* Hall, 17 Pick. 373, 379; Adams *v.* Field, 21 Vt. 256; Boldry *v.* Parris, 2 Cush. 433; Nickerson *v.* Buck, 12 Cush. 342, 343; Beave *v.* Yerby, 12 Grattan, 239; Green *v.* Crain, 12 Grattan, 552; Rucker *v.* Lambdin, 12 Sm. & M. 230; Small *v.* Small, 4 Greenl. 220; Ray *v.* Walton, 2 A. K. Marsh. 74; Cochran's Will, 3 Bibb, 494; Denton *v.* Franklin, 9 B. Mon. 28; Eelbeck *v.* Granberry, 2 Hayw. 232; Butler *v.* Benson, 1 Barb. 526; Jauncey *v.* Thorne, 2 Barb. Ch. 40; Nelson *v.* McGiffert, 3 Barb. Ch. 158; Baskin *v.* Baskin, 36 N. Y. 419; S. C. 48 Barb. 200; Conboy *v.* Jennings, 1 N. Y. Sup. Ct. 622; Allison *v.* Allison, 46 Ill. 61; Reed *v.* Watson, 27 Ind. 443; In re Will of Alpaugh, 8 C. E. Green (N. J.), 507. The acknowledgment may be made by the testator in the absence of the signature. Eelbeck *v.* Granberry, 2 Hayw. 232. It is not necessary that he should expressly request the subscribing witnesses to attest his will. Higgins *v.* Carlton, 28 Md. 117; Rogers *v.* Diamond, 13 Ark. 474; Seguine *v.* Seguine, 2 Barb. 385; Hutchins *v.* Cochrane, 2 Bradf. 295. If another person, acting for the testator, should in his presence and with his consent request the witnesses, and direct them where, to sign their names upon the will, the effect would be the same as if the testator had made the request himself. Inglesant *v.* Inglesant, L. R. 3 P. & D. 172; Allison *v.* Allison, 46 Ill. 61.] The like was held where the testator had intimated to the same effect by *gestur*. In the Goods of Davies, 2 Robert. 337. See, also, In re Jones, Dea. & Sw. 3; [Nickerson *v.* Buck, 12 Cush. 332, 342, 343; Ela *v.* Edwards, 16 Gray, 92, 93; Thomas J

where they are unable to see the signature, and the testator merely calls them in to sign, without giving them any explanation of the instrument they are signing. (*o*) So in a case before Sir C. * Cresswell, the witnesses were invited by the testator to witness his signature on a paper which appeared to them to be a blank. They saw no writing whatever on it, and the signature they witnessed was on the fourth side of a sheet of paper folded in the middle. On the first side of that sheet, when the paper was produced for probate, there appeared to be a codicil; but there was no evidence that anything was written on the paper before the signatures were put there: and on that ground the learned judge, after consideration, refused to admit the paper to probate. (*p*)

in Osborn *v.* Cook, 11 Cush. 532, 536; Tilden *v.* Tilden, 13 Gray, 110; Randebaugh *v.* Shelley, 6 Ohio St. 307. Where it did not appear whether the testator did or did not sign the will or acknowledge the signature to be his in the presence of the witnesses, but the testator, after his name was signed to the will, declared it to be his will and asked them to sign it as witnesses, and the attestation clause was in the handwriting of the testator, and declared that it was signed in the presence of the witnesses, the certificate was taken as true, and as proof of signing in their presence. In re Will of Alpaugh, 8 C. E. Green (N. J.), 507.] But it is not sufficient merely to produce the paper to the witnesses, where it does not appear that the signature of the testator was affixed to it at the time. 4 Notes of Cas. 181, per Sir H. Jenner Fust; In the Goods of Ashton, 5 Notes of Cas. 548; [Dunlop *v.* Dunlop, 10 Watts, 153.] For another instance of an insufficient acknowledgment of the signature, see In the Goods of Summers, 2 Rob. 295; S. C. 7 Notes of Cas. 562. [In New Jersey, where the statute for devising real estate (1714) required that the testator should sign his name in the presence of the witnesses, it has been held that his acknowledgment of his signature is not a compliance with the act. Den *v.* Milton, 7 Halst. 70; Combs *v.* Jolly, 2 Green Ch. 625; Mickle *v.* Matlack, 2 Harr. 86. For the present law of New Jersey upon this point, see stat. 1851, concerning wills. In re McElwaine, 3 Green (N. J.), 499. See, also, Butler *v.* Benson, 1 Barb. 526; Adams *v.* Field, 21 Vt. 256; Rosser *v.* Franklin, 6 Grattan, 1; Hoffman *v.* Hoffman, 26 Ala. 535.]

(*o*) Ilott *v.* Genge, 3 Curt. 160 (affirmed in privy council, 4 Moore P. C. 265); Hudson *v.* Parker, 1 Robert. 14. See, also, Doe *v.* Jackson, cited *per curiam* in 3 Curt. 181, 182, 184; S. C. *nomine* Faulds *v.* Jackson, before the privy council, 6 Notes of Cas. Suppl. p. 1; In the Goods of Trinder, 3 Notes of Cas. 275; [Ela *v.* Edwards, 16 Gray, 92; Hogan *v.* Grosvenor, 10 Met. 56; Tilden *v.* Tilden, 13 Gray, 110; Osborn *v.* Cook, 11 Cush. 532.] Where a will has been executed in the presence of two witnesses, and, in addition to their signatures, the signature of a third person, who is also residuary legatee, appears at the foot of the will, the court will receive evidence to explain why such signature was written, and if it be satisfied that it was not written with the intention to attest the signature of the deceased, it will order it to be omitted in the probate. In the Goods of Sharman, L. R. 1 P. & D. 661. [But if the court is satisfied that the witness signed with intent to attest, that will be sufficient to make him an attesting witness, although he also signed in the character of executor. Griffiths *v.* Griffiths, L. R. 2 P. & D. 300.]

(*p*) In the Goods of Hammond, 3 Sw.

It may here be observed, that the new statute further enacts, by sect. 13, "that every will executed in manner hereinbefore mentioned shall be valid without any other publication thereof." (*q*)

& Tr. 90. But a will was written across the second and third sides of a sheet of note paper, the lower part of such sides being left blank, and the attestation clause and the signature of the testator and witnesses were written at the back of the will, and, therefore, across the top of the first and fourth sides of the paper, and the testator wrote the will in the presence of the witnesses immediately before he executed it, it was held by Lord Penzance that the will was well executed under the stat. 15 & 16 Vict. c. 24. In the Goods of Archer, L. R. 2 P. & D. 252.

(*q*) It seems to be doubtful whether any publication as distinguished from attestation, was necessary for a will of land under the statute of frauds. See the judgment of Lord Denman, in Doe *v.* Burdett, 4 Ad. & El. 14, and the observations of the judges in the same case on error, in the exchequer chamber, 9 Ad. & El. 936; 1 P. & D. 670, and in the house of lords, 6 M. & Gr. 386; and, also, White *v.* Trustees of the British Museum, *ante*, 87, note (*l*). [It is sufficient publication in Maine, Massachusetts, Delaware, Vermont, Virginia, and South Carolina, if it be made to appear that the testator at the time of executing the instrument, knew it to be his will and intended it as such, and was fully apprised of its contents. Rice J. in Cilley *v.* Cilley, 34 Maine, 162, 164; Swett *v.* Boardman, 1 Mass. 258; Dewey *v.* Dewey, 1 Met. 349; Smith *v.* Dolby, 4 Harring. 350; Dean *v.* Dean, 27 Vt. 746; Beane *v.* Yerby, 12 Grattan, 239; Verdier *v.* Verdier, 8 Rich. (S. Car.) 135; Watson *v.* Piper, 32 Miss. 451; Hogan *v.* Grosvenor, 10 Met. 54. This point is fully discussed by Thomas J. in Osborn *v.* Cook, 11 Cush. 532. As to publication in New Jersey, see Den *v.* Milton, 7 Halst. 70; Mickle *v.* Matlack, 2 Harr. 87; Combs *v.* Jolly, 2 Green Ch. 625; Rev. Sts. N. J. 1847, p. 363; Nixon's Dig. 863. In Indiana, see Turner *v.* Cook, 36 Ind. 129.] No publication was ever necessary for a will of personal estate. See *ante*, 84. [But to authorize a surrogate in New York to admit a last will to probate, it must appear that he executed and attested in the following manner: 1st. Subscribed by the testator at the end of the will; 2d. Such a subscription shall be made in presence of each of the attesting witnesses, or shall be acknowledged to have been so made to each of the witnesses. 3d. When the testator subscribes the will, or makes the acknowledgment, he shall declare the instrument so subscribed to be his last will and testament. 4th. There shall be two witnesses who shall sign at the end of the will, at the request of the testator. 3 R. S. 144, § 35, 5th ed. An actual publication of the will, as a will, in the presence of the subscribing witnesses, is thus made indispensable; and this publication is an act independent and distinct from subscription or acknowledgment of subscription. Baskin *v.* Baskin, 36 N. Y. 416; S. C. 48 Barb. 200; Heyer *v.* Berger, 1 Hoff. Ch. 1; Brinkerhoff *v.* Remsen, 8 Paige, 488; S. C. 26 Wend. 325; Chaffee *v.* Baptist Miss. Conv. 10 Paige, 85; 2 Rev. Sts. N. Y. 63, § 40; Torry *v.* Bowen, 15 Barb. 304; Nipper *v.* Groesbeck, 22 Barb. 670; Abbey *v.* Christy, 49 Barb. 276; Lewis *v.* Lewis, 13 Barb. 17; S. C. 1 Kernan, 220; Newhouse *v.* Godwin, 17 Barb. 236; Gilbert *v.* Knox, 52 N. Y. 125; Harder's Will, 1 Tuck. (N. Y. Sur.) 426; Harris's Will, 1 Tuck. (N. Y. Sur.) 293. The publication must be in the presence of both witnesses, by declaration that the instrument is the testator's last will and testament. Seymour *v.* Van Wyck, 2 Selden, 120; Tyler *v.* Mapes, 19 Barb. 448. There must at least be some act or declaration recognizing the instrument, by the testator, as his will, indicating that he desires the witnesses to subscribe it as such. Hunt *v.* Mootrie, 3 Bradf. Sur. 322; Tunison *v.* Tunison, 4 Bradf. Sur. 138; Ruther-

And it has been said, (*r*) that the result of this enactment is, that the testator need not inform the witnesses of the nature of the instrument they are attesting, * and that even if he deceives them and leads them to believe that it is a deed, and not a will, the execution is good notwithstanding. (*r*[1])

ford *v.* Rutherford, 1 Denio, 33; Nipper *v.* Groesbeck, 22 Barb. 670; Moore *v.* Moore, 2 Bradf. Sur. 261. Publication in the presence of the witnesses is required in North Carolina, New Jersey, and Arkansas. Den *v.* Milton, 7 Halst. 70; Den *v.* Matlack, 2 Harr. 86; Morehouse *v.* Cotheal, 1 Zabr. 480. No particular form of publication is given, or seems to be required in any of these states, provided it amounts in substance to a declaration, that the instrument is the last will and testament of the testator. See Remsen *v.* Brinkerhoff, 26 Wend. 324; Whitbeck *v.* Patterson, 10 Barb. 608; Brown *v.* De Selding, 4 Sandf. 10; Cilley *v.* Cilley, 34 Maine, 164. In Coffin *v.* Coffin, 23 N. Y. 15, it is said that the declaration, that the instrument is the testator's last will and testament, need not be made in any particular form. Any communication of the testator to the witnesses whereby he makes known to them that he intends the instrument to take effect as his will, will satisfy the requirement. In that case both witnesses were present, and one of them asked the testator if he wished him to sign or witness the will, and the testator answered in the affirmative. This was held to be a good publication. The judge delivering the opinion said: "There can be no doubt that such a declaration can be made in answer to a question, or even by a sign. It is only required that it be understandingly made." Shaw C. J. in Bayley *v.* Bailey, 5 Cush. 245, 259, 260. In Lewis *v.* Lewis, 1 Kernan, 226, Allen J. said: "To satisfy the statute, the testator must in some manner communicate to the attesting witnesses, at the time they are called to sign as witnesses, the information that the instrument then present is of a testamentary character and that he then recognizes it as his last will and testament, by some assertion or clear assent in words or signs; and the declaration must be unequivocal. The policy and object of the statute require this, and nothing short of this will prevent the mischief and fraud which were designed to be reached by it. It will not suffice that the witnesses have elsewhere, and from other sources, learned that the document which they are called to attest is a will, or that they suspect, or infer from the circumstances and occasion that such is the character of the paper. The fact must in some manner, although no particular form of words is required, be declared by the testator in their presence, that they may not only know the fact but that they may know it from him, and that he understands it, and, at the time of his execution, which includes publication, designs to give effect to it as his will; and to this, among other things, they are required by statute to attest." See Bagley *v.* Blackman, 2 Lansing, 41; Smith *v.* Smith, 2 Lansing, 266; 40 How. Pr. 318. In Trustee of Auburn Theological Seminary *v.* Calhoun, 62 Barb. 381, it was testified by the subscribing witness to the execution of a will, that she saw the deceased sign his name at the end of the paper; that he said he wanted her to sign her name to a paper, and she did so; but did not hear him say that it was his last will and testament; that she signed it in his presence; it was held that this testimony did not show that the statute had been complied with. See McKinley *v.* Lamb, 64 Barb. 199. In this the law in New York differs from that in other states. See *ante*, 87, note (*l*).]

(*r*) Sugden's Essay, 140, citing Trimmer *v.* Jackson, 4 Burn E. L. 130; British Museum *v.* White, 3 M. & P. 689.

(*r*[1]) [See *ante*, 87, note (*l*).]

Again, in the construction of the statute of frauds, it was held, that the act did not require that the witnesses should subscribe in the presence of each other, but that they might attest the execution separately, at different times. (*s*) But the new statute makes it necessary that both the witnesses to the will shall be present at the same time when the signature is made or acknowledged by the testator. And they must attest in the presence of the testator, *though not of each other*. (*t*) And it appears to be now fully established that the act is not complied with unless *both witnesses* shall attest and subscribe *after* the testator's signature shall have been made or acknowledged to them when *both* are actually present at the same time. (*u*) And if one of the witnesses has subscribed

the attestation must be *after* the testator has signed or acknowledged his signature to both, the witnesses being present at the same time:

and they must attest in the presence of the testator, though not of each other:

(*s*) Cook *v.* Parsons, Prec. Chanc. 184; Ellis *v.* Smith, 1 Ves. jun. 12; Westbeech *v.* Kennedy, 1 V. & B. 362. See, also, De Zichy Ferraris *v.* Hertford, 3 Curt. 480, per Sir H. Jenner Fust; [Dewey *v.* Dewey, 1 Met. 349; Jauncey *v.* Thorne, 2 Barb. Ch. 40; Hoffman *v.* Hoffman, 26 Ala. 535; Parramore *v.* Taylor, 11 Grattan, 220. In Green *v.* Crain, 12 Grattan, 252, a will was witnessed on different days, by A., B. and C.; by A. in the absence of both the other witnesses; B. signed in the presence of the testator alone, but was also present when C. signed, and the testator acknowledged the will before both B. and C.; the will was held to be well executed. The wills act of Illinois does not require that the attesting witnesses shall sign in each other's presence. Flinn *v.* Owen, 58 Ill. 111. Nor is this necessary in New York; Willis *v.* Mott, 36 N. Y. 486; Haysradt *v.* Kingman, 22 N. Y. 372; nor in Alabama. Hoffman *v.* Hoffman, 26 Ala. 535.]

(*t*) 3 Curt. 659, per Sir H. Jenner Fust. And so held in Faulds *v.* Jackson, Privy Counc. June 14, 1845; 6 Notes of Cas. Suppl. 1; In the Goods of Webb, Dea. & Sw. 1; [Ela *v.* Edwards, 16 Gray, 92; Dewey *v.* Dewey, 1 Met. 349; Parramore *v.* Taylor, 11 Grattan, 220.] But in Casement *v.* Fulton, Priv. Counc. July 25, 1845, 5 Moore P. C. 130, the same court held (without adverting to their previous decision) that the witnesses must attest *in the presence of each other;* on the ground that the word "such" in the statute must embrace what has been just said of their presence, and must mean "the witnesses, &c. present at the same time." This case is remarkable, not only because it is opposed to Faulds *v.* Jackson, but, also, because the facts were such that it might have been decided on the principle of Moore *v.* King (cited in the text above), and indeed had been so decided in the court below (the supreme court of Calcutta). [In Vermont, the witnesses must subscribe their names in presence of each other. Roberts *v.* Welch, 46 Vt. 164; Williams *v.* Robinson, 42 Vt. 658; St. Vt. 1839, p. 254, § 6; Dean *v.* Dean, 27 Vt. 746, 748; Blanchard *v.* Blanchard, 32 Vt. 62.]

(*u*) Moore *v.* King, 3 Curt. 243; Cooper *v.* Bockett, Ib. 648; 4 Moore P. C. 419; [Jackson *v.* Jackson, 39 N. Y. 153.] See, also, accord. In the Goods of Allen, 2 Curt. 331; In the Goods of Olding, 2 Curt. 865; In the Goods of Simmonds, 3 Curt. 79; In the Goods of Byrd, 3 Curt. 117; Pennant *v.* Kingscote, 3 Curt. 643, 647; Hindmarsh *v.* Charlton, 8 H. L. Cas. 160. The words of the act are prospective, such witnesses "*shall* attest and *shall* subscribe the will in the presence of the testator." 3 Curt. 660, per Sir H. Jenner Fust.

before the testator signs or acknowledges his *signature in the presence of both, and the other witness alone then subscribes in the presence of the former witness and the testator, this is not sufficient even though the former witness then expressly acknowledges the signature which he has previously made: for the act says that the testator may *acknowledge* his signature; but does not say that the witnesses may acknowledge their subscriptions. (*x*) Thus, in

(*x*) 3 Curt. 253. See, also, In the Goods of Byrd, 3 Curt. 117; Casement *v.* Fulton, 5 Moore P. C. 130. [See Hudson *v.* Parker, 1 Rob. Ec. 14; Shaw *v.* Neville, 38 Eng. Law & Eq. 615; Reed *v.* Watson, 27 Ind. 443; Beckett *v.* Howe, L. R. 2 P. & D. 1; Goods of Puddephat, L. R. 2 P. & D. 97; Charlton *v.* Hindmarsh, 1 Sw. & Tr. 433; Re Cunningham, 29 L. J. N. S. (Prob.) 71; Re Haskins, 32 L. J. N. S. (Prob.) 158; Pope *v.* Pope, Vermont, cited in Chase *v.* Kittredge, 11 Allen, 61; Lamb *v.* Girtman, 33 Geo. 289; Jackson *v.* Jackson, 39 N. Y. 153. In New Jersey, an acknowledgment of his signature by a witness is held insufficient. Den *v.* Milton, 7 Halst. 70; Combs *v.* Jolly, 2 Green Ch. 625; Mickle *v.* Matlack, 2 Harr. 86. So in Massachusetts, Chase *v.* Kittredge, 11 Allen, 49, where the subject is fully and critically examined by Mr. Justice Gray. So in Delaware, Rash *v.* Purnel, 2 Harring. (Del.) 458; Pennel *v.* Weyant, 2 Harring. (Del.) 506. And in North Carolina, Ragland *v.* Huntington, Ired. 561; Graham *v.* Graham, 10 Ired. 269; In re Cox's Will, 1 Jones, 321. And in Georgia, Duffie *v.* Corridon, 40 Geo. 122. So in Indiana, Reed *v.* Watson, 27 Ind. 443. But the law is otherwise in Pennsylvania, where it was held that a will was sufficiently executed and attested, although the testator did not sign his name until after the attesting witnesses had subscribed their names to the will. Miller *v.* McNeill, 35 Penn. St. 217. In this state, however, the statute requires that the will shall be attested by the witnesses, but not that it shall be subscribed by them. See *ante*, 67, note (*b*[1]). So in other cases, it has been held that, if the execution is completed all at one time, and is a single transaction, the order in which the requisites are fulfilled is quite immaterial. See Vaughan *v.* Burford, 3 Bradf. Sur. 78. In Connecticut and Kentucky, it has been held that a witness might sign in the presence of the testator before he signed, and acknowledge it afterwards, all being done at the same time. O'Brien *v.* Galagher, 25 Conn. 229; Swift *v.* Wiley, 1 B. Mon. 117; Upchurch *v.* Upchurch, 16 B. Mon. 113. See Chisholm *v.* Ben, 7 B. Mon. 408. "But the only decisions," says Mr. Justice Gray, in Chase *v.* Kittredge, 11 Allen, 63, "which have come to our notice, in which an acknowledgment by a witness to a will in the testator's presence, of a signature affixed in his absence, has been held to be an attestation and subscription in his presence, are those of a bare majority of the court of appeals of Virginia, in Sturdivant *v.* Birchett, 10 Grattan, 67, and Parramore *v.* Taylor, 11 Grattan, 220." After a careful review of the authorities in the above case of Chase *v.* Kittredge, the learned judge adds: "This analysis of the cases shows that by the preponderance of American authority, as by the uniform current of the English decisions, an express requirement of statute that one person shall sign or subscribe in the presence of another is not complied with by signing in his absence and merely acknowledging in his presence." Then, treating the case on principle, he adds that it is the will of the testator which the witnesses are to attest and subscribe. It must be his will in writing, though he need not declare it to be such. It must, therefore, be signed by him, before it can be attested by the witnesses. He must either sign in their presence, or acknowledge his signature to them, before they

Moore *v.* King, (*y*) a testator signed a codicil in the presence of a witness (his sister) who, at his desire, attested and subscribed it: on a subsequent day, when the sister and another person were present, he desired her to bring him the codicil, and requested the other person present to attest and subscribe it, saying in the presence of both parties and pointing to his signature, "This is a codicil signed by myself and by my sister, as you see; you will oblige me, if you will add your signature, two witnesses being necessary." That party then subscribed in the presence of the testator and his sister, *the latter* who was standing by him, *pointing to her signature and saying*, "*There is my signature*, you had better place yours underneath:" she did not, however, re-subscribe; and it was held by Sir H. Jenner Fust, that the instrument was not sufficiently attested under the new statute. (*y*[1])

what is to be considered as the presence of the testator:

It will be observed that the provision of the statute of frauds, requiring that the witnesses shall attest and subscribe *in the presence of the testator*, is continued in the statute of Victoria, (*z*) and as the language in both the acts is the same in this respect, it should seem that the decisions which have taken place as to the former will govern the construction of the latter. (*z*[1]) The result of them is, that it is not requisite that the testator should actually see the witnesses sign, but that it is sufficient if he might have seen them if he chose to look. (*a*) * Thus where a will was executed by the testatrix in her

can attest it. The statute not only requires them to attest, but to subscribe. This subscription is the evidence of their previous attestation. It is as difficult to see how they can subscribe in proof of their attestation before they have attested, as it is to see how they can attest before the signature of the testator has made it his written will. "But the controlling consideration is, that the statute in terms requires not only that the witnesses shall attest his will, but that they shall subscribe in his presence." 11 Allen, 64.]

(*y*) 3 Curt. 243.

(*y*[1]) [See Reed *v.* Watson, 27 Ind. 443.]

(*z*) The real property commissioners recommended (4th Report, pp. 18, 19, 20) that this provision should be discontinued.

(*z*[1]) [As to what presence of the testator signifies, see Moore *v.* Moore, 8 Grattan, 309; Nock *v.* Nock, 10 Grattan, 106; Neil *v.* Neil, 1 Leigh, 22; 1 Greenl. Ev. § 272; 2 Greenl. Ev. § 678; *post*, 93, and cases in note (*h*).]

(*a*) Shires *v.* Glascock, 2 Salk. 688; Davy *v.* Smith, 3 Salk. 395; Todd *v.* Winchelsea, M. & Malk. 12; S. C. 1 C. & P. 488; [Reynolds *v.* Reynolds, 1 Spears, 253; Dewey *v.* Dewey, 1 Met. 349; Ruddon *v.* McDonald, 2 Bradf. Sur. 352; Edelen *v.* Hardy, 7 Harr. & J. 61; 4 Kent, 515, 516; Russell *v.* Falls, 3 Harr. & M'H. 457; Lamb *v.* Gertman, 26 Geo. 625; Moore *v.* Moore, 8 Grattan, 307; Hill *v.* Barge, 12 Ala. 687; Robinson *v.* King, 6 Geo. 539; Bundy *v.* McKnight, 48 Ind. 509; Turner *v.* Cook, 36 Ind. 129; McElfresh *v.* Guard, 32 Ind. 408. This subject is very fully and ably treated in Neil *v.* Neil, 1 Leigh, 6.]

carriage, and the witnesses subscribed in the attorney's office, opposite to the window of which the carriage was, so that she might have seen them through the window while subscribing, it was held that the statute was satisfied. (*b*) But where the witnesses signed in an adjoining room to that in which the testator was, and the door between them was open, but he was not in such a position that he could see them, it was held that the attestation was ill. (*c*) In a late case in the prerogative court, (*d*) where the question arose on a will made after the new act came into operation, the witnesses had attested in the room where testator was lying in bed with the bed-curtains closed around him, so that he could not, for that reason, have seen the witnesses while they were subscribing; Sir H. Jenner Fust was of opinion that where a paper is executed by the deceased in the same room where the witnesses are, who attest it in the same room where the testator was at the time, they do attest it in the presence of the testator, though he may not actually see them sign: the will was accordingly admitted to probate. (*e*) But in a subsequent case in the same court, (*f*) where the testatrix lay with the curtains closed, and her back to the attesting witnesses when they subscribed, and it appeared that she could not by possibility have seen them do so, even if the curtains had not been closed, by reason of her inability, from her state of weakness, to have turned herself in her bed into a position in which she could have seen them sign, the same judge held that the statute was not complied with, (*f*[1]) and he distinguished the

(*b*) Casson *v.* Dade, 1 Bro. C. C. 99. [The law of New York seems not to be so strict in this respect. See Rudden *v.* McDonald, 1 Bradf. Sur. 352; Jackson *v.* Christman, 4 Wend. 277; Lyon *v.* Smith, 11 Barb. 124.]

(*c*) Doe *v.* Manifold, 1 M. & S. 249; Winchelsea *v.* Wanchope, 3 Russ. 441. Held, accord. since the new act, In the Goods of Newman, Prerog. Nov. 30, 1838; 1 Curt. 914; In the Goods of Ellis, 2 Curt. 395; In the Goods of Colman, 3 Curt. 118; [Boldry *v.* Parris, 2 Cush. 433; Reynolds *v.* Reynolds, 1 Spears, 253.]

(*d*) Newton *v.* Clarke, Dec. 24, 1839; 2 Curt. 320.

(*e*) See, also, accord. *per curiam*, 2 Salk. 688, Shires *v.* Glascock.

(*f*) Tribe *v.* Tribe, 7 Notes of Cas. 132; S. C. 1 Robert. 775.

(*f*[1]) [See Brooks *v.* Duffell, 23 Geo. 441; Jones *v.* Tuck, 3 Jones (N. Car.) Law, 202; Reed *v.* Roberts, 26 Geo. 294. An attestation in the same room is held to be presumptively in the presence of the testator. Howard's Will, 5 Monroe, 199; Neil *v.* Neil, 1 Leigh, 6. But an attestation made in a different room is *primâ facie* an attestation not in his presence. Neil *v.* Neil, 1 Leigh, 6; Edelen *v.* Hardy, 7 Har. & J. 61; Lamb *v.* Girtman, 33 Geo. 289. In the well-considered case of Russell *v.* Falls, 3 Harr. & M'H. 463, 464, it was regarded as necessary that the testator should have been able to see the attestation, without leaving his bed; being

case from the former one where the testator could have * seen but that the curtains were closed; and the learned judge added that in the present case there would have been no difference, in principle, if the witnesses had signed the will down-stairs. In one of the latest cases on this subject, Sir John Dodson held that where the subscription of the witnesses takes place in a different room from that in which the testator is, he must be proved to have been in a position whence he could have seen the witnesses as they subscribed their names. (*g*)

Though the testator was blind, yet it must be shown that he could have seen the witnesses sign, had he had his eyesight. (*h*)

The new statute provides that "no form of attestation shall be necessary." It is, therefore, sufficient if the witnesses, without any attestation clause of any description, merely subscribe their names. (*i*) But it must be observed, that unless there is an attestation clause, reciting that the formalities prescribed by the act have been complied with, the executor cannot obtain probate in the usual way on his own oath alone; but must produce an affidavit from one of the attesting witnesses, or some other satisfactory evidence showing that the solemnities have been performed as required by the statute. (*k*)

no form of attestation necessary:

able to see the witnesses merely is not enough. Graham *v.* Graham, 10 Ired. 219.]

(*g*) Norton *v.* Bazett, Dea. & Sw. 259. In a recent case, In the Goods of Trinmel, 11 Jur. N. S. 248, 249, Sir J. P. Wilde laid it down that the true test is, whether the testator might have seen, not whether he did see, the witnesses sign their names. See, further, In the Goods of Kellick, 3 Sw. & Tr. 578; [Bynum *v.* Bynum, 11 Ired. 632; Dewey *v.* Dewey, 1 Met. 349; Reed *v.* Roberts, 29 Geo. 294; Lamb *v.* Girtman, 26 Geo. 625; Hill *v.* Barge, 12 Ala. 687; Neil *v.* Neil, 1 Leigh, 6; *ante*, 92, note (*f*[1]); Edelen *v.* Hardy, 7 Harr. & J. 61; Boldry *v.* Parris, 2 Cush. 433.]

(*h*) In the Goods of Piercy, 1 Robert. 278; [Boyd *v.* Cook, 3 Leigh, 32; Reynolds *v.* Reynolds, 1 Spears (S. Car.), 256; Ray *v.* Hill, 3 Strobh. 297. But a blind man's will need not be read to him in the presence of the witnesses; Martin *v.* Mitchell, 28 Geo. 382; *ante*, 19; if it can be shown that it was read to him before signing. Wampler *v.* Wampler, 9 Md. 540; Hemphill *v.* Hemphill, 2 Dev. Law, 291.]

(*i*) Bryan *v.* White, 2 Robert. 315; [Jackson *v.* Jackson, 39 N. Y. 153; Leaycraft *v.* Simmons, 3 Bradf. Sur. 35; Fatheree *v.* Lawrence, 33 Miss. 585.]

(*k*) See *post*, pt. I. bk. IV. ch. III. § III.; Roberts *v.* Phillips, 4 E. & B. 457, by Lord Campbell. [In Ela *v.* Edwards, 16 Gray, 91, 97, Dewey J. said: "It seems to be well established that the fact of the want of an attestation clause does not invalidate the will. It does not, in the case of the death or absence from the jurisdiction of the court of one or all of the witnesses, defeat the probate of the will, but only changes the nature of the proof. Instead of its being shown by the attestation clause that there was a compliance with the statute, the court, or jury, if the case is tried by a jury, are to be reasonably satisfied of the fact of a proper attestation from other sources and the circumstances of the case."

the witnesses may subscribe by mark:

The decisions (*l*) on the construction of the statute of frauds appear to make it clear that in the case of the witnesses, as well as of the testator, (*m*) a subscription by mark is sufficient, notwithstanding the witness be able * to write.

See Hand *v.* James, Com. Rep. 531; Croft *v.* Pawlet, 2 Stra. 1109; Murphy *v.* Murphy, 24 Misson. 526. In Osborn *v.* Cook, 11 Cush. 532, the only attestation clause was "witnesses," under which the names of the subscribing witnesses were written; the will was sustained. Chase *v.* Kittredge, 11 Allen, 49, 52. In the case of Fry's Will, 2 R. I. 88, where there was no attestation clause other than the word "witness," one of the subscribing witnesses having deceased, upon proof of the handwriting of the subscribing witness and of the testator, it was held to be the *primâ facie* presumption that all the statute requisites had been complied with. In Jackson *v.* Christman, 4 Wend. 277, the court held that from the signatures of the witnesses, all the statute required might be presumed to have been complied with. In Roberts *v.* Phillips, 4 El. & Bl. 450, it is said, "that it never has been held that a testimonium clause is necessary, or that the witnesses should be described as witnesses; nothing more is required than that the will should be attested by the witnesses." In Ela *v.* Edwards, *supra*, the will was sustained, notwithstanding the entire absence of any attestation clause. In Conboy *v.* Jennings, 1 N. Y. Sup. Ct. 622, the attestation clause was simply: "Witness by us this 10th day of January, 1873." It was proved that the testator told the witnesses that the paper in question was his will, and requested them to sign as witnesses, which they did, and the will was held to be properly executed. In Chaffee *v.* Baptist Missionary Convention, 10 Paige, 85, Walworth, chancellor, said: "The statute does not require an attestation clause showing that the proper legal formalities were complied with. But prudence requires that a proper attestation clause should be drawn, showing that all the statute formalities were complied with, not only as presumptive evidence of the fact in case of the death of the witnesses, or where from lapse of time they cannot recollect what did take place, but also for the purpose of showing that the person who prepared the will knew what the requisite formalities were, and therefore gave the proper information to the testator, or saw that they were complied with if he was present. To impress the more strongly upon the memory of the witnesses the important fact that all the legal forms requisite to the due execution of the will were complied with, at the time when they subscribed their names as witnesses to such execution, the safer course always is to read over the whole of the attestation clause, in the presence and hearing of the witnesses and of the testator. And where the person executing the will is not known to the subscribing witnesses to be capable of reading and writing, especially if he executes the will as a marksman, it would be proper that the whole will should be deliberately read over to him in the presence and hearing of the witnesses, and the fact of such reading should be stated in the attestation clause; or at least the witnesses ought, by inquiries of the illiterate testator himself, to ascertain the fact that he was fully apprised of the contents of the instrument which he executed and published as his will, as well as that he was of competent understanding to make a testamentary disposition of his property. All these, however, are matters of precaution and prudence, to prevent any well-founded doubt upon matters of fact; and where they are neglected, it does not necessarily render the will invalid, if the court or jury which is to pass upon the question of its validity is satisfied, upon the whole evidence, that the will was duly executed, and that the testator understood its contents."]

(*l*) Harrison *v.* Harrison, 8 Ves. 185; Addy *v.* Grix, 8 Ves. 504.

(*m*) See Baker *v.* Dening, *ante*, 75.

And these decisions have been followed, in the ecclesiastical court, in the construction of the new act. (*n*) So where a will was attested by one witness in his own handwriting, and he also held and guided the hand of a second witness, who could not write or read, and in this way the second witness's name was written as attesting witness, the testator having desired the two to attest; this was held a sufficient attestation under the new statute. (*o*) * But an attestation by *sealing* will not satisfy the statute. (*p*)

or with a guided hand:

but not by seal:

(*n*) In the Goods of Ashmore, 3 Curt. 756. (In this case the two attesting witnesses made their marks, opposite to which respectively the testatrix wrote their names, and by mistake a wrong surname of one of them; and Sir H. Jenner Fust held this to be a good attestation.) See, also, accord. In the Goods of Amiss, 2 Robert. 116; S. C. 7 Notes of Cas. 274; [Campbell *v.* Logan, 2 Bradf. Sur. 90; Meehan *v.* Rourke, 2 Bradf. Sur. 385; Ford *v.* Ford, 7 Humph. 92; Pridgen *v.* Pridgen, 13 Ired. (N. Car.) 259; Gray J. in Chase *v.* Kittredge, 11 Allen, 59; Needham *v.* Needham, Essex Co. Mass. Nov. T. 1802, 11 Allen, 59; Den *v.* Milton, 7 Halst. 70; Upchurch *v.* Upchurch, 16 B. Mon. 102; Adams *v.* Chaplin, 1 Hill Ch. 266; Jackson *v.* Van Dusen, 5 John. 144; Chaffee *v.* Baptist Missionary Convention, 10 Paige, 85; Morris *v.* Kniffin, 37 Barb. 336; Jackson *v.* Jackson, 39 N. Y. 153. It must, however, be shown to be the mark of the witness. Collins *v.* Nichols, 1 Harr. & J. 399.] But in a case where an attesting witness to a will which had been once duly executed, attested a second execution of the same will, by no other act than by writing the word "Bristol" (the name of the city) at the end of her name and the name of the street in which she dwelt (which she had written when she attested the former execution), it was held by Sir H. J. Fust that the latter attestation was insufficient. In the Goods of Trevanion, 2 Robert. 311. See, also, Hindmarsh *v.* Charlton, 8 H. L. Cas. 160. The same learned judge appears to have previously allowed that the *initials* of the witnesses may constitute a sufficient subscription and attestation, if made by them for their signatures as attesting the execution. In the Goods of Christian, 2 Robert. 110; S. C. 7 Notes of Cas. 265; [Adams *v.* Chaplin, 1 Hill (S. Car.) Ch. 265.] Though not when placed in the margin opposite alterations in the will, so that their real purpose is to identify or attest the alterations, and not to attest the testator's reëxecution of the will. In the Goods of Martin, 6 Notes of Cas. 694; S. C. 1 Robert. 712.

(*o*) Harrison *v.* Elvin, 3 Q. B. 117; S. C. 2 G. & D. 769; S. P. In the Goods of Frith, 1 Sw. & Tr. 153; Lewis *v.* Lewis, 2 Sw. & Tr. 153; [Ex parte Le Roy, 3 Bradf. Sur. 227; Adams *v.* Chaplin, 1 Hill Ch. 266; Harrison *v.* Rowan, 3 Wash. 585; Lewis *v.* Lewis, 6 Serg. & R. 496; Clifton *v.* Murray, 7 Geo. 564; Reynolds *v.* Reynolds, 1 Spears, 256; Ray *v.* Hill, 3 Strobh. 297.] But the one witness cannot subscribe for the other. In the Goods of White, 2 Notes of Cas. 461; [Ex parte Le Roy, 3 Bradf. Sur. 227; Horton *v.* Johnson, 18 Geo. 396.] The desire that another should sign for a witness cannot be construed to be a subscription by that witness, even though he cannot write; for he might make his mark. In the Goods of Cope, 2 Robert. 335. So in a case where the two attesting witnesses, who were able to write, held the top of the pen whilst another person (the drawer of the

(*p*) In the Goods of Byrd, 3 Curt. 117.

acknowledgment of signature not sufficient.

It has been decided several times that, in the case of a witness, an acknowledgment by him of his previously subscribed signature is not a sufficient compliance with this act. (*q*) Accordingly, where an attesting witness to a will, on the reëxecution thereof by the testator, merely traced over his previous signature with a dry pen, Sir H. Jenner Fust held that this amounted to no more than to an acknowledgment of the signature, which had been held not to be a sufficient compliance with the statute, inasmuch as it requires the witness to *subscribe* the will. (*r*) And it is now settled by the decision of the house of lords, (*s*) that to make a valid subscription and attestation there must be either the name of the witness, or some mark intended to represent it. (*t*)

there must be either the name of the witness or a mark intending to represent it:

will) wrote their names, Sir H. J. Fust rejected the motion for probate, and observed, that where a person's hand is guided, the act is his own, but that here another person signed the names of the witnesses. In the Goods of Kileher, 6 Notes of Cas. 15. [See Montgomery *v.* Perkins, 2 Met. (Ky.) 448; Ex parte Le Roy, 3 Bradf. Sur. 227; Gray J. in Chase *v.* Kittredge, 11 Allen, 59; Campbell *v.* Logan, 2 Bradf. Sur. 90. But it has been held in some cases that the name of the witness may be written by another at his request and in his presence. Upchurch *v.* Upchurch, 16 B. Mon. 102; Jesse *v.* Parker, 6 Grattan, 57. But see Horton *v.* Johnson, 18 Geo. 396. "A subscription of the name or mark of a witness by another person in the presence of himself and the testator might possibly be a compliance with the statute, but, not being in the handwriting of the witness, would create no presumption of a lawful execution and attestation, without affirmative evidence that it was so made." Gray J. in Chase *v.* Kittredge, 11 Allen, 59. The deceased executed his will by his mark in the presence of two witnesses, one of whom also made a mark in attestation of the signature of the deceased. The second witness then wrote the names of the deceased and the witness opposite their respective marks, and also the word witness, but he did not subscribe his own name. The execution was held to be invalid. In Eynon, L. R. 3 P. & D. 92; Ex parte Le Roy, 3 Bradf. Sur. 227.]

(*q*) Moore *v.* King, 3 Curt. 253, and the other cases collected, *ante*, 91, note (*x*). [But it has been held that a witness may adopt a signature already made as well as to write it anew. Pollock *v.* Glassel, 2 Grattan, 439. And in Sturdivant *v.* Birchett, 10 Grattan, 67, it was decided, that where the witnesses to a will wrote their names in an adjoining room, where the testator could not see them, and immediately took the will, open in the hand of one of them, to the testator, and said, "Here is your will witnessed," pointing to the names, while all were present, this was tantamount to a subscribing of their names in the presence of the testator. Two judges dissented.]

(*r*) Playne *v.* Scriven, 1 Robert. 772; 7 Notes of Cas. 122; [Re Cunningham, 1 S. & S. 132; 29 L. J. Prob. 71.]

(*s*) Hindmarsh *v.* Charlton, 8 H. L. Cas. 160, affirming the decision of Sir C. Cresswell, 1 Sw. & Tr. 433.

(*t*) But where the witness subscribed "Servant to Mrs. Sperling," but without any name; this was held a sufficient attestation. In the Goods of Sperling, 3 Sw. & Tr. 272. See, further, as to what is a sufficient attestation, Griffiths *v.* Griffiths, L. R. 2 P. & D. 300.

It was further held in that case that a correction of an error in the previous writing of his name, or his acknowledgment of it, or the adding a date to it, will not be sufficient for this purpose.

in what part of the will they must subscribe:

The act, though it requires that the testator shall sign the will at the foot or end of it, is silent as to the part of the instrument where the witnesses shall subscribe. It was said by Dolben J. in Lea *v.* Libb, (*u*) with reference to the statute of frauds, that if a will is written on different sheets of paper, and each of the three witnesses subscribe on a different sheet, it is a good subscription within that statute. If this be good law, it should seem to be equally applicable to the new statute of Victoria. And it has * been held, accordingly, in several cases in the ecclesiastical court, that it matters not, under that statute, in what part of the will the attesting witnesses sign their names; provided it appears that the signatures were meant to attest the requisite signature of the testator. (*x*) The same question has lately been decided, after full consideration, by the court of queen's bench, in the case of Roberts *v.* Phillips, (*y*) upon the language of the statute of frauds, which requires that a will of lands shall be "attested and subscribed" by the witnesses. It was thereupon contended, that the primary meaning of the word "subscribed" is *written under* and that it must here mean *written under the concluding words of the will*, and signature of the testator, and so preventing any spurious additions after the execution; but the court held that the word "subscribed" might well be understood as merely denoting a signing of the name without any reference to the part of the paper on which the name is to be written; and that the requisition as to the will being subscribed by the witnesses was complied with, where the witnesses, who saw it executed by the testator, immediately signed their names on any part of it at his request with the intention of attesting it. (y^1) This decision is plainly applicable to the construction of the word "subscribe" in the new statute. (y^2)

(*u*) Carth. 37.

(*x*) In the Goods of Davis, 3 Curt. 748; In the Goods of Chamney, 1 Robert. 757; [Murray *v.* Murray, 39 Miss. 214.] But where there were two testamentary instruments, it was held not sufficient for the witnesses to subscribe their names at the end of the first of them alone, notwithstanding they were both written on the same sheet of paper. In the Goods of Taylor, 2 Robert. 411.

(*y*) 4 El. & Bl. 450.

(y^1) [Gray J. in Chase *v.* Kittredge, 11 Allen, 58.]

(y^2) [In New York, both the testator and the witnesses must sign at the end of

attestation of a will written on several sheets:

No provision is contained in the act as to wills written on several sheets. And, therefore, in this respect also, the decisions on the construction of the statute of frauds appear to be authorities; and they have established that if a will be written on several or even separate sheets, and the last alone be attested, the whole will is well executed, provided the whole be in the room, and although a part * may not have been seen by the witnesses; and that is a question for a jury whether all the papers constituting the will were in the room; and further, that the presumption is in the affirmative. (*z*) But where a will was signed by the testator and also by two witnesses in the margin of the first four sheets, but in the fifth and last sheet the signature of the testator alone appeared, probate of the will was refused, the court (Sir J. Dodson) being of opinion that the signatures on the earlier sheets were intended merely to guard against other sheets being interpolated, and there being nothing to show that the signatures in the margin were intended to attest that signature of the testator which alone would give effect to the paper as a will. (*a*)

in what cases unattested papers referred to by a will

Again, the authorities with respect to the statute of frauds appear to apply to the new act, upon the question, whether an unattested will or other paper may be rendered valid as a testamentary disposition, by being referred to and adopted by a will or codicil properly attested. Those

the will, and the latter *at the request* of the testator. See *ante*, 87, note (*l*[1]); Lewis *v.* Lewis, 13 Barb. 17; McDonough *v.* Loughlin, 20 Barb. 238; Watts *v.* Public Ad'r City of New York, 4 Wend. 168. This request may be implied as well as expressed. Brown *v.* De Selding, 4 Sandf. 10; Nelson *v.* McGiffert, 3 Barb. Ch. 158; Doe *v.* Roe, 2 Barb. Ch. 200; Seguine *v.* Seguine, 2 Barb. 385; Gilbert *v.* Knox, 52 N. Y. 125; Peck *v.* Cary, 27 N. Y. 9; Rutherford *v.* Rutherford, 1 Denio, 33; Coffin *v.* Coffin, 23 N. Y. 9.] So in Arkansas, Rev. St. Ark. c. 157, § 4. In Indiana, the witnesses to a will must attest and subscribe it in the presence of the testator and at his request. But it is not imperative that the request should proceed directly and immediately from the testator himself. It is sufficient if the request be made by the person employed by the testator to prepare his will in the presence and hearing of the testator and without objection from him. Bundy *v.* McKnight, 48 Ind. 502.]

(*z*) Bond *v.* Seawell, 3 Burr. 1773; Gregory *v.* The Queen's Proctor, 4 Notes of Cas. 620, 639; Marsh *v.* Marsh, 1 Sw. & Tr. 528; [Gass *v.* Gass, 3 Humph. 278; Wikoff's Appeal, 15 Penn. St. 281; Ela *v.* Edwards, 16 Gray, 91, 99; Tonnele *v.* Hall, 4 Comst. 140; Rees *v.* Rees, L. R. 3 P. & D. 84.]

(*a*) Ewen *v.* Franklin, Dea. & Sw. 7. [See Conboy *v.* Jennings, 1 N. Y. Sup. Ct. 622, cited *ante*, 80, note (*d*); Rees *v.* Rees, L. R. 3 P. & D. 84.]

authorities have established, that if the testator, in a will or codicil or other testamentary paper duly executed, refers to an existing unattested will or other paper, the instrument so referred to becomes part of the will. (*b*) But the ref-

or codicil duly executed become a part of it.

(*b*) Habergham *v.* Vincent, 2 Ves. jun. 228; Utterton *v.* Robins, 1 Ad. & El. 423; Doe *v.* Evans, 1 Cr. & M. 42. For cases decided since the new act in conformity with these authorities, see In the Goods of Smith, 2 Curt. 796; In the Goods of the Countess of Durham, 3 Curt. 57; In the Goods of Dickins, 3 Curt. 60; In the Goods of Willesford, 3 Curt. 77; In the Goods of Claringbull, 3 Notes of Cas. 1; In the Goods of Bacon, 3 Notes of Cas. 644; In the Goods of Smartt, 4 Notes of Cas. 38; Swete *v.* Pidsley, 6 Notes of Cas. 189; In the Goods of Dickin, 2 Robert. 298; In the Goods of Hally, 5 Notes of Cas. 510; In the Goods of Ash, Dea. & Sw. 181; In the Goods of Stewart, 3 Sw. & Tr. 192; In the Goods of Gill, L. R. 2 P. & D. 6; [Wikoff's Appeal, 15 Penn. St. 290; Chambers *v.* M'Daniel, 6 Ired. (N. Car.) 226; Loring *v.* Sumner, 23 Pick. 98; Dewey J. in Thayer *v.* Wellington, 9 Allen, 292; Wilbar *v.* Smith, 5 Allen, 194; Johnson *v.* Clarkson, 3 Rich. Eq. 305; Tonnele *v.* Hall, 4 Comst. 140; Beall *v.* Cunningham, 3 B. Mon. 390; Harvey *v.* Chouteau, 14 Misson. 587; Wood *v.* Sawyer, Phill. (N. Car.) Law, 251.] Where a will (dated in 1841) revoking all former wills referred to a clause in a former will, Sir H. Jenner Fust refused to grant probate of so much of the former will as was necessary to explain the latter will. In the Goods of Sinclair, 3 Curt. 746. However, where a will expressly annulling all former wills nevertheless referred to prior will put up in the same box with the present, "that in so far as any of the provisions therein contained may be applicable to existing circumstances at the time of my death, they may be carried into effect, and I recommend them accordingly with this view to the consideration of my executors," the same learned judge held that probate must be taken of the two papers as together containing the will. In the Goods of Duff, 4 Notes of Cas. 474. See, also, Jorden *v.* Jorden, 2 Notes of Cas. 388. The principles and practice, as to incorporating *in the probate* of wills of personalty papers sufficiently referred to by such wills but not *per se* testamentary, are fully discussed and explained in the judgment of Dr. Lushington, in Sheldon *v.* Sheldon, 1 Robert. 81; [In the Goods of Lord Howden, 43 L. J. (P. & M.) 26; In the Goods of Astor, L. R. 1 P. Div. 150; *post*, 107, note (*x*).] The state of the law on this subject is very unsatisfactory, especially in cases where the paper referred to is in the hands of another party who will not part with it, and the court has no power to enforce its production. See, further, on this subject, In the Goods of Dickins, 3 Curt. 60; In the Goods of Darby, 4 Notes of Cas. 427; In the Goods of Pewtner, 4 Notes of Cas. 479; In the Goods of Limerick, 2 Robert. 313; In the Goods of Battersea, Ib. 439. It should seem that the court may exercise a discretion in the matter, according to the exigencies of the case. In the Goods of Lord Lansdowne, 3 Sw. & Tr. 184; In the Goods of Dundas, 32 L. J. (N. S.) P. M. & A. 165; In the Goods of Sibthorpe, 1 L. R. 1 P. & D. 106. [In Phelps *v.* Robbins, 40 Conn. 250, the court were strongly inclined to the opinion that under the statute of Connecticut directing as to the mode of executing and attesting wills, papers referred to in a will, which are not descriptive or explanatory in their character, of property given by the will, but contain instructions with regard to the dispositions of the property, cannot be admitted and considered as a part of the will. See Tonnele *v.* Hall, 4 Comst. 146; Langdon *v.* Astor, 3 Duer, 477; S. C. 16 N. Y. 9; Van Cortland *v.* Kip, 1 Hill, 590; Thompson *v.* Quimby, 2 Bradf. Sur. 449.]

erence * must be distinct, so as, with the assistance of parol evidence when necessary and properly admissible, to exclude the possibility of mistake; (*c*) and the paper referred to must be already written. (*d*) Accordingly, in De Zichy Ferraris *v.* Lord Hertford, (*e*) where a testator by will, duly executed, directed his executors to pay legacies which he should give * by any testamentary writing signed by him, *whether witnessed or not*, it was held that such a clause could not give effect to legacies bequeathed by an unattested paper made after the new act came into operation. Again, in the same case, it appeared that the testator, before January 1, 1838 (at which date the new act came into operation) had made a will and several codicils, some duly executed, others only signed by the testator. After January 1, 1838, he made and signed a codicil (B), but the same was not duly attested: afterwards, by a codicil (C), duly executed and attested, he ratified and confirmed his will and "*codicils*." And it was held that the unattested codicil (B) was not so identified with the duly attested codicil (C) as to be ratified by, or incorporated with it; the word "codicils" being more completely and properly applicable to the codicils which had been made before January 1, 1838. (*f*) But in Ingoldby *v.* Ingoldby, (*g*) where a testator made a codicil to his will in 1845, attested by one witness, and the day before his death dictated a paper (which was afterwards duly executed according to the new act) as "another codicil to my will," without more specifically referring to the defectively executed instrument, it was held that both codicils were entitled to probate; and Sir H. Jenner Fust distinguished, in delivering his judgment, this case from that of

(*c*) Smart *v.* Prujean, 6 Ves. 565; 1 Cr. & M. 42; Dillon *v.* Harris, 4 Bligh N. S. 321; 1 Ad. & El. 423; Gordon *v.* Reay, 5 Sim. 274; In the Goods of Sotheron, 2 Curt. 831; Collier *v.* Langebear, 1 Notes of Cas. 369; In the Goods of Edwards, 6 Notes of Cas. 306; In the Goods of Lady Pembroke, Dea. & Sw. 182; In the Goods of Drummond, 2 Sw. & Tr. 8; In the Goods of Allnutt, 3 Sw. & Tr. 167; In the Goods of Brewin, 3 Sw. & Tr. 473; Dickinson *v.* Stidolph, 11 C. B. N. S. 341; Van Straubenzee *v.* Monck, 3 Sw. & Tr. 6. See, also, In the Goods of Sutherland, 35 L. J., P. M. & A. 82; In the Goods of Lady Truro, Ib. 89; In the Goods of Watkins, L. R. 1 P. & D. 19; In the Goods of Dallow, L. R. 1 P. & D. 189.

(*d*) Wilkinson *v.* Adam, 1 Ves. & B. 445; 1 Ad. & El. 423; [Phelps *v.* Robbins, 40 Conn. 250.]

(*e*) 3 Curt. 468; S. C. on appeal, 4 Moore P. C. 339, *nomine* Croker *v.* Lord Hartford.

(*f*) See, also, accord. Haynes *v.* Hill, 1 Robert. 795; S. C. 7 Notes of Cas. 256; In the Goods of Phelps, 6 Notes of Cas. 695; In the Goods of Hakewell, Dea. & Sw. 14; In the Goods of Mathias, 3 Sw. & Tr. 100.

(*g*) 4 Notes of Cas. 493.

Lord Hertford, where there were codicils duly executed and codicils not duly executed; there being in the present case only one paper which came under the description of codicil, and no other paper to which the testator could have referred under that description.

A will cannot create a power of disposition by a future unattested paper.

The decision in Lord Hertford's case of the former of the points above mentioned appears to have applied, under the existing law, to testamentary dispositions of all kinds, the doctrine which had been already established as to devises of * real estate under the statute of frauds, viz, that a testator cannot by his will prospectively create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil. (*h*)

Parol evidence admissible to identify the reference.

The doctrines above stated as to the incorporation of unattested papers with duly executed wills and codicils were fully confirmed, and very many of the cases which are collected in the notes to the foregoing pages were cited and discussed by Lord Kingsdown in delivering the opinion of the privy council in the case of Allen *v.* Maddock, (*i*) and his lordship proceeded to state the law as follows: "The result of the authorities, both before and since the late act, appears to be, that where there is a reference in a duly executed testamentary instrument to another testamentary instrument, by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified." (*k*)

(*h*) Johnson *v.* Ball, 5 De G. & Sm. 85, 91; [Thayer *v.* Wellington, 9 Allen, 283. See Dawson *v.* Dawson, 1 Cheves Eq. 148; Johnson *v.* Clarkson, 3 Rich. Eq. 305; Tonnele *v.* Hall, 4 Comst. 140; Chambers *v.* McDaniel, 6 Ired. Law, 226. The fact that the disposition of property, made by the unattested instrument, is to a public charity, does not give to it any greater legal effect, no charity being declared or indicated in the will. Thayer *v.* Wellington, *ubi supra.*] See, also, Briggs *v.* Penny, 3 De G. & S. 525.

(*i*) 11 Moore P. C. 427, 461. See, also, S. C. *coram* Sir J. Dodson, Dea. & Sw. 325; Anderson *v.* Anderson, L. R. 13 Eq. Ca. 381.

(*k*) See accord. In the Goods of Greves, 1 Sw. & Tr. 250; In the Goods of Almosnino, 1 Sw. & Tr. 508; In the Goods of McCabe, 2 Sw. & Tr. 478; Dickinson *v.* Stidolph, 11 C. B. N. S. 341; Van Straubenzee *v.* Monck, 3 Sw. & Tr. 6; In the Goods of Lukc, 34 L. J. (N. S.) P. M. & A. 105; [Phelps *v.* Robbins, 40 Conn. 250, 272, 273.]

Will referring to two memorandums and where one only can be found.

Where a will referred to two memorandums and only one could be found, it was held that effect must be given to that which was found, — for either the ordinary presumption must prevail, that the missing paper was destroyed by the testatrix *animo revocandi*, or the principle must be applied that the apparent testamentary intentions of a testator are not to be disappointed, merely because he made other dispositions of his property which are unknown by reason of the testamentary * paper which contained them not being forthcoming. (*l*)

Effect of the evidence of the attesting witnesses as to the circumstances of the attestation.

In acting upon the doctrines established by the authorities which there has been occasion to cite in the foregoing pages, no little difficulty has occurred with respect to the evidence given by the subscribed witnesses of the circumstances attending the attestation, particularly where the witnesses have been examined for the first time (as must very often happen) at a period long after the transaction. For it may be that they have no recollection at all on the subject, so that they are quite unable to affirm that the will was executed according to the new statute ; or it may be that one affirms and the other negatives, or that both negative, a compliance with the statute. The result of the cases in the prerogative court on this subject appears to be, that although, if a party be put to proof of a will, he must examine the attesting witnesses, (l^1) it is not absolutely necessary, for the validity of the will, to have their positive affirmative testimony that the will was actually signed or actually acknowledged in their presence before they subscribed. (*m*) For if the will on the face of it appears to be duly executed, the presumption is "*omnia esse rite acta ;*" even though there should be an attestation clause, omitting to state some essential particular, *e. g.* that the will was signed in the joint presence of both

(*l*) Dickinson *v.* Stidolph, 11 C. B. N. S. 341 ; [Wood *v.* Sawyer, Phill. (N. Car.) Law, 251. A testator, by a paper purporting to be a codicil to his will, bequeathed the balance at his banker's to his wife. No will was found, though one had been in the testator's possession previous to the date of the codicil; it was held that the codicil was independent of the will, and should be admitted to probate until the will was found. In re Greig, L. R. 1 P. & D. 72. See *ante*, 8, note (*q*).]

(l^1) [*Post*, 346, and note (d^3), 347; Jackson *v.* La Grange, 19 John. 386.]

(*m*) Blake *v.* Knight, 3 Curt. 547 ; Gregory *v.* The Queen's Proctor, 4 Notes of Cas. 620; Thompson *v.* Hall, 2 Robert. 426. [See *post*, 103, note (*w*), 346, 347, and notes.]

witnesses. (*n*) So in a case where an affidavit was required from the attesting witnesses (there being no attestation clause), as to the due execution of the will under the statute, and one of them deposed that he saw the deceased sign, in the presence of himself and the other witness, but the latter could not recollect whether the deceased signed * her name in his presence or not, probate was allowed to pass on motion. (*o*) Again, it has been held, that where the attesting witnesses depose contrary to each other (as where one swears that they attested the will in the presence of the testator, and the other that it was attested in another room; or where one of three attesting witnesses swears that the testator signed in their presence, and the two other swear that he did not), the court is not thereupon bound to pronounce against the validity of the will; but may either examine other witnesses (who were present at the execution though they did not subscribe the will) in order to arrive at the truth, (*p*) or may, upon the mere circumstances, give credence to the affirmative rather than to the negative testimony. (*q*) And even where both the attesting witnesses profess to remember the transaction, and state facts which show that the will was not duly executed (as that the testator did not make or acknowledge his signature in their joint presence, or the like), not only may this negative evidence be rebutted by the testimony of other witnesses, or by the proof of circumstances showing that the attesting witnesses are not to be credited; (*r*) but in this case also the court may justly come to a conclusion from the facts and circumstances which the attesting witnesses themselves state, that their memory fails them; and so the will may

(*n*) Burgoyne *v.* Showler, 1 Robert. 5. See, also, Croft *v.* Pawlett, 2 Stra. 1109; Hands *v.* James, Com. Rep. 531; Doe *v.* Davies, 9 Q. B. 648; Leech *v.* Bates, 1 Robert. 714; S. C. 6 Notes of Cas. 699. See, also, In the Goods of Leach, 6 Notes of Cas. 92; Hitch *v.* Wells, 10 Beav. 84; [Jauncey *v.* Thorne, 2 Barb. Ch. 40; Jackson *v.* La Grange, 19 John. 386; Chaffee *v.* Baptist Missionary Convention, 10 Paige, 85; Peebles *v.* Case, 2 Bradf. Sur. 226, 240; Clarke *v.* Dunnavant, 10 Leigh, 13; Griffith *v.* Griffith, 5 B. Mon. 511; Scribner *v.* Crane, 2 Paige, 147; Dunlap *v.* Dunlap, 4 Desaus. 305.]

(*o*) In the Goods of Hare, 3 Curt. 45; In the Goods of Attridge, 6 Notes of Cas. 597; [Trustees of Auburn Theological Seminary *v.* Calhoun, 62 Barb. 381; Nelson *v.* McGiffert, 3 Barb. Ch. 158.]

(*p*) Young *v.* Richards, 2 Curt. 371.

(*q*) Chambers *v.* The Queen's Proctor, 2 Curt. 433; Gove *v.* Gawen, 3 Curt. 151. Gregory *v.* The Queen's Proctor, 5 Notes of Cas. 620; Brenchley *v.* Lynn, 2 Robert. 441.

(*r*) See accord. Austen *v.* Willes, Bull. N. P. 264; Pike *v.* Badmering, cited 2 Stra. 1096, in Rice *v.* Oatfield, *post*, pt. 1. bk. IV. ch. III. § V.

be admitted to probate, notwithstanding their testimony. (*s*) Thus, in Cooper *v.* Bockett, (*t*) a will was held by Sir H. Jenner Fust, upon the circumstances of the case, to have been * signed before the witnesses subscribed, although one witness deposed that the testator signed *after* he and his fellow witness had subscribed, and the other witness deposed that the part of the will where the signature of the testator was written was blank when she, the witness, subscribed; and this decision was affirmed in the privy council. (*u*) On the same principles several subsequent cases of a similar character have been decided, which will be found collected in the note below. (*w*) Where, however, the attesting wit-

(*s*) 3 Curt. 663. See, also, Ib. 547; 1 Robert. 10; Baylis *v.* Sayer, 3 Notes of Cas. 22; Shield *v.* Shield, 4 Notes of Cas. 647; [*post*, 103, note (*w*), 346, 347; Jauncey *v.* Thorne, 2 Barb. Ch. 40; Peebles *v.* Case, 2 Bradf. Sur. 226, 240; Jackson *v.* Christman, 4 Wend. 277; Dudleys *v.* Dudleys, 3 Leigh, 436; Chaffee *v.* Baptist Missionary Convention, 10 Paige, 85; Lawrence *v.* Norton, 45 Barb. 448; Rush *v.* Purnell, 2 Harring. 448; Rigg *v.* Wilton, 13 Ill. 15.]

(*t*) 3 Curt. 648; S. C. 2 Notes of Cas. 391.

(*u*) 4 Notes of Cas. 685; 4 Moore P. C. 419.

(*w*) Foot *v.* Stanton, Dea. & Sw. 19; In the Goods of Thomas, 1 Sw. & Tr. 255; In the Goods of Holgate, 1 Sw. & Tr. 261; Trott *v.* Skidmore, 2 Sw. & Tr. 12; Lloyd *v.* Roberts, 12 Moore P. C. 158; Gwillim *v.* Gwillim, 3 Sw. & Tr. 200; Vinnicombe *v.* Butler, 3 Sw. & Tr. 580; In the Goods of Rees, 34 L. J., P. M. & A. 56; Wright *v.* Rogers, L. R. 1 P. & D. 678; Beckett *v.* Howe, L. R. 2 P. & D. 1. [In Tilden *v.* Tilden, 13 Gray, 110, a will was offered for probate, which was not in the handwriting of the testator, but was signed by him, with the usual attestation clause added, signed by three witnesses; one of the witnesses testified that he and the second witness signed the will at the same time, in the presence and at the request of the testator, without reading it or being told that it was a will, and that the testator directed him where to put his name, but did not himself sign it in his presence, nor say the signature was his. The second witness testified that the testator said to himself and the first witness, "Gentlemen, I wish you to witness my signature to my will," and then signed it, and they signed it, and his impression was that the third witness was then present. The third witness testified that the other witnesses did not sign in his presence; that the testator brought the paper to him, and requested him to witness it, which he did in the testator's presence, but without reading it; that he thought the names of the other witnesses were then upon it, but he could not say whether the testator's name was; and that the testator did not sign it in his presence, or say anything about his signature. Dewey J. after reviewing the testimony, said: "In the opinion of the court, the evidence was sufficient to authorize finding this instrument to have been duly signed by the testator, and duly attested as his last will and testament." Dewey J. in Ela *v.* Edwards, 16 Gray, 98, 99, said: "The obvious policy of the law, as heretofore declared in this commonwealth, has been that no man's will should be defeated through the want of memory on the part of the attesting witnesses to the facts essential to a good attestation." See Montgomery *v.* Perkins, 2 Met. (Ky.) 448;

nesses state facts (not contradicted by other testimony) which demonstrate that the will was not duly executed, and there are no circumstances on which the court can found an inference that the recollection of the witnesses is infirm on the subject, the will must be pronounced against, notwithstanding it should be all in the handwriting of the deceased, and be signed by him and profess to be duly attested. (*x*)

Finally, it must be borne in mind that a testamentary paper is not entitled to probate, unless the court is satisfied that the names of the alleged witnesses were subscribed on it for the purpose of attesting the testator's signature. (*y*)

Lawyer *v.* Smith, 8 Mich. 411; Trustees of Auburn Theological Seminary *v.* Calhoun, 62 Barb. 381; Dean *v.* Dean, 27 Vt. 746; Kirk *v.* Carr, 54 Penn. St. 285; Chaffee *v.* Baptist Missionary Convention, 10 Paige, 85. In Dewey *v.* Dewey, 1 Met. 349, 353, 354; Dewey J. said: "The question is not whether this witness now recollects the circumstance of the attestation, and can state it as a matter within his memory. If this were requisite, the validity of a will would depend, not upon the fact whether it was duly executed, but whether the testator had been fortunate in securing witnesses of retentive memories. The real question is, whether the witness did in fact properly attest it." Sears *v.* Dillingham, 12 Mass. 361, 362. In Clarke *v.* Dunnavant, 10 Leigh, 13, the court said, "that on a question of probate, the defect of memory of the witnesses will not be permitted to defeat the will, but that the court may, from circumstances, presume that the requisitions of the statute have been observed; and this they ought to presume from the fact of attestation, unless the inferences from that fact are rebutted by satisfactory evidence." See Dudleys *v.* Dudleys, 3 Leigh, 443; Lewis *v.* Lewis, 1 Kernan, 220; Nelson *v.* McGiffert, 3 Barb. Ch. 158; Newhouse *v.* Godwin, 17 Barb. 236; Cheeney *v.* Arnold, 18 Barb. 434; Boyd *v.* Cook, 3 Leigh, 32; Smith *v.* Jones, 6 Rand, 32; Vernon *v.* Kirk, 30 Penn. St. 218; Welty *v.* Welty, 8 Md. 15; Dean *v.* Dean, 27 Vt. 746; Jackson *v.* La Grange, 19 John. 386; Pate *v.* Joe, 3 J. J. Marsh. 113; Bailey *v.* Stiles, 1 Green Ch. 221; Gwinn *v.* Radford, 2 Litt. 137; Howard's Will, 5 Monroe, 199; Janncey *v.* Thorne, 2 Barb. Ch. 40; Peebles *v.* Case, 2 Bradf. Sur. 226, 240; Welch *v.* Welch, 9 Rich. (S. Car.) 133; Leckey *v.* Cunningham, 56 Penn. 370. But the rule is different, if the witness is able to recollect that things essential were positively wanting. Barr *v.* Graybill, 13 Penn. St. 396.] See, further, as to the execution by signature of wills, In the Goods of Swinford, L. R. 1 P. & D. 630.

(*x*) Pennant *v.* Kingscote, 3 Curt. 642. See, also, 1 Robert. 10; Beach *v.* Clarke, 7 Notes of Cas. 120; Croft *v.* Croft, 34 L. J., P. M. & A. 44; [Barr *v.* Graybill, 13 Penn. St. 396.]

(*y*) In the Goods of Wilson, L. R. 1 P. & D. 269; Eckersley *v.* Platt, L. R. 1 P. & D. 281; [*ante*, 88, note (*o*).]

SECTION III.

The Form of a Will.

"There is nothing that requires so little solemnity," said Lord Hardwicke, (*z*) "as the making of a will of personal *estate, according to the ecclesiastical laws of this realm; for there is scarcely any paper writing which they will not admit as such." (*z*[1])

Testamentary form not necessary.

Although much greater strictness seems to have prevailed in earlier times, it has been decided in a great variety of modern instances, that it is not necessary that an instrument should be of a testamentary form, in order to operate as a will. Indeed, it may be considered as a settled point, that the *form* of a paper does not affect its title to probate, provided it is the intention of the deceased that it should operate after his death. (*a*) Thus, a deed poll, or an indenture, (*b*) a deed of

(*z*) In Ross *v.* Ewer, 3 Atk. 163.

(*z*[1]) [The date is not a material part of a will. It may be held valid though it has no date, or a wrong one. Wright *v.* Wright, 5 Ind. 389.]

(*a*) By Sir John Nicholl, in Masterman *v.* Maberly, 2 Hagg. 248, and by Buller J. in Habergham *v.* Vincent, 2 Ves. jun. 231. See, also, Bagnall *v.* Downing, 2 Cas. temp. Lee, 3, and Sir J. Nicholl's judgment in Glynn *v.* Oglander, 2 Hagg. 432, and in the King's Proctor *v.* Daines, 3 Hagg. 220, 221; [Matter of Belcher, 66 N. Car. 51.] See, also, Ryan *v.* Daniel, 1 Y. & Coll. C. C. 60; Doe *v.* Cross, 8 Q. B. 714; [Patterson *v.* English, 71 Penn. St. 454; Succession of Ehrenberg, 21 La. Ann. 280; In re Wood's Estate, 36 Cal. 75; Robinson *v.* Schly, 6 Geo. 515; Walker *v.* Jones, 23 Ala. 448; Clingan *v.* Micheltree, 31 Penn. St. 25; Means *v.* Means, 5 Strobh. 167; Ragsdale *v.* Booker, 2 Strobh. Eq. 348; Brown *v.* Shand, 1 McCord, 409; Wheeler *v.* Durant, 3 Rich. Eq. 452; Jacks *v.* Henderson, 1 Desaus. 554; Jackson *v.* Jackson, 6 Dana, 657; Millican *v.* Millican, 24 Texas, 426; Allison *v.* Allison, 4 Hawks, 141; Carey *v.* Dennis, 13 Md. 1; Rohrer *v.* Stehman, 4 Watts, 442; Mosser *v.* Mosser, 32 Ala. 551; Dunn *v.* Bank of Mobile, 2 Ala. 152; Matter of Wood, 36 Cal. 75; Millege *v.* Lamar, 4 Desaus. 523; M'Gee *v.* M'Cants, 1 McCord, 517; Johnson *v.* Yancey, 20 Geo. 707; Symmes *v.* Arnold, 10 Geo. 506; Wilbar *v.* Smith, 5 Allen, 194; Leathers *v.* Greenacre, 53 Maine, 561; Lyles *v.* Lyles, 2 Nott & McC. 531. Whether a writing is a will, depends upon its contents, and not upon any declaration of the maker that it is a will when he executes it. Patterson *v.* English, 71 Penn. St. 454. A paper, in the form of a power of attorney, may be admitted to probate, if intended to operate as a testamentary disposition of property. Rose *v.* Quick, 30 Penn. St. 225.]

(*b*) Habergham *v.* Vincent, 2 Ves. jun. 231; Peacock *v.* Monk, 1 Ves. sen. 127; Tomkyns *v.* Ladbrooke, 2 Ves. sen. 591; Shingler *v.* Pemberton, 4 Hagg. 356; Consett *v.* Bell, 1 Y. & Coll. C. C. 569. See, also, Attorney General *v.* Jones, 3 Price, 360; Vin. Abr. tit. Devise, A. 2, 4; [Hixon *v.* Wytham, 1 Ch. Cas. 248; S. C. Finch, 195; Green *v.* Proude, 3 Keb. 310; S. C. 1 Mod. 117; Habergham *v.* Vincent, 2 Ves. jun. 204; S. C. 4 Bro. C. C. 355; Evans *v.* Smith, 28 Geo. 98; Gage *v.* Gage, 12 N. H. 371; Sheppard *v.* Nabors, 6 Ala. 634.]

gift, (*c*) a bond, (*d*) marriage settlements, (*e*) letters, (*f*) drafts on * bankers, (*g*) the assignment of a bond by indorsement, (*h*) receipts for stock and bills indorsed "for A. B." (*i*) an indorsement on a note, "I give this note to C. D." (*k*) promissory notes, and notes payable by executors to evade the legacy duty, (*l*) have

(*c*) Thorold *v.* Thorold, 1 Phillim. 1, and the cases there cited; Ousley *v.* Carroll, cited by Lord Hardwicke in Ward *v.* Turner, 2 Ves. sen. 440; Attorney General *v.* Jones, 3 Price, 368; [Gilham *v.* Mustin, 42 Ala. 365; Hall *v.* Bragg, 28 Geo. 330; Watkins *v.* Dean, 10 Yerger, 321.] But see, also, Tompson *v.* Browne, 3 My. & K. 32; Sheldon *v.* Sheldon, 1 Robert. 81, 83; Majoribanks *v.* Hovenden, 1 Drury, 11, *coram* Sugden C.; In the Goods of Webb, 3 Sw. & Tr. 482. [An instrument may be a deed or other contract in part, and a will as to the other part. Robinson *v.* Schly, 6 Geo. 515; Taylor *v.* Kelly, 31 Ala. 59.]

(*d*) Masterman *v.* Maberly, 2 Hagg. 235.

(*e*) Passmore *v.* Passmore, 1 Phillim. 218, in Sir J. Nicholl's judgment; Marnell *v.* Walter, T. T. 1796, cited in 2 Hagg. 247, by Sir John Nicholl. See, also, In the Goods of Knight, 2 Hagg. 554; [Hogg *v.* Lashley, stated 3 Hagg. 415, note.]

(*f*) Habberfield *v.* Browning, 4 Ves. 200, note; Repington *v.* Holland, 2 Cas. temp. Lee, 106; Passmore *v.* Passmore, 1 Phillim. 218; Drybutter *v.* Hodges, E. T. 1793, cited by Sir John Nicholl in 2 Hagg. 247; Denny *v.* Barton, 2 Phillim. 575; Manly *v.* Lakin, 1 Hagg. 130; In the Goods of Dunn, 1 Hagg. 488; In the Goods of Milligan, 2 Robert. 108; S. C. 7 Notes of Cas. 271; In the Goods of Parker, 2 Sw. & Tr. 375; In the Goods of Mundy, 2 Sw. & Tr. 119; Herbert *v.* Herbert, Dea. & Sw. 10; [Boyd *v.* Boyd, 6 Gill & J. 25; Morrell *v.* Dickey, 1 John. Ch. 153; Leathers *v.* Greenacre, 53 Maine, 561. A paper written somewhat in the form of a letter, which stated, "If I should not come to you again, my son shall pay, &c." it having been proved that the writer went to Kentucky and that he returned and lived for several weeks thereafter, it was held that inasmuch as the writer had returned before his death, the paper could not be admitted to probate as his last will. Wagner *v.* M'Donald, 2 Harr. & J. 346. To the same effect is Todd's Will, 2 Watts & S. 145, where a somewhat similar informal paper was refused probate. The opinion of Chief Justice Gibson, in this last case is instructive on the point.] Where the language is, "I appoint *you* my executor, &c." without naming any person in the body of the letter, probate will be granted to the person named in the address superscribed on the outside. In the Goods of Wedge, Prerog. M. T. 1842, 2 Notes of Cas. 14; In the Goods of Taylor, Prerog. M. T. 1845, 4 Notes of Cas. 290.

(*g*) Bartholomew *v.* Henley, 3 Phillim. 317; Gladstone *v.* Tempest, 2 Curt. 650; Walsh *v.* Gladstone, 1 Phill. Ch. C. 294; Jones *v.* Nicholay, 2 Robert. 288; S. C. 7 Notes of Cas. 564; In the Goods of Marsden, 1 Sw. & Tr. 542.

(*h*) Musgrave *v.* Down, T. T. 1784, cited by the judge in 2 Hagg. 247. [Where the payee of a note made on it the following indorsement: "If I am not living at the time this note is paid, I order the contents to be paid to A. H.," and having signed it, afterwards died before the note was paid, it was held that the indorsement was testamentary, and entitled to probate as a will. Hunt *v.* Hunt, 4 N. H. 434; Jackson *v.* Jackson, 6 Dana, 30. See Plumstead's Appeal, 4 Serg. & R. 545.]

(*i*) Sabine *v.* Goate & Church, 1782. cited by the judge in 2 Hagg. 247.

(*k*) Chaworth *v.* Beech, 4 Ves. 565. [See Mitchell *v.* Smith, 4 De G., J. & S. 422.]

(*l*) Maxee *v.* Shute, H. T. 1799, cited by the judge in 2 Hagg. 247; Longstaff *v.* Rennison, 1 Drew. 28; Gough *v.* Findon, 7 Exch. 48. See, further, as to con-

been held to be testamentary. So a memorandum in a paper in the following words, "The above named bonds were restored by A., and are placed in the hands of B. in trust for the use of C. after my decease," was held to be testamentary, notwithstanding a delivery of the bonds had taken place, and in the donor's last illness. (*m*)

The supposed exercise of a power may operate as a mere will.

So if a man intends by will to execute, and purports to execute a power, and it turns out that the power is not well created, or does not exist, yet if he has a right to dispose of the fund, the will may operate, and ought to be admitted to probate; for in a will no particular words are necessary to pass the property, and his authority to give it shall come in aid of his intended disposition of it. (*n*)

Principles on which instruments not purporting to be testamentary may be admitted to probate:

And it must be further observed, that it is not necessary for the validity of a testamentary instrument, that the testator should intend to perform, or be aware that he had performed a testamentary act: (*o*) for it is settled law, that if the paper contains a disposition of the property to be made *after death*, though it were meant to operate as a settlement or a deed of gift, or a bond; though such paper * were not intended to be a will or other testamentary instrument, but an instrument of a different shape, yet if it cannot operate in the latter, it may nevertheless operate in the former character. (*p*)

veyances for the purposes of evading the legacy duty, *post*, pt. III. bk. v. ch. II.

(*m*) Tapley *v.* Kent, 1 Robert. 400. [The questions which arose in the class of cases referred to in the text, though less likely to arise with respect to wills coming within the operation of the recent act, are not altogether precluded by it. Thus, in Jones *v.* Nicholay, 2 Rob. 288; 14 Jur. 675, a person on his death-bed executed, with all the formalities necessary to a proper will, a paper in the form of a bill of exchange, and it was held that such paper was entitled to probate as a codicil to his will. Again, in the case of Doe *v.* Cross, 8 Q. B. 714, an instrument in the form of a power of attorney, given by a person abroad, appointing his mother to receive the rent of his lands, and disposing of his lands in case of his death before his return to England, being properly executed as a will, was held to be a good will of the land in question. The court seemed to think that there was no objection to an instrument operating partly *in præsenti* as a deed, and partly *in futuro* as a will. See Robinson *v.* Schly, 6 Geo. 515; Dawson *v.* Dawson, 2 Strobh. Eq. 34. But it is said that the same paper cannot operate both as a deed and as a will. Thompson *v.* Johnson, 19 Ala. 59.]

(*n*) Southall *v.* Jones, 1 Sw. & Tr. 298.

(*o*) Bartholomew *v.* Henley, 3 Phillim. 318. [But an instrument intended to operate as a deed cannot take effect as a will, though invalid as a deed. Edwards *v.* Smith, 35 Miss. 197. See Simmons *v.* Augustin, 3 Porter, 69; Horn *v.* Gartman, 1 Branch (Florida), 63; Golding *v.* Golding, 24 Ala. 122.]

(*p*) By Sir John Nicholl in Masterman

But no case has gone the length of deciding, that because an instrument cannot operate in the form given to it, it *must* operate as a will. (p^1) The true principle to be deduced from the authorities appears to be, that, if there is proof, either in the paper itself, or from clear evidence *dehors*, (q) first, that it was the intention of the writer of the paper to convey the benefits by the instrument which would be conveyed by it if considered as a will; secondly, that death was the event that was to give effect to it; then whatever may be its form, it may be admitted to probate as testamentary. (r) And there seems to be this distinction

v. Maberly, 2 Hagg. 247; In the Goods of Montgomery, 5 Notes of Cas. 99; In the Goods of Morgan, L. R. 1 P. & D. 214. [See Crain *v.* Crain, 21 Texas, 790; Lucas *v.* Parsons, 24 Geo. 640.] In these cases the instrument was intended by the deceased to be operative, though not in a testamentary way. But a will, though formally executed as a will, will not be valid if there were no *animus testandi;* and therefore it may be shown in evidence that it was written in jest, or without any intention of making an operative will. Nicholls *v.* Nicholls, 2 Phillim. 180; Lister *v.* Smith, 3 Sw. & Tr. 282. See, also, Trevelyan *v.* Trevelyan, 1 Phillim. 149; [Swett *v.* Boardman, 1 Mass. 258; Combs *v.* Jolly, 3 N. J. Eq. 625; Ex parte Lindsay, 2 Bradf. Sur. 204.] See, also, as to the necessity of there being an *animus testandi,* Shep. Touch. 404; Swinb. pt. 1, s. 3, pl. 23; Taylor *v.* D'Egville, 3 Hagg. 206. But if an instrument, upon the face of it, is manifestly executed as a will, the court of probate cannot look at its effect; it must have legal operation, without regard to the intention as to effect. 3 Hagg. 231; Philips *v.* Thornton, 3 Hagg. 852.

(p^1) [Edwards *v.* Smith, 35 Miss. 197.]

(q) If the instrument be equivocal or silent, it may be proved by extrinsic circumstances to have been intended to operate as a testamentary disposition. 3 Hagg. 221; Coventry *v.* Williams, 3 Curt. 787, 790, 791; Jones *v.* Nicholay, 2 Robert. 292, where Sir H. Jenner Fust said, "Evidence to show *quo intuitu* has always been received in a court of probate." In the Goods of English, 3 Sw. & Tr. 586; Cock *v.* Cooke, L. R. 1 P. & D. 241; Robertson *v.* Smith, L. R. 2 P. & D. 43; [Gage *v.* Gage, 12 N. H. 371, 381; Wareham *v.* Sellers, 9 Gill & J. 98; Witherspoon *v.* Witherspoon, 2 McCord, 520. As to the admissibility of the declarations of the maker of the instrument, to show his intention, see Gage *v.* Gage, *supra;* Harrington *v.* Bradford, Walker, 520.] See, also, *post,* pt. I. bk. IV. ch. III. § V. for other cases as to the reception of parol evidence respecting the testator's intention.

(r) The King's Proctor *v.* Daines, 3 Hagg. 221; Jones *v.* Nicholay, 2 Robert. 288; S. C. 7 Notes of Cas. 564; [Millege *v.* Lamar, 4 Desaus. 617; Ingram *v.* Porter, 4 McCord, 198; Singleton *v.* Bremar, 4 McCord, 12; Wheeler *v.* Durant, 3 Rich. Eq. 452; Symmes *v.* Arnold, 10 Geo. 506; Gage *v.* Gage, 12 N. H. 371.] A duly executed paper in these terms, "I wish my sister to have my bank-book for her own use," was held to be testamentary, the court being satisfied on the evidence that the deceased at the time of its execution intended it to take effect after her death, and not as a present deed of gift. Cock *v.* Cooke, L. R. 1 P. & D. 241; In the Goods of Coles, L. R. 2 P. & D. 362. [An instrument having some of the features of a will, and some of a deed, executed by a native of Scotland, about to remove to the United States to take possession of an estate there, and made to prevent disputes in case of his death, is contingent, and cannot operate to defeat the claims of his wife, whom he married

in * the consideration of papers which are in their terms dispositive, and those which are of an equivocal character; that the first will be entitled to probate, unless they are proved not to have been written *animo testandi;* whilst, in the latter, the *animus* must be proved by the party claiming under them. (*s*)

If a testator by a subsequent paper say he has bequeathed by former instrument that which he has not bequeathed, the subsequent paper would, it should seem, be admitted to probate, as being a declaration of his will at the time he made it, to dispose by the will. (*t*)

they must depend on the death of the maker for consummation.

But it is essentially requisite that the instrument should be made to *depend upon the event of death*, as necessary to *consummate* it; for where a paper directs a benefit to be conferred *inter vivos*, without reference, expressly or impliedly, to the death of the party conferring it, it cannot be established as testamentary. (*u*)

Several instruments of different natures may constitute altogether a will.

The ecclesiastical courts do not confine the testamentary disposition to a single instrument: but they will consider several, of different natures and forms, as constituting altogether the will of the deceased. (*x*)

subsequently in the United States. Jacks *v.* Henderson, 1 Desaus. 543. See Wagner *v.* M'Donald, 2 Harr. & J. 346; Stewart *v.* Stewart, 5 Conn. 317; Pitkin *v.* Pitkin, 7 Conn. 315.]

(*s*) 3 Hagg. 221; Griffin *v.* Ferrard, 1 Curt. 199; Coventry *v.* Williams, 3 Curt. 790, 791; Thorncroft *v.* Lashmar, 2 Sw. & Tr. 794; [Lyles *v.* Lyles, 2 Nott & McC. 531; Wareham *v.* Sellers, 9 Gill & J. 98; Crain *v.* Crain, 21 Texas, 790. A deed in the ordinary form, delivered for record, to take effect only on the death of the maker, if not witnessed so as to be valid as a will, may still be good as a deed. Moye *v.* Kittrell, 29 Geo. 677.] See, also, In the Goods of Stoddart, 2 Sw. & Tr. 356.

(*t*) Druce *v.* Denison, 6 Ves. 397, in the judgment of Lord Eldon C. Bibin *v.* Walker, Ambl. 661; Godolph. pt. 3, c. 3, s. 3; Jordan *v.* Fortescue, 10 Beav. 259; [Van Deuzer *v.* Gordon, 39 Vt. 111.] But see Frederick *v.* Hall, 1 Ves. jun. 396.

(*u*) Glynn *v.* Oglander, 2 Hagg. 428; The King's Proctor *v.* Daines, 3 Hagg. 218; Shingler *v.* Pemberton, 4 Hagg. 359. See, also, Tompson *v.* Browne, 3 My. & K. 32; Fletcher *v.* Fletcher, 4 Hare, 67; [Hamilton *v.* Peaces, 2 Desaus. 92; Robey *v.* Hannon, 6 Gill, 463; Thompson *v.* Johnson, 19 Ala. 59.]

(*x*) Sandford *v.* Vaughan, 1 Phillim. 39, 128; Harley *v.* Bagshaw, 2 Phillim. 48; Masterman *v.* Maberly, 2 Hagg. 235; Beauchamp *v.* Lord Hardwicke, 5 Ves. 280; 8 Vin. Abr. Devise, A. 3; Hitchings *v.* Wood, 2 Moore P. C. 355; In the Goods of Luffman, 5 Notes of Cas. 183; Foley *v.* Vernon, 7 Notes of Cas. 119; [Forman's Will, 54 Barb. 274; S. C. 1 Tuck. (N. Y. Sur.) 205; Wikoff's Appeal, 15 Penn. St. 281; Negley *v.* Gard, 20 Ohio, 310; Tonnele *v.* Hall, 4 Comst. 140; Phelps *v.* Robbins, 40 Conn. 250, 271; Van Wert *v.* Benedict, 1 Bradf. Sur. 114.] Where probate is granted of two or more testamentary papers, as together containing the last will of the deceased, it is the practice to make the grant to all

* SECTION IV.

The Language of a Will.

Language of a testamentary paper.

The rules of ecclesiastical courts are not more scrupulous with respect to the language, than the nature, of instruments which they allow to operate as testamentary. It is not held necessary that the directions contained in them, how property should be disposed of in the event of death, should be in direct and imperative terms: wishes and requests have been deemed sufficient. (*y*) It has already appeared that instructions

the executors named in the several papers. In the Goods of Morgan, L. R. 1 P. & D. 323. [If the testator, in his will, refers expressly and clearly to another paper, and the will is duly executed and attested, that paper, whether attested or not, makes part of the will; but the instrument referred to must be distinctly and manifestly described and identified, so that the court can act without danger of mistake in connecting the same with the will, and the reference must be to a paper already written. Chambers *v.* McDaniel, 6 Ired. Law, 226; Pollock *v.* Glassell, 2 Grattan, 439; Tonnele *v.* Hall, 4 N. Y. 140; Bailey *v.* Bailey, 7 Jones (N. Car.) Law, 44; Gabrill *v.* Barr, 5 Penn. St. 441; Zimmerman *v.* Zimmerman, 23 Penn. St. 375. It was, nevertheless, held in a late case in England, — where an American, by a will and codicils, disposed of his property generally, and by a second will, in which he named separate executors of moneys he had invested in the British funds, and expressed a distinct wish that the British, being this second will, should take effect as a separate testamentary disposition of property independent of and disconnected from his general will, — that it was unnecessary to incorporate the American will, which was very bulky, in the English probate, but that an authenticated copy of the American will and codicils should be filed in the registry, and a note be added to the English probate to the effect that such copy had been so filed. In the Goods of Astor, L. R. 1 P. Div. 150.]

(*y*) Passmore *v.* Passmore, 1 Phillim. 218, in Sir J. Nicholl's judgment. Generally speaking, when property is given absolutely to any person, and the same person is by the giver "recommended," or "entreated," or "requested," or "wished" to dispose of that property in favor of another, the recommendation, request, or wish, is held imperative and to create a trust. See the cases cited in Knight *v.* Knight, 3 Beav. 148, and Knight *v.* Broughton, 11 Cl. & Fin. 513. But this rule does not apply, where it appears clearly from the context that the first taker is intended to have a discretionary power to withdraw any part of the fund from the object of the wish or request, or that he is in any way to have an option to control or defeat the desire expressed. Wynne *v.* Hawkins, 1 Bro. C. C. 179; Malim *v.* Keighley, 2 Ves. jun. 333; 3 Beav. 173, 174; 11 Cl. & Fin. 551, 552. See, further, on this subject, Young *v.* Martin, 2 Y. & Coll. C. C. 582; Corporation of Gloucester *v.* Wood, 3 Hare, 131; Knott *v.* Cottee, 2 Phill. Ch. C. 192; White *v.* Briggs, 15 Sim. 33; Constable *v.* Bull, 3 De G. & S. 411; Williams *v.* Williams, 1 Sim. N. S. 358; Briggs *v.* Penny, 3 Mac. & G. 546; Corporation of Gloucester *v.* Osborn, 1 H. L. Cas. 272; Huskisson *v.* Bridge, 4 De G. & S. 245; Green *v.* Marsden, 1 Drew. 646; Palmer *v.* Simmons, 2 Drew. 221; Reeves *v.* Baker, 18 Beav. 372; Bernard *v.* Marstell, Johns. 276; Eaton *v.* Watts, L. R. 4 Eq. Ca. 151. [The question to be set-

for a will may be as operative as a will itself: (*z*) and that a will made by interrogatories is * valid. (*a*) So, although if a paper be superscribed "heads of a will, &c." or "plan of a will," the inference would be from this, that it was a paper from which it was intended that a more formal will should be drawn out, (*b*) yet in a case where such an instrument was dated, and signed, and indorsed "Intended will," and alterations in it afterwards made in a formal manner, and the deceased declared, upon being taken ill, "that he had written the heads of his will, and signed it, and that *it would do very well;*" the paper was established as a will. (*c*)

In Hattatt *v.* Hattatt, (*d*) an entry in an account book, containing a full disposition of the property, and the appointment of an executor, dated eight months before the testatrix's death (which

tled is, whether the testator, by the expression of his confidence or wishes, intended to impose a duty upon the devisee or legatee, or to leave him to act at his discretion. Every case depends upon the construction the court gives to the language of the will. Negroes *v.* Plummer, 17 Md. 165, 176; Bull *v.* Bull, 8 Conn. 47; Gilbert *v.* Chapin, 19 Conn. 342; Harper *v.* Phelps, 21 Conn. 257; Warner *v.* Bates, 98 Mass. 274, 277; Whipple *v.* Adams, 1 Met. 444; Homer *v.* Shelton, 2 Met. 194, 206; Collins *v.* Carlisle, 7 B. Mon. 14; Coate's Appeal, 2 Barr, 129; Pennock's Estate, 20 Penn. St. 268; Harrison *v.* Harrison, 2 Grattan, 1; Ellis *v.* Ellis, 15 Ala. 296; Steele *v.* Livesay, 11 Grattan, 454; Van Amee *v.* Jackson, 35 Vt. 173; Shepherd *v.* Nottidge, 2 J. & H. 766; Bonser *v.* Kinnear, 2 Giff. 195; Barrs *v.* Fewkes, 12 W. R. 666; 13 W. R. 987; Lewin Trusts (5th Eng. ed.), 104 *et seq.;* McKonkey's Appeal, 13 Penn. St. 253; 1 Jarman Wills (3d Eng. ed.), 354 *et seq.;* Knight *v.* Boughton, 11 Cl. & Fin. (Am. ed.) 513, note (1); Wells *v.* Doane, 3 Gray, 201; Brunson *v.* Hunter, 2 Hill Ch. 490; Hart *v.* Hart, 2 Desaus. 83; Van Duyne *v.* Van Duyne, 1 McCarter, 405; Burt *v.* Herron, 66 Penn. St. 402; McRee *v.* Means, 34 Ala. 364; Lines *v.* Darden, 5 Florida, 74; Lucas *v.* Lockhart, 10 Sm. & M. 470; Ingram *v.* Fraley, 29 Geo. 553; Dominick *v.* Sayre, 3 Sandf. 560; Withers *v.* Yeadon, 1 Rich. Eq. 324. The word "will" is imperative and not precatory. McRee *v.* Means, 34 Ala. 364. A clause in a will, expressing the testator's "will and intention that W. may dispose of the furniture, plate, pictures, and other articles now in my house absolutely, as he may deem expedient, in accordance with my wishes as otherwise communicated by me to him," gives W. the absolute property in these articles, even though the will contain a previous residuary bequest to W. for life, with remainder over. Wells *v.* Doane, 3 Gray, 201, 204, and cases cited.]

(*z*) See *ante*, 70, 71; and Habberfield *v.* Browning, 4 Ves. 200, note, where the instructions were sent in a letter, and the letter established as a will.

(*a*) Swinb. pt. 2, s. 25, pl. 9; Green *v.* Skipworth, 1 Phillim. 53. But see Cranvel *v.* Saunders, Cro. Jac. 497.

(*b*) 1 Phillim. 350.

(*c*) Bone *v.* Spear, 1 Phillim. 345. [A will must be complete on its face, or, if incomplete, it must appear that it was intended to operate as a will in its unfinished state. Patterson *v.* English, 71 Penn. St. 454; *ante*, 68–75, and notes.] See, also, the cases collected, *post*, pt. 1. bk. IV. ch. III. § V.

(*d*) 4 Hagg. 211.

was sudden), subscribed, and carefully preserved, was pronounced for, and probate decreed, though containing these words, "I intend this as a sketch of my will, which I intend making on my return home."

In Torre *v.* Castle, (*e*) the question was, whether a document was entitled to probate as a part of the testamentary dispositions of Lord Scarborough. It was all in the handwriting of the deceased, and was subscribed by him, and dated 11th of October, 1834. At the commencement it was described to be "head of instructions to my solicitor, J. Lee, to add to my will the codicil following." It went on to state what the contents of the codicil were to be. There were initials for several of the legatees, with the words "&c. &c." in many parts of it; but it concluded in these words: "this is my last will and testament, Scarborough," and was indorsed "Mem^m^ to J. Lee, — Will — Oct. 11, 1834." Sir H. Jenner Fust pronounced for the validity of this paper, and decreed probate thereof, being satisfied by parol evidence *and the circumstances of the case, that the deceased intended the paper to have full operation, in case anything should happen to him before he had an opportunity of going, or before it was convenient to him to go to Mr. Lee for the purpose of having a more formal instrument prepared. (*f*) And on appeal to the privy council, the judicial committee affirmed this decision. (*g*) But it should be remarked, that the paper, in this case, was not regarded as amounting to an actual testamentary disposition, and entitled to probate *proprio vigore*, but as *instructions*, fixed and final, containing the settled intentions of the writer, up to the last moments of his life, and only prevented from being formally carried into execution by his own sudden death. (*h*)

It should be observed, that in these cases, where the character of the paper is upon the face of it equivocal, the case is opened to the admission of parol evidence of the testator's intention, as to whether he meant the instrument as memoranda for a future disposition, or to execute it as a final will. (*i*) This subject will

(*e*) 1 Curt. 303.

(*f*) See, also, Popple *v.* Cunison, 1 Add. 377; and Barwick *v.* Mullings, 2 Hagg. 225, where a paper commencing, "This is a memorandum of my intended will," was admitted to probate. See, also, Price *v.* Scott, 1 Cas. temp. Lee, 12.

(*g*) Torre *v.* Castle, 2 Moore P. C. C. 133.

(*h*) Torre *v.* Castle, 2 Moore P. C. C. 175. See *ante*, 70–72.

(*i*) Mathews *v.* Warner, 4 Ves. 186; 5 Ves. 23; Mitchell *v.* Mitchell, 2 Hagg. 74; Coppin *v.* Dillon, 4 Hagg. 361; Sal-

be found more fully considered in a subsequent part of this treatise. (*k*)

It is immaterial in what language a will is written, whether in Latin, French, or any other tongue. (*l*) If the testator be a domiciled Englishman, the effect of the foreign tongue employed can only be looked at in order to ascertain what are the equivalent expressions in English. (*m*)

* SECTION V.

Of the Materials with which a Will may be written, and of the Person who may be the Writer: and herewith of a Will prepared by a Legatee.

Pencil will, or alterations in will.

There are scarcely any restrictions in the ecclesiastical law, with respect to the materials on which, or by which, a testamentary document may be executed. (*n*) Thus, a will or codicil, or any part thereof, may be made or altered in pencil as well as in ink. (*o*) But when the question is, whether the testator intended the paper as a final declaration of his mind, and as testamentary, or whether it was merely preparatory to a more formal disposition, the material with which it is written becomes a most important circumstance. (*p*) And it has been held that the general presumption and probability are, that where alterations in pencil only are made, they are deliberative; where in ink, they are final and absolute. (*q*)

mon *v.* Hays, 4 Hagg. 382; Torre *v.* Castle, 2 Moore P. C. C. 154, per Bosanquet J.; *ante*, 106, note (*q*).

(*k*) *Post*, pt. 1. bk. IV. ch. III. § V.

(*l*) Swinb. pt. 4, s. 25, pl. 3. See, as to a will in a foreign language, Foubert *v.* Cresseron, Show. P. C. 194.

(*m*) Reynolds *v.* Kortright, 18 Beav. 417.

(*n*) Swinb. pt. 4, s. 25, pl. 2.

(*o*) Rymes *v.* Clarkson, 1 Phillim. 35; Green *v.* Skipworth, 1 Phillim. 53; Dickenson *v.* Dickenson, 2 Phillim. 173; In the Goods of Dyer, 1 Hagg. 219; Mence *v.* Mence, 18 Ves. 348. [The question whether, under the wills act of Pennsylvania, a paper written in pencil can be a will, was raised, but not decided, in Patterson *v.* English, 71 Penn. St. 454. But in Read *v.* Woodward, C. Pleas Court of Chester Co. reported 8 Chicago Legal News, it was held that a will written on a slate is not valid. 2 Central Law Jour. 649.]

(*p*) 1 Phillim. 35; Parkin *v.* Bainbridge, 3 Phillim. 321; Lavender *v.* Adams, 1 Add. 406. [See Patterson *v.* English, 71 Penn. St. 454.]

(*q*) Hawkes *v.* Hawkes, 1 Hagg. 322; Edward *v.* Astley, 1 Hagg. 490; Ravenscroft *v.* Hunter, 2 Hagg. 68; Bateman *v.* Pennington, 3 Moore P. C. C. 223; Francis *v.* Grover, 5 Hare, 39; In the Goods of Hall, L. R. 2 P. & D. 256; In the Goods of Adams, L. R. 2 P. & D. 367.

By the civil law, if a person wrote a will in his own favor, the instrument was rendered void. (*r*) That rule has not been adopted in its fullest extent by the law of England, which only holds that where the person who prepares the instrument or conducts its execution, is himself benefited by its dispositions, this circumstance creates a presumption against the act, and renders necessary very clear proof of volition and capacity as well as of a knowledge by the testator of the contents of the instrument. (*s*) Nor does the * ecclesiastical law of this realm determine that the act is absolutely void, even though the person making the will in his own favor is the agent and attorney of the testator; but the suspicion is thereby, for obvious reasons, greatly increased. (*t*)

Where a will is written or prepared by a party in his own favor:

when he is the agent and attorney of the testator.

This doctrine has lately been fully considered by the lords of the judicial committee of the privy council, in the case of Barry

(*r*) Dig. lib. 48, t. 10, s. 15, and lib. 34, s. 8.

(*s*) Paske *v.* Ollatt, 2 Phillim. 324; Ingram *v.* Wyatt, 1 Hagg. 391; Barton *v.* Robins, 3 Phillim. 456, note; In the Goods of Edwards, 1 Sw. & Tr. 10; [Tomkins *v.* Tomkins, 1 Bailey, 92; Duffield *v.* Morris, 2 Harring. 384; Newhouse *v.* Godwin, 17 Barh. 236; Crispell *v.* Dubois, 4 Barb. 393; Beall *v.* Mann, 5 Geo. 456; Clark *v.* Fisher, 1 Paige, 171; Hill *v.* Barge, 12 Ala. 687; Breed *v.* Pratt, 18 Pick. 115, 117; 1 Jarman Wills (3d Eng. ed.), 30; Jones *v.* Godrich, 5 Moore P. C. C. 16. In Coffin *v.* Coffin, 23 N. Y. 9, the will was sustained, although the person who prepared it for the testator was appointed one of the executors and took a legacy of a moderate amount under it. In this case the proof of capacity and of freedom from influence was not entirely free from doubt, but the provisions of the will showed no want of harmony with the well-considered wishes and purposes of the testator. In Gerrish *v.* Nason, 22 Maine, 438, the person who drew the will was named in it as executor, and was a legatee. The testatrix was of doubtful capacity, and did not appear to have known the contents of the paper she had executed. The court pronounced against the will, although the fact that the person who drew the will took an interest under it was not noticed in the opinion given.] But it must not be understood that the rule is that *direct* evidence that the testator knew the contents [of his will] is necessary; circumstantial evidence may be sufficient for this purpose. Raworth *v.* Marriott, 1 My. & K. 643; [McNinch *v.* Charles, 2 Rich. (S. Car.) 229; Day *v.* Day, 2 Green Ch. (N. J.) 549.] As to the nature and extent of the scrutiny which ought to be instituted into cases of this description, see the learned note of Dr. Phillimore, 1 Cas. temp. Lee, 238, and the cases there collected. See, also, Durling *v.* Loveland, 2 Curt. 225; Wrench *v.* Murray, 3 Curt. 623.

(*t*) 4 Hagg. 391; Wheeler *v.* Alderson, 3 Hagg. 587. See, also, Hitchings *v.* Wood, 3 Moore P. C. C. 355; Croft *v.* Day, 1 Curt. 784; S. C. *nomine* Dufaur *v.* Croft, 3 Moore P. C. C. 136. In some cases the conduct of a professional man who prepared a will has been held fraudulent, and the will inoperative, by reason of his allowing the testator to remain in ignorance, which influenced the will in favor of himself. See Segrave *v.* Kirkwan, 1 Beat. 157; Hindson *v.* Weatherill, 1 Sm. & G. 609; 5 De G., M. & G. 301; Walker *v.* Smith, 29 Beav. 394. See, also, Bulkeley *v.* Wilford, 2 Cl. & F. 102; Walkers *v.* Thorn, 22 Beav. 547; *post*, pt. 1. bk. VI. ch. I.

v. Butlin. (*u*) And it should seem that the terms in which the rule above stated has been laid down, require some qualification. In delivering the judgment of their lordships in that case, Parke B. made the following observations: "The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute, so far as they are necessary to the determination of the present appeal, and have been acquiesced in on both sides. These rules are two; the first is, that the *onus probandi* lies upon the party propounding a will, who must satisfy the conscience of the court that the instrument propounded is the last will of a free and capable testator; (*u*[1]) the second is, that * if a party writes or prepares a will under which he takes a benefit, that is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased. These principles, to the extent that I have stated, are well established. The former is undisputed; the latter is laid down by Sir John Nicholl, in substance, in Paske *v.* Ollatt, Ingham *v.* Wyatt, and Billinghurst *v.* Vickers; and is stated by that very learned and experienced judge to have been handed down to him by his predecessors; and this tribunal has sanctioned and acted upon it in a recent case, that of Baker *v.* Batt. (*x*) Their lordships are fully sensible of the wisdom of this rule, and of the importance of its practical application on all occasions. At the same time they think it fit to observe, especially as there has been some discussion upon this point towards the close of this inquiry, that some of the expressions reported to have been used by Sir John Nicholl, in laying down this doctrine, appear to them to be somewhat equivocal, and capable of leading into error in the investigation and decision of questions of this nature. It is said that, where the party benefited prepares the will, 'the presumption and *onus probandi* is against the instrument, and the proof must go not merely to the act of signing, but to the knowledge of the contents of the paper;' and that, 'where the capacity is doubtful, there must be proof of instructions or reading over.' If by these expressions

(*u*) Privy Council, Dec. 24, 1838; 1 Curt. 637; S. C. 2 Moore P. C. C. 480.

(*u*[1]) [*Ante*, 20, 21, and notes.]

(*x*) 2 Moore P. C. C. 317. See, also, Hitchings *v.* Wood, 2 Moore P. C. C. 355, 436.

the learned judge meant merely to say, that there are cases of wills prepared by a legatee so pregnant with suspicion, that they ought to be pronounced against in the absence of evidence in support of them extending to clear proof of actual knowledge of the contents by the supposed testator, and that the instructions proceeding from him, or the reading over the instrument by or to him, are the most satisfactory * evidence of such knowledge, we fully concur in the proposition so understood. In all probability, the learned judge intended no more than this. But if the words used are to be construed strictly; if it is intended to be stated, as a rule of law, that in every case in which the party preparing the will derives a benefit under it, the *onus probandi* is shifted, (x^1) and that not only a certain measure, but a particular species of proof is thereupon required from the party propounding the will; we feel bound to say that we conceive the doctrine to be incorrect. (x^2) The strict meaning of the term '*onus probandi*' is this: that if no evidence is given by the party on whom the burden is cast, the issue must be found against him. In all cases, this *onus* is imposed on the party propounding a will; it is in general discharged by proof of capacity, and the fact of execution, from which the knowledge of and assent to the contents of the instrument are presumed: and it cannot be that the simple fact of the party who prepared the will being himself a legatee is, in very case and under all circumstances, to create a contrary presumption; and to call upon the court to pronounce against the will, unless additional evidence is produced to prove knowledge of its contents by the deceased. A single instance, of not unfrequent occurrence, will test the truth of this proposition. A man of acknowledged competence and habits of business, worth 100,000*l.*, leaves the bulk of that property to his family, and a legacy of 10*l.* or 50*l.* to his confidential attorney, who prepared his will. Would this fact throw the burden of proof of actual cognizance by the testator of the contents of the will on the party propounding it, so that, if such proof were not supplied, the will would be pronounced against? The answer is obvious — it would not. All that can be truly said is, that if a person, whether attorney or not, prepares a will with a legacy to himself, it is at most a suspicious circumstance, of more or less weight according

(x^1 [See *ante*, 21, note (x^4).]

(x^2) [Downey *v.* Murphey, 1 Dev. & Bat. 82; Harrison *v.* Rowan, 3 Wash. C. C. 580.]

to the facts of each particular case; in some of no weight at all, as in the case suggested; varying according to the circumstances, for instance the *quantum* of the legacy, * and the proportion it bears to the property disposed of, and numerous other contingencies; (x^3) but in no case amounting to more than a circumstance of suspicion, demanding the vigilant care and circumspection of the court in investigating the case, and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased. Nor can it be necessary that in all such cases, even if the testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the will is to be in the shape of instructions for or reading over the instrument; (x^4) they form, no doubt, the most satisfactory, but they are not the only satisfactory description of proof by which the cognizance of the contents of the will may be brought home to the deceased. (x^5) The court would naturally look for

(x^3) [See Coffin *v.* Coffin, 25 N. Y. 9, cited *ante*, 111, note (s^1).]

(x^4) [Washington J. in Harrison *v.* Rowan, 3 Wash. C. C. 580, 584; Durling *v.* Loveland, 2 Curt. 225; McNinch *v.* Charles, 2 Rich. (S. Car.) 229; Day *v.* Day, 2 Green Ch. 549.]

(x^5) [*Knowledge of contents of will.* — As a general rule, a person is presumed to know the contents of any instrument he signs. Androscoggin Bank *v.* Kimball, 10 Cush. 373, 374. In regard to wills, they form no exception to the rule. Day *v.* Day, 2 Green Ch. 549; Munnikhuysen *v.* Magraw, 35 Md. 280. But where there is doubt respecting the capacity of the testator, — when his capacity appears to have become weak, — and especially where the person who drew the will receives a large benefit under it, the presumption of a knowledge of the contents of the will becomes weaker, and the suspicion of a want of such knowledge becomes stronger. Durnell *v.* Corfield, 1 Robert. Ecc. 51, 63. This subject is discussed in Downey *v.* Murphey, 1 Dev. & Bat. 82, and it is there held that a will written for the testator *in extremis*, by one standing in a confidential relation to him, and who takes a benefit under it, is not invalid by conclusion of law unless read over to the testator, or its contents otherwise proved to have been known to him. These facts, though strong evidence, must be left to the jury; and from them, unless repelled by proof of *bona fides*, they may find fraud rendering the will invalid. See Crispell *v.* Dubois, 4 Barb. 393. Ordinarily it is not necessary to give evidence of the testator's knowledge of the contents of his will, until it appears that he was blind or otherwise unable to read, or until a failure or want of capacity appears. Knowledge of the contents of the will, and assent thereto, are presumed, upon proof of capacity and the fact of execution. McNinch *v.* Charles, 2 Rich. (S. Car.) 229; Day *v.* Day, 2 Green Ch. 549; Pettes *v.* Bingham, 10 N. H. 514; Downey *v.* Murphey, 1 Dev. & Bat. 87; Carr *v.* M'Cannon, 1 Dev. & Bat. 276; Smith *v.* Dolby, 4 Harring. 350; Vernon *v.* Kirk, 30 Penn. St. 218; Hoshauer *v.* Hoshauer, 26 Penn. St. 404; Stewart *v.* Lispenard, 26 Wend. 287, 288; Munnikhuysen *v.* Magraw, 35 Md. 280. But if it appears affirmatively that the testator did not read the will himself, and that its contents were not read to him by some other person, the court must be satisfied by evidence from some source that he was in

such evidence; in some cases it might be impossible to establish a will without it; but it has no right in every case to require it. I have said thus much upon the rules of law applicable to this case, with the concurrence of all their lordships who heard the argument, not particularly with a view to the decision of this case, but in order to prevent any misconception upon a subject of so great practical importance. At the same time, their lordships wish it to be distinctly understood, that, entirely acquiescing in the propriety of the rule so qualified and explained, they should be extremely sorry if anything which has fallen from them should have the effect of impeding its full operation."

In the subsequent case of Durling *v.* Loveland, (*y*) Sir H. Jenner Fust, referring to these passages in the judgment of Mr. Baron Parke, observed that he acceded to every one of the doctrines and principles there laid down, but that he was not aware that the prerogative court had ever acted on any other or different. (*z*)

some way made acquainted with the contents of the instrument, and approved them. Day *v.* Day, 2 Green Ch. 549; Harding *v.* Harding, 18 Penn. St. 340; Vernon *v.* Kirk, 30 Penn. St. 218; Clifton *v.* Murray, 7 Geo. 564; Gerrish *v.* Nason, 22 Maine, 438; Dorsheimer *v.* Rorbach, 8 C. E. Green, 46, 50; Chandler *v.* Ferris, 1 Harring. 454, 464. So where the capacity of the testator appears to be doubtful. Tomkins *v.* Tomkins, 1 Bailey, 92, 96; Day *v.* Day, 2 Green Ch. 549; Gerrish *v.* Nason, 22 Maine, 438; McNinch *v.* Charles, 2 Rich. (S. Car.) 229. See the remarks of Whitman C. J. in Gerrish *v.* Nason, 22 Maine, 438; and of Washington J. in Harrison *v.* Rowan, 3 Wash. C. C. 580, 584, 585. But even where it appears that the testator was of sound mind, and that the will was read over to him, no conclusive and irrebuttable presumption of knowledge and approval of its contents would arise therefrom. Fulton *v.* Andrew, House of Lords, 2 Central Law Journ. 529.]

(*y*) Prerog. March 19, 1839; 2 Curt. 225, 227.

(*z*) See, also, Durnell *v.* Corfield, 1 Robert. 63, per Dr. Lushington (sitting for Sir H. Jenner Fust), accord. The doctrine laid down as above, in Barry *v.* Butlin, has been recognized and acted on in many subsequent cases. See Jones *v.* Goodrich, 5 Moore P. C. 16; Mitchell *v.* Thomas, 6 Moore P. C. 137; S. C. 5 Notes of Cas. 600; Browning *v.* Budd, 6 Moore P. C. 430; Greville *v.* Tylee, 7 Moore P. C. 320; Souler *v.* Plowright, 10 Moore P. C. 440; Keogh *v.* Barrington, Cas. temp. Napier, 1; Smith *v.* Goodacre, L. R. 1 P. & D. 359.

* SECTION VI.

Of Nuncupative Wills and Codicils.

All nuncupative wills (made on and after Jan. 1, 1838) are invalid:

A nuncupative testament is when the testator, without any writing, doth declare his will before a sufficient number of witnesses. (*a*) Before the statute of frauds it was of as great force and efficacy (except for lands, tenements, and hereditaments) as a written testament. (*b*) But as wills of this description are liable to great impositions, and may occasion many perjuries, that statute (29 Car. 2, c. 3) laid them under several restrictions; except when made by "any soldier being in actual military service, or any mariner or seaman being at sea." (*c*) And now by the new statute of wills (1 Vict. c. 26), nuncupative wills (or other testamentary dispositions) are altogether rendered invalid. The exception, however, in favor of soldiers and mariners has been continued by the 11th section of the latter statute, which provides and enacts that "any soldier being in actual military service, or any mariner or seaman being at sea, may * dispose of his personal estate as he might have done before the making of this act." (*c*[1])

except those made by soldiers or mariners.

(*a*) Swinb. pt. 1, s. 12, pl. 1; Godolph. pt. 1, c. 4, s. 6. It is called nuncupative, says Swinburne, *a nuncupando, i. e. nominando*, of naming; because when a man maketh a nuncupative testament, he must name his executor, and declare his whole mind before witnesses. Ib. pl. 2. According to the civil law, the appointment of an executor was the essence of a will; and if he were appointed by word of mouth, although many legacies were made and written in a will, and many things were expressed to be done, it was considered a nuncupative will only. Swinb. pt. 1, s. 12, pl. 6; Godolph. pt. 1, c. 4, s. 7.

(*b*) Swinb. pt. 1, s. 12, pl. 3; Godolph. pt. 1, c. 4, s. 6.

(*c*) It appears from the preface to the Life of Sir Leoline Jenkins, that he claimed to himself some merit for having, during the preparation of the statute of frauds, obtained for the soldiers of the English army the full benefit of the testamentary privilege of the Roman army. 3 Curt. 531.

(*c*[1]) [See Warren *v.* Harding, 2 R. I. 133; Leathers *v.* Greenacre, 53 Maine, 561. No other nuncupative wills but those made by soldiers and seamen in actual service are now recognized as valid in the state of New York. The language of the statute is, "unless made by a soldier while in actual military service, or by a mariner while at sea." 2 Rev. Sts. N. Y. p. 60, § 22, p. 63, § 40; Prince *v.* Hasleton, 20 John. 502–523; Hubbard *v.* Hubbard, 12 Barb. 148; S. C. 4 Selden, 196. In Massachusetts, "a soldier in actual military service, or a mariner at sea, may dispose of his wages and other personal estate by a nuncupative will." Genl. Sts. c. 95, § 9. No provision is made for making a nuncupative will in any other case in that state. But a nuncupative will made and

This privilege, as it respects soldiers, has been held to be confined, by the insertion of the words "actual military service," to those who are *on an expedition;* and consequently it has been decided that the will of a soldier made while he was quartered in barracks, either at home (*d*) or in the colonies (*e*) is not privileged. The same was held as to the will of a soldier made at Bangalore, in the East Indies, whilst in command of the Mysore division of the army there stationed, and who died whilst on a tour of inspection of the troops under his command. (*f*) But where the deceased was on his way from one regiment to another, both of which were in actual military service, it was held that his will was privileged. (*g*) The term "soldier" extends to persons in the military service of the East India Company. (*h*)

Construction of this exception: as to soldiers:

valid in another state and which might be proved and allowed according to the laws of the state or country in which it was made, may be proved, allowed, and recorded in Massachusetts, and shall have the same effect as if executed according to its laws. Genl. Sts. Mass. c. 92, § 8; Slocomb *v.* Slocomb, 13 Allen, 38. Nuncupative wills are valid in many of the American States. See their statutes; Brayfield *v.* Brayfield, 3 Harr. & J. 208; Gwin *v.* Wright, 8 Humph. 639; Gibson *v.* Gibson, Walker (Miss.), 364; Palmer *v.* Palmer, 2 Dana, 390; Dorsey *v.* Sheppard, 12 Gill & J. 192; Ellington *v.* Dillard, 42 Geo. 361. These statutes differ mainly as to the amount of property that may be bequeathed by a nuncupative will, and also as to the requisite number of witnesses. They are generally very specific as to the formalities required, and great strictness in the proof of compliance with those formalities is universally demanded. In Michigan, not over three hundred dollars can be bequeathed by such a will. The same in Iowa. In Alabama, not over five hundred. Erwin *v.* Hammer, 27 Ala. 296. In Maryland a nuncupative will bequeathing over three thousand dollars was allowed. Dorsey *v.* Sheppard, 12 Gill & J. 192. In Vermont the property allowed to be so disposed of is limited to two hundred dollars. As to real estate, see Campbell *v.* Campbell, 21 Mich. 438; Smithdale *v.* Smith, 64 N. Car. 52; McLeod *v.* Dell, 9 Florida, 451; Palmer *v.* Palmer, 2 Dana, 390; Page *v.* Page, 2 Rob. (Va.) 424; Gillis *v.* Weller, 10 Ohio, 462; Ashworth *v.* Carleton, 12 Ohio St. 381.]

(*d*) Drummond *v.* Parish, 3 Curt. 522. [A soldier at home on furlough cannot make a valid nuncupative will; Will of Smith, 6 Phil. (Pa.) 104; nor can he while in camp. Van Deuzer *v.* Gordon, 39 Vt. 111.]

(*e*) White *v.* Repton, 3 Curt. 818. See In the Goods of Phipps, 2 Curt. 368; In the Goods of Johnson, 2 Curt. 341.

(*f*) In the Goods of Hill, 1 Robert. 276. [See In the Goods of Perry, 4 Notes of Cas. 402; In the Goods of Norris, 3 Notes of Cas. 197.]

(*g*) Herbert *v.* Herbert, Dea. & Sw. 10. See, also, S. P. In the Goods of Thorne, 29 Jur. 569; S. C. 24 L. J. (N. S.) P., M. & A. 131, where an officer went with his

(*h*) In the Goods of Donaldson, 2 Curt. 386. [The term "soldier" embraces every grade from the private to the highest officer, and includes the gunner, the surgeon, or the general. In the Goods of Donaldson, *supra;* Shearman *v.* Pike, in 3 Curt. 539; Re Prendergast, 5 Notes of Cas. 92.]

as to mariners:

So, in the case of the Earl of Euston *v.* Seymour, (*i*) the testator, Lord Hugh Seymour, was commander-in-chief of the naval force at Jamaica, but lived on shore at the official residence with his family; and it was held by Sir Wm. Wynne, that the testator did not come within the exception; for that he was not "*at sea*" within the meaning of that expression in the act, and consequently that a nuncupative will made by him on shore was invalid. (*i*[1]) But in a late case *on motion, (*k*) the unattested will of a seaman, who, while on board a vessel lying in the harbor of Buenos Ayres, on the 4th of November, 1839, obtained leave to go on shore, where he met with an accident, and was thereby so severely injured that he died on shore on the 9th, was admitted to probate as being within the exception; and the court distinguished the case from that of Lord Hugh Seymour, who was living on shore at Jamaica, only occasionally going on board his ship; but this was to be regarded as the will of a seaman "at sea," although the deceased was not actually on board ship at the time the will was made. So where an admiral, though not actually at sea, was in a river on a naval expedition, it was held that his case fell within the spirit of the exception in the act. (*l*)

As to the construction of the words "mariner or seaman," in

regiment to Africa, for the purpose of joining a military expedition into the interior, and his will was made before the expedition left the British settlement. The affidavit on which the application for probate is made must be explicit. Ib. [In Gould *v.* Safford, 39 Vt. 498, it was decided that a soldier who falls sick upon the march, and is by necessity allowed to fall out and wait for restoration of health and strength, but who died soon after he was carried into hospital, may properly be regarded as in actual military service, or, as the civil law expresses it, *in expeditione*. The opinion drawn up by Kellogg J. in this case will well repay a careful perusal. Another well considered case is Leathers *v.* Greenacre, 53 Maine, 561, in which a very able opinion is given by Barrows J.]

(*i*) Cited *per curiam*, 2 Curt. 339; 3 Curt. 530.

(*i*[1]) [The nuncupative will of a mariner, to be valid, must be made at sea. Key *v.* Jordan, in 3 Curt. 522; Warren *v.* Harding, 2 R. I. 133.]

(*k*) In the Goods of Lay, 2 Curt. 375.

(*l*) In the Goods of Austen, 2 Robert. 611. [The will of a shipmaster made off Otaheite has also been allowed. Re Thompson, 5 Notes of Cas. 596. A cook, on board of an Atlantic steamer, lying in the harbor at Bremen, is entitled to make such a will. Ex parte Thompson, 4 Bradf. Sur. 154. So a captain of a coaster may make a nuncupative will, while on a voyage, though at the time at anchor in the mouth of a bay, and where the tide ebbs and flows. Hubbard *v.* Hubbard, 4 Selden (N. Y.), 196. But a mariner while on the Mississippi River is not within the statute allowing nuncupative wills to be made by "mariners while at sea." Gwin's Will, 1 Tuck. (N. Y. Sur.) 44.]

the exception; it has been held that the purser of a man-of-war is within this description, and it should seem that it includes the whole service, applying equally to superior officers up to the commander-in-chief, as to a common seaman, being at sea. (*m*) And it has also been held to apply to *merchant* seamen. (*n*)

Persons within the exception may make their wills though under age.

It has been held by Sir H. Jenner Fust, on motion, (*o*) that, notwithstanding the general provisions of the act, a minor may make his will if he falls within the exception as being "in actual military service, &c;" the words of the clause being, "*any* soldier, &c."

With respect to the making and probate of the wills of petty officers and seamen in the queen's service, and the non-commissioned officers of marines, and marines serving on board a ship in the queen's service, several statutes have been passed containing regulations calculated to counteract * the frauds and impositions to which they are liable. These, however, have been repealed, and other provisions for the same purpose substituted, by the stat. 11 Geo. 4, and 1 W. 4, c. 20, which will be pointed out when the subject of the probate of wills occurs. (*p*)

Provisions of stat. 11 G. 4, & 1 W. 4, c. 20, as to wills of seamen.

It must be observed that the new statute of wills does not extend to any will made before January 1, 1838; and as cases of nuncupative wills made at an earlier date may still arise, it is thought expedient to state the enactments of the statute of frauds and the authorities relating to them.

By section 19 of that statute, it is enacted, "That no nuncupative will shall be good, *where the estate thereby bequeathed shall exceed the value of thirty pounds*, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such nuncupative will were made in the time of the last sickness of the deceased; and in the house of his or her habitation or dwelling, or

Statute of frauds, s. 19:

how a nuncupative will must be made.

(*m*) In the Goods of Hays, 2 Curt. 338.

(*n*) Morrell *v.* Morrell, 1 Hagg. 51; In the Goods of Milligan, 2 Robert. 108; In the Goods of Parker, 2 Sw. & Tr. 375. [To a purser on board of an Atlantic steamer. Ex parte Thompson, 4 Bradf. Sur. 154.]

(*o*) In the Goods of Farquhar, 4 Notes of Cas. 651, 652.

(*p*) See *post*, pt. I. bk. IV. ch. IV.

where he or she hath been resident for the space of ten days, or more, next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling."

S. 20, it must be put into writing within six days; otherwise it cannot be proved after six months.

And by section 20, "After six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will."

S. 21: when to be proved.

Citation of next of kin, &c.

And by section 21, "No letters testamentary, or probate of any nuncupative will, shall pass the seal of any court till fourteen days at the least after the decease of the testator be fully expired, nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call * in the widow or next of kindred to the deceased, to the end they may contest the same if they please."

S. 22: written will of personal property not to be repealed or altered by a nuncupative disposition.

And by section 22, it is further enacted, "That no will, in writing, concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least."

Stat. 4 Ann. c. 16.

What witnesses are to be deemed good.

With respect to the witnesses required by the 19th section, it is declared by the statute 4 Ann. c. 16, s. 14, that "all such witnesses as are and ought to be allowed to be good witnesses upon trials at law, by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or any thing relating thereunto."

Summary of restrictions on nuncupative wills, by Mr. J. Blackstone.

"Thus," says Mr. Justice Blackstone, "hath the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse, and it is hardly ever heard of but in the only instance where favor ought to be shown to it, when the testator is surprised by sudden and violent sickness. The testamentary words must be spoken with an intent to bequeath, not any loose idle discourse in his illness; for he must require the bystanders to bear witness to his

intention; the will must be made at home, or among his family or friends, unless by unavoidable accident: (p^1) to prevent impositions from strangers, it must be in his *last* sickness; (p^2) for if he recovers, he may alter his dispositions, and has time to make a written will. (p^3) It must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily, and without notice, lest the family of the testator should be put to inconvenience or surprised." (q)

The statute as to nuncupative wills construed strictly.

* The words of the statute of frauds, with respect to nuncupative wills, have always been construed strictly, and all its provisions must be completely complied with. (r) Accordingly the enactment, that no nuncupative will shall be good that "is not *proved by the oath of three witnesses*," has been held to make such a will invalid, where one of three witnesses present died before he could make proof. (s)

Strictness as to the *rogatio testium*.

The statute is also strictly construed with respect to its requisition, that the testator shall bid the persons present, or some of them, bear witness that such is his will, or to that effect; which is technically called the *rogatio testium*. Thus, where a mother in her last sickness called sev-

(p^1) [See Marks *v.* Bryant, 4 Hen. & M. 91; Nowlin *v.* Scott, 10 Grattan, 64; Sykes *v.* Sykes, 2 Stew. (Ala.) 364; Gibson *v.* Gibson, 1 Miss. 364.]

(p^2) [And when the extremity of the testator's illness prevented a written will. Boyer *v.* Frick, 4 Watts & S. 357; Yarnall's Will, 4 Rawle, 46; Stricker *v.* Groves, 5 Wbart. 397; Porter's Appeal, 10 Barr, 254; Werkheiser *v.* Werkheiser, 6 Watts & S. 184; Haus *v.* Palmer, 21 Penn. St. 296; Prince *v.* Hazleton, 20 John. 502; Hubbard *v.* Hubbard, 12 Barb. 148; Kelly *v.* Kelly, 9 B. Mon. 553. The words "last sickness" have not in all cases been held to mean the very last extremity of life. See Johnson *v.* Glasscock, 2 Ala. N. S. 218. But in cases of lingering disease, though finally proving fatal, it must come to the last day, if not to the last hour, to justify a nuncupative will. Prince *v.* Hazleton, 20 John. 502; Yarnall's Will, 4 Rawle, 46; Porter's Appeal, 10 Barr, 254; Werkheiser *v.* Werkheiser, 6 Watts & S. 184; O'Neill *v.* Smith, 33 Md. 569.]

(p^3) [If the testator recover, even when he has made a nuncupative will with all due formality, it becomes of no force. Prince *v.* Hazelton, 20 John. 502; Magee *v.* McNeil, 41 Miss. 17.]

(q) 2 Bl. Com. 501. An instance of a nuncupative will being established may be found in the case of Freeman *v.* Freeman, 1 Cas. temp. Lee, 343.

(r) Bennett *v.* Jackson, 2 Phillim. 190; Lemann *v.* Bonsall, 1 Add. 389; [Ridley *v.* Coleman, 1 Sneed, 616; Welling *v.* Owings, 9 Gill, 467; Lucas *v.* Goff, 33 Miss. 629. Nuncupative wills are not favored in the law. Mitchell *v.* Vickers, 20 Texas, 377.]

(s) Phillips *v.* St. Clement's Danes, 1 Abr. Eq. Cas. 404; also reported in Swinb. 6th ed. 60. [See Mitchell *v.* Vickers, 20 Texas, 377.]

eral of her children, and the daughter of the person with whom she lodged, to her bedside, and declared her wishes as to the disposition of her effects, and the conduct of her family after her death, such declaration was held inadmissible to probate, as a nuncupative will, on account of the want of *rogatio testium;* for the words of the statute are very strong, and must be held strictly that the deceased shall call upon the persons present to bear witness to the act; he must declare that the words were spoken with the intention of making a will at the time. (*t*)

Strictness as to the *factum* of a nuncupative will independent of the statute.

So little are nuncupative wills favorites with the ecclesiastical courts, that not only must all the provisions of the statute of frauds be strictly complied with to enable such a will to probate; but added to this, and independent of that statute altogether, the *factum* of a nuncupative will requires to be proved by evidence more strict and stringent than that of a written one, in every single particular. (*u*) This is requisite in consideration of the facilities with which frauds *in setting up nuncupative wills are obviously attended; facilities which absolutely require to be counteracted by courts insisting on the strictest proofs as to the "*facta*" of such alleged wills. Hence the testamentary capacity of the deceased, and the *animus testandi* at the time of the alleged nuncupation, must appear, in the case of a nuncupative will, by the clearest and most indisputable testimony. (*x*)

(*t*) Bennett *v.* Jackson, 2 Phillim. 190. See, also, Parsons *v.* Miller, and Darn-Brooke *v.* Silverside, cited by Sir John Nicholl, in his judgment, 2 Phillim. 192; and Richards *v.* Richards, 2 Cas. temp. Lee, 588; [Babineau *v.* Le Blanc, 14 La. Ann. 729; Garner *v.* Lansford, 20 Miss. 558; Gwin *v.* Wright, 8 Humph. 639; Haden *v.* Bradshaw, 1 Wins. (N. C.) 263; Taylor's Appeal, 47 Penn. St. 31; Winn *v.* Bob, 3 Leigh, 140; Haus *v.* Palmer, 21 Penn. St. 296; Dockum *v.* Robinson, 26 N. H. 372; Brown *v.* Brown, 2 Murph. 350; Dawson's Appeal, 23 Wisc. 69; Smith *v.* Smith, 63 N. Car. 637; Arnett *v.* Arnett, 27 Ill. 247; Sampson *v.* Browning, 22 Geo. 293. It is not enough that the alleged testator declare his will first in the presence of one witness, and afterwards in the presence of another. The requisite number of witnesses must all be present and called on at the same time to attest the will. Yarnall's Will, 4 Rawle, 46; Prince *v.* Hazelton, 20 John. 505; Haus *v.* Palmer, 21 Penn. St. 296: Weeden *v.* Bartlett, 6 Munf. 123; Tally *v.* Butterworth, 10 Yerger, 501; Rankin *v.* Rankin, 9 Ired. 156; Offut *v.* Offut, 3 B. Mon. 162; Reese *v.* Hawthorn, 10 Grattan, 531; Parsons *v.* Parsons, 3 Greenl. 298; Wester *v.* Wester, 5 Jones Law, 95. But see Portwood *v.* Hunter, 6 B. Mon. 538.]

(*u*) Lemann *v.* Bonsall, 1 Add. 389; [Parsons *v.* Parsons, 2 Greenl. 298; Welling *v.* Owings, 9 Gill, 467; Bronson *v.* Burnett, 1 Chand. (Wisc.) 136; Woods *v.* Ridley, 27 Miss. 119; Rankin *v.* Rankin, 9 Ired. 156.]

(*x*) 1 Add. 389, 390. [It should appear that the deceased, at the time he spoke the

A nuncupative will may be made by interrogatories.

It is laid down in a book of authority (*y*) that a nuncupative testament may be made, not only by the proper motion of the testator, but also at the interrogation of another.

S. 22 of the statute does not apply to lapsed legacies:

It has already appeared that by the twenty-second section of the statute of frauds it is provided, that no written will shall be repealed or altered by any words or will by word of mouth only. It has, however been held, that this section does not prevent a nuncupative provision (made according to the restrictions of the statute) of a lapsed legacy. Thus, where one made his will, and his wife executrix, and gave her all the residuum of his estate after certain legacies paid; she died in the testator's lifetime, and he, having notice of her death, made an nuncupative codicil, and gave to another all that he had given to his wife; and the single question was, whether the nuncupative codicil was allowable notwithstanding this clause of the statute of frauds. And it was held at the delegates that, as this case was, the nuncupative will was good; for, by the death of the wife before the testator, the devise of the residuum became totally void; and so there was no will as to that part; and therefore the nuncupative codicil was *quasi* a new will for so much, and was no alteration of the will as to that; because there was no such will, its operation being determined. (*z*)

alleged testamentary words, had the present intention to make his will, and spoke the words with such intention; Winn *v.* Bob, 3 Leigh, 140; see Gibson *v.* Gibson, Walker (Miss.), 364; Reese *v.* Hawthorn, 10 Grattan, 458; Dockum *v.* Robinson, 26 N. H. 372; and for the purpose of having the very words, uttered by him at the time, constitute his will. Gould *v.* Saffold, 39 Vt. 498. In Kentucky, a paper not perfected as a written will, may be considered as a nuncupative will, where its completion is prevented by the act of God. Offutt *v.* Offutt, 3 B. Mon. 162. So in some other States. Mason *v.* Dunman, 1 Munf. 456; Boofter *v.* Rogers, 9 Gill, 44; Frierson *v.* Beale, 7 Geo. 438; Parkison *v.* Parkison, 12 Sm. & M. 673; Aurand *v.* Wilt, 9 Penn. St. 54; Phœbe *v.* Boggess, 1 Grattan, 129. But see Dockum *v.* Robinson, 20 N. H. 372; In re Hebden, 20 N. J. Eq. 473. To establish such a paper as a nuncupative will, however, it must appear to contain the final determination of the testator as to the disposition of the estate, and his whole will respecting it. Winn *v.* Bob, 3 Leigh, 140; Rochelle *v.* Rochelle, 10 Leigh, 125; Malone *v.* Harper, 2 Stew. & P. 454; Reese *v.* Hawthorn, 10 Grattan, 548; Dockum *v.* Robinson, 26 N. H. 372. As to the evidence sufficient to establish a nuncupative will, see Smith *v.* Thurman, 2 Heisk. (Tenn.) 110. It is said that a signed writing cannot be a nuncupative will. Stamper *v.* Hooks, 22 Geo. 603; Reese *v.* Hawthorn, 10 Grattan, 548. But see Botsford *v.* Krake, 1 Abb. Pr. (N. S.) 112.]

(*y*) Swinb. pt. 1, s. 12, pl. 6.

(*z*) Robinson's case, Sir T. Raym. 334; Com. Dig. Devise, C.

or a void legacy:

And it was held in the last case, that if any part of a will in writing was made by force of fraud, the thing so given and specified in such part might be devised by a nuncupative codicil; for such part as was so obtained was no part of the will; and therefore such codicil would be no alteration *of what was not, but would be an original will for so much. (*a*)

or property not disposed of by the previous will.

And it was also held in the last case, that if A. be possessed of an estate of 1,000*l.*, and by will in writing gives 500*l.* of it to B., he may give the residue by a nuncupative will, so as he does not alter the executor. (*b*)

A disposition not valid as a nuncupative will, may sometimes be supported as a trust.

It seems that a disposition not valid as a nuncupative will, by reason of non-compliance with the forms and circumstances required by the statute of frauds, may in some cases be supported as a trust in equity. Thus, where a daughter deposited 180*l.* in the hands of her mother, and then made her will, and gave several legacies, and made her mother executrix, but took no manner of notice of the 180*l.*; but afterwards by word of mouth desired her mother, if she thought fit, to give the 180*l.* to her niece; and on a bill filed by the niece for this sum, it was proved in the cause for the plaintiff, that the daughter after making the will had said she had left her niece 180*l.* as a legacy, but the parol declaration of the daughter appeared only by the answer of the mother upon oath; it was agreed that this was not good as a nuncupative will, being above 30*l.* and not reduced into writing within six days after the speaking, as the statute of frauds requires; but the mother was decreed to be a trustee for the niece. (*c*)

Whether the statute, s. 22, applies to a nuncupative will made abroad.

In a late case, where the testator made a written will in England, and afterwards a nuncupative will in Peru, not in conformity with the statute of frauds, with a general revocatory clause, and probate thereof was obtained in Peru; Sir John Nicholl said there might be some doubt whether the twenty-second section of the statute ap-

(*a*) Robinson's case, Sir T. Raym. 334; Com. Dig. Devise, C.

(*b*) Ib.

(*c*) Nab *v.* Nab, 10 Mod. 404; 1 Eq. Ca. Abr. 404, pl. 3; Gilb. Rep. Eq. 146.

plied to such a nuncupative will; but the other circumstances of the case made it unnecessary to decide that point. (*d*)

(*d*) In re Moresby, 1 Hagg. 380. The statute of frauds has often been held at the council board not to apply to the plantations. By Sir G. Lee in Serocold *v.* Hemming, 2 Cas. temp. Lee, 495. See *post*, pt. I. bk. IV. ch. III. § VI. [See Slocomb *v.* Slocomb, 13 Allen, 38, cited *ante*, 117, note (c[1]).]

*CHAPTER THE THIRD.

OF THE REVOCATION OF WILLS OF PERSONALTY.

Ambulatory and revocable nature of a will.

THERE has already been occasion to observe that a will is in all cases whatever a revocable instrument. For though a man may make his testament and last will irrevocable in the strongest and most express terms, yet he may revoke it; because his own act and deed cannot alter the judgment of law to make that irrevocable which is of its own nature revocable. (*a*) A will is, therefore, said to be *ambulatory* until the death of the testator. (*b*)

Mutual will: whether ever irrevocable in equity.

It has already been stated that a mutual and conjoint will is unknown to the testamentary law of this country. (*c*) One ground of objection to such an instrument as testamentary, is its irrevocability. (*c*[1]) However, such a will may, it should seem in some cases, be enforced in equity as a compact. (*c*[2]) In Dufour *v.* Pereira, (*d*) Mrs. Camilla Rancer, the wife of Mr. Rancer, being entitled to a legacy under the will of her aunt, she and her husband agreed to make a mutual will, which they did, and both executed it; the husband died; the wife proved his will, and afterwards made another will. And

(*a*) Vynior's case, 8 Co. 82 *a*; Swinb. pt. 7, s. 14, pl. 2.

(*b*) The making of a will is but the inception of it, and it doth not take effect till the death of the testator; for *omne testamentum morte consummatum est, et voluntas est ambulatoria usque ad extremum Vitæ exitum.* Then it would be against the nature of a will to be so absolute that he who makes it cannot countermand it. Forse & Hembling's case, 4 Co. 61 *b*.

(*c*) *Ante*, 10.

(*c*[1]) [See Schumaker *v.* Schmidt, 44 Ala. 454; *ante*, 10, and notes.]

(*c*[2]) [Schumaker *v.* Schmidt, 44 Ala. 454. An oral promise to make a will of all the testator's property, real and personal, in favor of a person who in consideration thereof agreed to make a similar will in favor of the first testator, and made one accordingly, was held to be a contract for the sale of lands, within the statute of frauds, almost the entire property of both parties being real estate. Gould *v.* Mansfield, 103 Mass. 408. See Caton *v.* Caton, L. R. 1 Ch. Ap. 137; Harder *v.* Harder, 2 Sandf. Ch. 17; Johnson *v.* Hubbell, 2 Stockt. Ch. 332.]

(*d*) 1 Dick. 419. [See Bynum *v.* Bynum, 11 Ired. 632.]

the question was, whether it was in the power of the wife to revoke the mutual will. Lord Camden C. "This question arises on a mutual will of the husband and wife; the will is jointly executed by them; * what the wife disposes of, is the residue of her aunt's estate, given to her by her will. I do not find the cases go so far as to consider a legacy to a wife as excluding the husband by implication; but there is no occasion to determine that question: the question is, as the husband by the mutual will assents to his wife's right, and makes it separate, whether the second will by the wife is to be considered as void. It struck me at first, more from the novelty of the thing than its difficulty. The case must be decided by the laws of this country. The will was made here; the parties lived here; and the funds are here. Consider how far the mutual will is binding, and whether the accepting of the legacies under it by the survivor is not a confirmation of it. I am of opinion it is. It might have been revoked by both jointly, it might have been revoked separately, provided the party who intended it had given notice to the other of such revocation. But I cannot be of opinion that either of them could, during their joint lives, do it secretly; or that after the death of either, it could be done by the survivor by another will. It is a contract between the parties, which cannot be rescinded but by the consent of both. The first that dies carries his part of the contract into execution. Will the court afterwards permit the other to break the contract? Certainly not. The defendant, Camilla Rancer, hath taken the benefit of the bequest in her favor by the mutual will, and hath proved it as such; she hath thereby certainly confirmed it; and therefore I am of opinion the last will of the wife, so far as it breaks in upon the mutual will, is void. And I declare, that Mrs. Camilla Rancer, having proved the mutual will after her husband's death, and having possessed all his personal estate, and enjoyed the interest thereof during her life, hath by those acts bound her assets to make good all her bequests in the said mutual will; and therefore let the necessary accounts be taken." (*e*)

This case was succeeded by that of Walpole *v.* Lord * Orford, (*f*) where the will of George, Earl of Orford, made in 1756, and

(*e*) See this judgment also reported in 2 Harg. Jurid. Arg. 272; 2 Harg. Jurid. Exerc. 101.

(*f*) 3 Ves. 402.

Horace Lord Walpole's codicil of the same date, made in concert, constituted, in effect, a mutual will. Horace Lord Walpole died in 1757, without revoking his part of the mutual will, namely, the codicil of 1756. George, Earl of Orford, died in 1791; when it appeared that he had made a codicil in 1776; and this, by reason of a reference to his last will, bearing date in 1752, was construed a revocation of his part of the mutual will, namely, the will of 1756. A case was then raised in equity, that the mutual will of 1756 became irrevocable on the death of Lord Walpole in 1757, though it was admitted to have been revocable by either during the joint lives of Lord Walpole and Lord Orford, with notice to the other. And the judgment of Lord Camden, in Dufour *v.* Pereira, was mainly relied on in support of that position. Lord Loughborough, however, refused to enforce the compact of the mutual will; but this was chiefly, it seems, by reason of the uncertainty, and, in some sense, unfairness, of the compact; so that it leaves the principle of Lord Camden's decision in Dufour *v.* Pereira wholly unshaken. (*g*)

Will held irrevocable where legatee was induced by it to render services to the testator.

And here it may be right to mention the case of Loftus *v.* Maw. (*h*) In that case the testator induced his niece to reside with him as his housekeeper, on a promise that he would leave her certain property by his will; and he executed a codicil to that effect, which he took his niece to his solicitor's office to see, in order to satisfy her mind and to induce her to continue in his service, and by these means did induce her so to continue; but subsequently, by another codicil, he revoked that which he had so made in her favor: and Stuart V. C. held that, as the niece had been induced to render valuable services to the testator on * the faith of the representation, that by so doing she would become entitled to the benefit of the trusts created in her favor by the codicil, the testator had no right to revoke it; and therefore his honor decreed that the trusts in her favor thereby declared should be performed.

By stat. 1 Vict. c. 26, s. 20, it is enacted, "that no will or

(*g*) See 1 Add. 278, note by the learned reporter to Hobson *v.* Blackburn, and also Mr. Hargrave's remarks on the case of Walpole *v.* Lord Orford, in 2 Jurid. Arg. 272; 2 Jurid. Ex. 101. See, also, Chester *v.* Urwick, 23 Beav. 407.

(*h*) 3 Giff. 592.

codicil, or any part thereof, shall be revoked otherwise than as aforesaid [*i. e.* by marriage under sect. 18], or by another will or codicil executed in manner hereinbefore required, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same."(*h*[1])

1 Vict. c. 26, s. 20. No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction:

(*h*[1]) [The sixth section of the statute of frauds enacts that no devise in writing of lands, &c. nor any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating, by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands, &c. shall remain and continue in force (until the same be burnt, &c.), or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same. It will be observed that the revocation by burning, &c. was not required to be attested by witnesses. But see Bulkley *v.* Redmond, 2 Bradf. Sur. 281. These provisions, in the statute of frauds, respecting the revocation of wills, have in substance been very generally adopted in the American States, both as to wills of real and of personal estate. "To prevent the admission," says Chancellor Kent, "of loose and uncertain testimony, countervailing the operation of an instrument made with the formalities prescribed, it is provided that the revocation must be by another instrument executed in the same manner, or else by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his direction. This is the language of the English statute of frauds, and of the statute law of every part of the United States." 4 Kent, 520, 521. See White *v.* Casten, 1 Jones Law (N. Car.), 197; Clark *v.* Smith, 34 Barb. 140; Kent *v.* Mahaffey, 10 Ohio St. 204; Lawyer *v.* Smith, 8 Mich. 411; Belden *v.* Carter, 4 Day, 66; Ray *v.* Walton, 2 A. K. Marsh. 73; Pringle *v.* M'Pherson, 2 Brevard, 279; Barksdale *v.* Barksdale, 12 Leigh, 535; Nelson *v.* Public Administrator, 2 Bradf. Sur. 210; Graves *v.* Sheldon, 2 D. Chip. 71. Thus, in Massachusetts, no will shall be revoked, unless by burning, tearing, cancelling, or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence and by his direction, or by some other will, codicil, or writing, signed, attested, and subscribed in the manner provided for making a will; but nothing contained in this section shall prevent the revocation implied by law from subsequent changes in the condition and circumstances of the testator. Genl. Sts. c. 92 § 11. Corresponding and similar provisions will be found in the statutes of other states. See Bayley *v.* Bailey, 5 Cush. 245; Laughton *v.* Atkins, 1 Pick. 535; Reid *v.* Borland, 14 Mass. 208. In Iowa, wills can be revoked, in whole or in part, only by being cancelled or destroyed by the act or direction of the testator with the intention of so revoking them, or by the execution of subsequent wills; when done by cancellation, the revocation requires to be witnessed in the same manner as the execution of a new will. Laws of Iowa (Revis. of 1860), 407, §§ 2320, 2321. As to the revocation of wills in Connecticut, see Card *v.* Grinman, 5 Conn. 164; Witter *v.* Mott, 2 Conn. 67; Brant *v.* Wilson, 8 Conn. 56. In Delaware, see Smith *v.* Dolby, 4 Harring. 350. In Pennsyl-

Hence it appears that there is a distinction between a will or a codicil, and *some writing*. Accordingly, where at the foot of his will the deceased wrote a memorandum to the effect, "This will was cancelled this day," and he duly executed such memorandum in the presence of two witnesses, it was held that such memorandum was not a will or codicil, but only a writing which could not be admitted to probate. (*i*) But the propriety of this decision may be doubted. Surely the memorandum was "a writing declaring an intention to revoke." (*i*[1])

1 Vict. c. 26, s. 21. No alteration in a will shall have any effect unless executed as a will.

And by sect. 21, it is further enacted, "that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses * be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will."

By sect. 34, "This act shall not extend to any will made before the 1st day of January, 1838." With regard, therefore, to wills, to which the act does not extend, it is necessary to consider the law as it stood at the time of the passing of the statute, with respect to revocations, 1st, by cancellation, destruction, or

* vania, see Lewis *v.* Lewis, 2 Watts & S. 455; Lawson *v.* Morrison, 2 Dallas, 289; Baptist Church *v.* Robbarts, 2 Penn. St. 110; Burns *v.* Burns, 4 Serg. & R. 297; Bondinot *v.* Bradford, 2 Yeates, 170; S. C. 2 Dallas, 268; Hine *v.* Hine, 31 Penn. St. 246. A will can be revoked only in manner provided by statute, and cannot be annulled, or changed, by any verbal directions or declarations of the testator made after its execution. Boylan *v.* Meeker, 2 Dutcher, 274. See Lewis *v.* Lewis, 2 Watts & S. 455; Gaines *v.* Gaines, 2 A. K. Marsh. 190; Clingan *v.* Mitcheltree, 31 Penn. St. 25.]

(*i*) In the Goods of Fraser, L. R. 2 P. & D. 40. See, also, In the Goods of Hicks, L. R. 1 P. & D. 683. [The "other writing" in the wills act of Pennsylvania, 1833, by which the revocation of a will may be declared, has been held not to be a will of which probate is necessary. But it is otherwise when the revocation is in what purports to be a will disposing of property. Rudy *v.* Ulrich, 69 Penn. St. 177; *post*, 181, note (*s*[2]).]

(*i*[1]) [A will once revoked by written declaration cannot be set up or republished by parol. Witter *v.* Mott, 2 Conn. 67; Love *v.* Johnston, 12 Ired. Law, 355; Sawyer *v.* Sawyer, 7 Jones (Law), 174.]

obliteration. 2. By a subsequent testamentary disposition. 3. By an express revocation contained in a will or codicil or in any other distinct writing. 4. By the republication of a prior will. 5. By marriage or other change of circumstances; and therewith of presumptive or implied revocation.

A testator cannot authorize a will to be destroyed after his death.

It may here be observed that, by reason of the above enactment contained in the 20th section, a testator cannot delegate his power of revoking the will, by inserting in it a clause conferring on another an authority to destroy it after his death. (*j*)

SECTION I.

Revocation by Destruction, Burning, Tearing, Cancellation, or Obliteration.

It will be observed, that the 20th section of the new statute of wills confines the modes of total revocation by means of any act done to the instrument itself, to "burning, tearing, or otherwise *destroying*." 1 Vict. c. 26, s. 20:

It is obvious, also, that a part only of a will may be revoked in the manner here described; for the statute says that "no will, *or any part thereof*, shall be revoked otherwise than, &c. or by the burning, tearing, or otherwise destroying the same," &c. (*k*)

And as to partial revocation, it is further enacted by * sect. 21, that no obliteration, interlineation, *or other alteration*, made after the execution, shall be valid or have any effect (except so far as the words or effect of the will before such alteration shall not be apparent), unless *such alteration* shall be executed in like manner as is required for the execution of the will. sect. 21.

By the sixth section of the statute of frauds, with respect to devises of lands, revocations of this nature were confined to "burning, cancelling, tearing, or obliterating the same." (*k*[1])

This section, however, did not extend to wills of personal property; but with respect to them it was merely provided, by sect.

(*j*) Stockwell *v.* Ritherdon, 1 Robert. 661, per Sir H. Jenner Fust; S. C. 6 Notes of Cas. 409, 414; [and if, in such a case, the will is destroyed, its contents may be proved *aliunde*. Re North, 6 Jur. 564.]

(*k*) Clarke *v.* Scripps, 2 Robert. 563, 567, by Sir J. Dodson.

(*k*[1]) [See *ante*, 127, note (*h*[1]).]

22, that no will concerning any goods or chattels or personal estate should be repealed or altered "by any words." (*l*)

To what cases the new statute extends:

The 34th section of the new statute enacts, that "this act shall not extend to any will made before the 1st day of January, 1838;" and certainly these words are of very general import; and seem to leave all wills, made before January 1, 1838, in the same situation as if the act had not passed, and to be dealt with in all respects, with regard to execution, revocation, or alteration, according to the law as it then stood; and if this were the true construction, a testator, whose will was in existence before January, 1838, if he should live for fifty years after that date, might at any time during his life revoke the will by any of the modes which were effectual according to the old ecclesiastical law, or make alterations in it to any extent, or at any period, without regard to the exigencies of the statute of Victoria.

every act done to a will after Jan. 1, 1838, must be in compliance with the statute though the will be made before that date:

But the interpretation of the act, which has been adopted by the prerogative court, and approved by the privy council, is, that the operation of the act was meant only to be suspended with respect to the execution of such wills as were already made at the passing of the act and those made between the passing of the act and the 1st of January, 1838, and that a will made before the statute came into operation * is not exempted from the necessity of complying with the provisions of the new law *with respect to any act done to it after that period.* (*m*)

at what time alterations, &c. without date shall be presumed to have been made:

A further question of much importance has arisen with reference to this subject, viz, whether in a case where unattested alterations appear on the face of a will, and no information can be given, and there are no circumstances, one way or the other, to show when the alterations were made, the presumption is, that they were made before or after the execution of the will. After some variety of decision in the prerogative court of Canterbury, (*n*) it has been

(*l*) See the section *verbatim*, *ante*, 120.

(*m*) In the Goods of Livock, 1 Curt. 906; Hobbs *v.* Knight, 1 Curt. 768; Brooke *v.* Kent, 3 Moore P. C. C. 334; De Zichy Ferraris *v.* Lord Hertford, 3 Curt. 468, 512, 513; Croker *v.* Lord Hertford, 4 Moore P. C. 339, 356. [As to the effect on a will, of an unexplained and material alteration in it, which upon inspection appears to have been made after execution, see In re Wilson, 8 Wis. 171.]

(*n*) See In the Goods of Stow, 4 Notes of Cas. 477; Burgoyne *v.* Showler, 1 Robert. 5, 13; S. C. 3 Notes of Cas. 201; In the Goods of Saumarez, Ib. 208; [Wikoff's Appeal, 15 Penn. St. 281.]

established by the judgment of the judicial committee of the privy council, in Cooper *v.* Bockett (*o*) (which has been confirmed by several subsequent cases in both the temporal and spiritual courts), (*p*) that the presumption in such a case is that the alterations were made *after* the execution. (*q*) So where a will and codicil were in the testator's *custody, and the will is found mutilated after his death, in the absence of evidence, the presumption is that it was mutilated by the testator, after the execution of the codicil. (*r*) Consequently, if the will is dated on or after January 1st, 1838, it is obvious that the alterations also must be taken to have been made after the new act came into operation. (*s*) It has

(*o*) 4 Notes of Cas. 685; S. C. 4 Moore P. C. C. 419.

(*p*) Simmons *v.* Rudall, 1 Sim. N. S. 115, 137; Greville *v.* Tylee, 7 Moore P. C. C. 320; Lushington *v.* Onslow, 6 Notes of Cas. 183; Swete *v.* Pidsley, 6 Notes of Cas. 189; Gann *v.* Gregory, 3 De G., M. & G. 780, by Lord Cranworth; Doe d. Shallcross *v.* Palmer, 16 Q. B. 747; In the Goods of James, 1 Sw. & Tr. 238; [Doe d. Tatum *v.* Catomore, 16 Q. B. 745; S. C. *nom.* Tatham *v.* Cattamore, 20 L. J. Q. B. 364; Re Thompson, 3 Notes of Cas. 441; Re White, 6 Jur. N. S. 808.] But in Williams *v.* Ashton, 1 Johns. & H. 115, 118, Wood V. C. said he did not think it was quite a correct mode of stating the law, to say that alterations in a will are presumed to have been made at one time or at another; but that the correct view is that the *onus* is cast on the party who seeks to derive an advantage from an alteration in a will, to adduce some evidence from which a jury may infer that the alteration was made before the will was executed.

(*q*) In order to rebute this presumption, declarations of the testator, before the execution of his will, that he intended to provide by his will for a person who would be unprovided for without the alteration in question, are admissible evidence; but not declarations, after the execution, that the alteration had been made previously. Doe d. Shallcross *v.* Palmer, 16 Q. B. 747. See *post*, pt. I. bk. IV. ch. III. § V. It is not sufficient to prove that the testator told the witnesses at the time of attestation, that he had made some alterations in his will, but did not allow them to see what the alterations were. Williams *v.* Ashton, 1 Johns. & H. 115. Where a will was found after the testator's death, but parol evidence was given that he had executed a subsequent will, which contained a clause of revocation, and which remained in his custody until his death, and could not then be found, and that he had declared an intention to destroy it, the court pronounced for an intestacy. Wood *v.* Wood, L. R. 1 P. & D. 309.

(*r*) Christmas *v.* Whinyates, 3 Sw. & Tr. 81.

(*s*) But when a will has been prepared in the first instance with the amounts of the legacies in blank, and the amounts, involving, for want of space, some interlineations and alterations, have been afterwards filled in by the testator himself, the court will presume that they were filled in previous to execution; for it cannot be supposed that the execution was prior to the insertion of the legacies. Birch *v.* Birch, 1 Robert. 675; S. C. 6 Notes of Cas. 581. And the mere circumstance of the amount of a legacy, or name of a legatee, being inserted in different ink, and in a different handwriting, does not alone constitute an obliteration, interlineation, "or other alteration," within the meaning of the statute; nor does any presumption arise against the will having been duly executed as it appears. Greville *v.* Tylee, 7 Moore P. C. C. 320. See, also,

*also been held, that this presumption is not at all varied or altered by the circumstance of a codicil to the will having been duly executed. The presumption of law must still be that the alterations were made after the execution of the codicil; unless there be proof or internal evidence to the contrary, in which case the codicil, being a republication of the will, would republish the will with the alterations. (*t*)

But if the will is dated *before* the 1st of January, 1838, the point does not appear to be yet settled, whether the presumption is that they were made before or after the act came into operation; for though they must be taken to have been made after the execution of the will, it does not follow that they were made on or after January 1st, 1838. (*u*) It may be observed that in the instance of an unattested will without date, where the case is bare of circumstances from which the time when it was made may be inferred, it has been held that the presumption is that it was made before the act came into operation. (*v*)

In the Goods of Swindin, 2 Robert. 192. Where some trifling alterations and interlineations appeared on the face of a holograph will, and there was no evidence whether they were written before or after the execution, except the affidavit of an expert that, in his opinion, they were written at the same time as the rest of the will, on that evidence the court admitted them to probate. In the Goods of Hindmarch, L. R. 1 P. & D. 307. [See Goods of Cadge, L. R. 1 P. & D. 543.] It may here be observed that where probate has been granted of a will made after the new wills act came into operation "with the several alterations, interlineations, and erasures appearing thereon," it must be taken as conclusively settled by the ecclesiastical court, that the will was, at its execution, in the state in which it is found. Thus where probate had been granted of a will with cross lines drawn in ink over the bequests of certain legacies, Lord Cranworth C. held, that the testator must be taken to have executed the instrument with the cross lines drawn over it, and his meaning was that the legacies were not to stand part of the will. Gann *v.* Gregory, 3 De G., M. & G. 777. See, also, Shea *v.* Boschetti, 18 Beav. 321, and *post*, pt. 1. bk. vi. ch. 1.

(*t*) Lushington *v.* Onslow, 6 Notes of Cas. 183; [Rowley *v.* Merlin, 6 Jur. N. S. 1165;] In the Goods of Bradley, 5 Notes of Cas. 186.

(*u*) See In the Goods of Pennington, 1 Notes of Cas. 399; Wynn *v.* Heveringham, 1 Coll. 630. See, also, Banks *v.* Thornton, 11 Hare, 180, per Wood V. C.

(*v*) Pechell *v.* Jenkinson, 2 Curt. 273; *ante*, 68. And on the authority of this case, and of In the Goods of Pennington, *ante*, note (*u*), Sir C. Cresswell held, *hæsitans*, that the presumption is the same as to alterations. In the Goods of Streaker, 28 L. J., P. M. & A. 50. See, also, Benson *v.* Benson, L. R. 2 P. & D. 172. In that case a will duly executed before the passing of the wills act, and remaining in the testator's custody till his death, after the passing of the wills act, was found with his signature crossed out. In the absence of evidence as to the date when the crossing out was done, the court (Lord Penzance) refused to presume that it was before 1838, and therefore pronounced for the will.

what shall amount to a revocatory act of destruction, if done before Jan. 1, 1838:

With respect to what shall amount to an act of destruction, if done before January 1, 1838, sufficient to operate as a total revocation; if the testator has torn off or effaced his * seal and signature at the end of a will, the court will infer an intention to revoke the whole will, this being (until the passing of the new statute) the ordinary mode of performing that operation. (*w*) Again, where lines were drawn over the name of the testator, this was held to amount to a revocation by cancellation. (*x*) So tearing off the seal only of a will, where the attestation clause declares it was signed and sealed, has been held a cancellation. (*y*) And the principle appears to have been established, that if the intention to revoke was apparent, an act of destruction or cancellation should carry such intention into effect, although not literally an effectual destruction or cancellation, provided the testator had completed all he designed to do for that purpose. (*z*) Thus in a case decided in the prerogative court (afterwards taken up on appeal to the delegates, where the decisions below were confirmed), a will was found in the repositories of the deceased, and it appeared that some one had carefully cut out, apparently with scissors, the whole of the instrument from its marginal frame; the attestation clause was also cut through, but no part of the writing; and it was held, that the court was bound to construe the act as one done by the testatrix for the purpose of cancelling, revoking, or destroying the validity of the instrument, and consequently that it was thereby revoked. (*a*)

if done after Jan. 1, 1838.

With respect to the acts of destruction or cancellation done after the new act came into operation: It will be observed, that the words "cancelling" and "obliterating," which occur in the statute of frauds, are omitted in the 20th section of the new statute of wills, and that the words "otherwise destroying," are substituted. It has been considered that * these latter words mean modes of destruction *ejusdem generis*, as cutting,

(*w*) Scruby *v.* Fordham, 1 Add. 78.

(*x*) Slade *v.* Friend, cited by Sir G. Lee, 2 Cas. temp. Lee, 34; [Baptist Church *v.* Robbarts, 2 Penn. St. 110.]

(*y*) Lumbell *v.* Lumbell, 3 Hagg. 568. See, also, Davies *v.* Davies, 1 Cas. temp. Lee, 444; [*post*, 138, and cases in note (*j*[1]).]

(*z*) See Andrew *v.* Motley, 12 C. B. N. S. 525, per Willes J.

(*a*) Moore *v.* Moore, 1 Phillim. 357. See Grantley *v.* Garthwaite, 2 Russ. 90, for an instance of erasure which does not amount to a cancellation. See, also, Martins *v.* Gardiner, 8 Sim. 73.

throwing into the water, or the like, and, therefore, exclude cancelling. (*b*) And it has been argued, that a still narrower construction ought to prevail, viz, that a revocation of a will under the new law, by any mode short of actual destruction or annihilation, can only be by burning or tearing. In Hobbs *v.* Knight, (*c*) the deceased died on the 7th of March, 1838. The day after his death, a will was found in the drawer of his writing desk, dated 19th of January, 1835, and which had apparently been signed by him (two witnesses having signed an attestation clause reciting his signature), but the signature had been cut out by a knife or scissors. The allegation pleaded that the will remained entire until after January 1, 1838. It was admitted that the act of excision was done by the testator, and the legal inference seems not to have been disputed, viz, that it was done *animo revocandi;* but it was contended that the *excision* of the name of the testator was not a sufficient revocation under the new statute, which, it was said, had advisedly departed from the terms used by the statute of frauds, by prescribing as the modes of revoking a will, "burning, tearing, or otherwise destroying the same," omitting * "cancelling," and "obliterating," and inserting "otherwise destroying." And it was urged, that as the act must be construed strictly, cutting out the name was not one of the modes of revocation. It was only a demonstration of an intention to revoke. But Sir Herbert Jenner Fust held, that the excision of the name of the testator amounted to a revocation of the will under the terms "otherwise destroying;" and that it was not necessary, in order to operate a revocation, that the whole instrument should be destroyed; it was sufficient if the entirety or essence of the thing were destroyed.

(*b*) Sugden's Essay, p. 46. And accordingly, it was held by Sir H. Jenner Fust, in Stephens *v.* Taprell, 2 Curt. 458, that cancellation by striking through with a pen was not a revocation under the new statute. So it was held by the same judge on motion that the testator had not revoked his will by striking a line through his signature, *animo revocandi.* In the Goods of Rose, Prerog. E. T. 1845, 4 Notes of Cas. 101; [Benson *v.* Benson, L. R. 2 P. & D. 172.] See, also, In the Goods of De Bode, 5 Notes of Cas. 189, 191; In the Goods of Brewster, 29 L. J., P. M. & A. 69; and see, further, Lushington *v.* Onslow, 6 Notes of Cas. 183, S. P. as to part of a will. The real property commissioners, in their proposition for altering the law in this respect, did not exclude revocation by cancelling. Their recommendation was (Propositions for Alterations, No. 10), "that no will shall be revoked otherwise than by another will or codicil, or by some writing executed and attested in the same manner as is required for the validity of a will, or by burning, *cancelling*, or tearing with the intention of revoking it by the testator, or in his presence and by his direction."

(*c*) Prerog. May 29, 1838; 1 Curt. 768.

In the present case, the name of the testator, an essential part of the will, had been removed; and the learned judge proceeded to state that the inclination of his opinion was, upon the same principle, that a testator might revoke his will by obliterating his signature to it, if the obliteration amounted to a destruction; if the testator had so carefully obliterated it that it was perfectly illegible; (c[1]) and further, by parity of reasoning, that if the names of the attesting witnesses were taken away by the testator *animo revocandi*, it would be a good destruction of the will under the act. (c[2]) The learned judge likewise observed, that if the signature had been burnt or torn out, that would be clearly sufficient to revoke; and that if it were necessary to determine the point, he thought it would not be difficult to hold that cutting is equivalent to tearing. This decision was cited by Sir John Dodson in Clarke *v.* Scripps; (*d*) and that learned judge said that he quite agreed with Sir H. J. Fust, that cutting and tearing are equivalent acts. (*e*)

It was held, in the construction of the statute of frauds, * that in order to operate a revocation of a will, it was not necessary that the instrument itself should be consumed or torn to pieces: In the case of Bibb *v.* Thomas, (*f*) it appeared in evidence that the testator ordered his will, which he had previously duly executed, to be brought to him; after opening it and looking at it, he gave it a "rip" with his hands, so as almost to tear a bit off; then rumpled it together, and threw it upon the fire, but it fell off; that it must soon have been burnt, had not one Mary Wilson, who was present, taken it up, and put it in her pocket; that the testator did not see her take it up, but seemed to have some suspicion of it, and he asked her what she was at, to which she made little or no answer; that the testator at several times afterwards said that was not and should not be his will, and bid her

(c[1]) [See Re Gullan, 1 Sw. & Tr. 23; Re Lewis, 1 Sw. & Tr. 31; Re Simpson, 5 Jur. N. S. 1366.]

(c[2]) [See Birkhead *v.* Bowdoin, 2 Notes of Cas. 66; Abraham *v.* Joseph, 5 Jur. N. S. 179; Re James, 7 Jur. N. S. 52.]

(*d*) 2 Rob. 563, 570, 575.

(*e*) Where, however, the will was found with the testator's original signature erased, but another signature appeared at a short distance beneath, Dr. Lushington held, on the facts and circumstances deposed to, that the original signature had not been erased *animo revocandi* as required by the new wills act, and that in the probate the original signature must be restored, and the second omitted. In the Goods of King, 2 Robert. 403. See, also, In the Goods of Coleman, 2 Sw. & Tr. 314.

(*f*) 2 W. Bl. 1043.

destroy it; that she said at first, "So I will, when you have made another;" but afterwards, upon his repeated inquiries she told him that she had destroyed it, though in fact it was never destroyed; that she believed he imagined that it was destroyed; that she asked him to whom his estate would go when the will was burnt; he answered, to his sister and her children; that he afterwards told a person that he had destroyed his will, and should make no other until he had seen his brother, and desired the person would tell his brother so, and that he wanted to see him; that he afterwards wrote to his brother, saying, "I have destroyed my will which I made; for, upon serious consideration, I was not easy in my mind about that will," and desired him to come down, saying, "if I die intestate, it will cause uneasiness." The testator, however, died without making another will. The jury, with the concurrence of the judge, thought this a sufficient revocation of the will; and of this opinion was Lord C. J. De Grey, and the whole court, on a motion for a new trial; the chief justice observing, that this case fell within two of the specific acts described by the statute of frauds; it was both a burning and a tearing; and that *throwing it on the fire, with an intent to burn, though it was only very slightly singed and fell off, was sufficient within the statute.

It was decided, however, that there must be an actual burning of the will to some extent, in order to effect a revocation of this nature; and that an intention and attempt to burn were insufficient. (f^1) Thus, in Doe *v.* Harris, (g) a testator, intending to destroy a will, threw it on the fire; but a devisee under the will snatched it off, against the wishes of the testator, and took it away, a corner of the envelope only being burnt, and no part of the will itself having been affected by the fire: the testator afterwards insisted on its being thrown on the fire again, with intent that it should be burnt, and the devisee then promised to burn it,

(f^1) [There must be some actual revoking act, beyond the mere intent to revoke; but it may be very slight. Gaines *v.* Gaines, 2 A. K. Marsh. 190; Hise *v.* Fincher, 10 Ired. 139; Jackson *v.* Betts, 9 Cowen, 208; Brown *v.* Thorndike, 15 Pick. 388, 408; Ray *v.* Walton, 2 A. K. Marsh. 71; Sumner *v.* Sumner, 17 Harr. & J. 388; Johnson *v.* Brailsford, 2 Nott & McC. 272; Dan *v.* Brown, 4 Cowen, 483; 4 Kent, 532; White *v.* Casten, 1 Jones Law (N. Car.), 197; Clingan *v.* Mitcheltree, 31 Penn. St. 25; Marr *v.* Marr, 2 Head, 303; Nelson *v.* Public Administrator, 2 Bradf. Sur. 210.]

(g) 6 Ad. & El. 209; S. C. 2 Nev. & P. 615.

but did not do so. It was held by the court of queen's bench, that the will, so far as it related to freehold property, was not revoked; because there was no burning of the will itself to satisfy the statute of frauds; and no evidence whatever of what was said, proving an intention to revoke, could supply that deficiency. The same court, however, afterwards held, (*h*) that the will was revoked in respect of a copyhold estate bequeathed by it, the statute of frauds not extending to property of that nature. (*h*[1])

There seems to be no reason why these decisions should not be applied to the new statute of wills. But assuming them to be adopted as authorities in its construction, it is difficult to state any precise rule with respect to the extent to which the burning or tearing of the will must go, in order to effect a revocation. In giving judgment in Doe *v.* Harris, Lord Denman observed, that doubt might be entertained now, whether the proof given in Bibb *v.* Thomas would be sufficient as to the acts of burning and tearing. Pattison J. said, "There must be, at all events, a partial burning of the instrument itself. I do not say that a quantity of words * must be burnt; but there must be a burning of the paper on which the will is." Williams J. said, "The will must be torn or burnt, and the question will always be whether that was done with intention to cancel; how much should be burnt, or whether the will should be torn into more or fewer pieces, it is not necessary to lay down." Coleridge J. said, "The question is put, whether the will must be destroyed wholly, or to what extent? It is hardly necessary to say; but there must be such an injury with intent to revoke *as destroys the entirety of the will;* because it may then be said that the instrument no longer exists as it

(*h*) 8 Ad. & El. 1.

(*h*[1]) [In Pryor *v.* Coggin, 17 Geo. 444, it appeared that a testator being ill in bed, called for his will with the purpose of destroying it, and one of the executors and legatees in the will deceived him by handing him an old letter in its stead, and it was ruled to the jury, and the ruling sustained, that if, from the rest of the testimony, the jury believed that the testator destroyed that letter thinking it was his will, these circumstances would amount in law to a revocation of the will. See, also, to the same effect, Anon. Sup. Court of Penn. 1 Smith, 41; White *v.* Casten, 1 Jones Law (N. Car.), 197; Smiley *v.* Gambill, 2 Head, 164; Blanchard *v.* Blanchard, 32 Vt. 62. But where the testator, being blind, directed another person to destroy his will, and was told by that person, and believed, that he had destroyed it, whereas, in fact, the will was fraudulently preserved entire by him, and no act was done towards the destruction of it, there was held to be no revocation. Boyd *v.* Cook, 3 Leigh, 32; Giles *v.* Giles, 1 Cam. & Nor. 174. To the same effect, see Runkle *v.* Gates, 11 Ired. 95; Hylton *v.* Hylton, 1 Grattan, 161. See Leaycraft *v.* Simmons, 3 Bradf. Sur. 35.]

was. (*h*[2]) And Sir Herbert Jenner Fust, in giving judgment in Hobbs *v.* Knight, (*i*) cited and adopted the view of the question thus taken by Mr. Justice Coleridge as applicable to the construction of the new statute.

The same view has been taken by the courts in several subsequent cases; as in Price *v.* Powell, (*j*) where the barons of the exchequer regarded the tearing off the seal of a will *animo revocandi* as amounting to a revocation of it by reason of its being a destruction of its entirety. (*j*[1]) So in Williams *v.* Tyley, (*k*) where there was the usual statement in the witnessing clause at the end of a will that the testator had set his hand to the preceding pages, Wood V. C. held, that the testator had thereby made the signatures on those pages a part of his will, and that the whole will was revoked by tearing them off, *animo revocandi;* and his honor relied on the above mentioned case of Price *v.* Powell, and approved of the principle on which it had been decided. Again, In the Goods of Harris, (*l*) where a testatrix, having executed her will by signing her name at the foot of each sheet, cut off the signatures on the five first sheets, and cancelled her own signature at the end of the last sheet, writing underneath that she had cancelled the will on a certain day. The last sentence in her will in effect referred to the signatures * she had cut off as giving validity to the will. And it was thereupon considered by Sir J. P. Wilde that the will was destroyed in its entirety, and could not be admitted to probate. So, In the Goods of Lewis, (*m*) the will was held by Sir C. Cresswell to be revoked by tearing off the signatures and attestation. (*m*[1]) And in another case, before the same judge, In the Goods of Gullan, (*n*) where the testator had subscribed each of the several sheets of which his will consisted at the foot of

(*h*[2]) [See Johnson *v.* Brailsford, 2 Nott & McC. 272; Dan *v.* Brown, 4 Cowen, 483, 490.]

(*i*) *Ante*, 134.

(*j*) 3 H. & N. 341.

(*j*[1]) [In re Will of Engelina S. White, 25 N. J. Eq. 501; Smock *v.* Smock, 3 Stockt. 156; Avery *v.* Pixley, 4 Mass. 460.]

(*k*) Johns. 529.

(*l*) 3 Sw. & Tr. 485; [Youse *v.* Forman, 5 Bush, 337.]

(*m*) 1 Sw. & Tr. 31.

(*m*[1]) [Barker *v.* Bell, 46 Ala. 216. So by tearing off the signatures of the witnesses. Evans *v.* Dallow, 31 L. G. Pr. 128. But the mere *crossing out* of the testator's signature is not a revocation, there being no other evidence on the point. Benson *v.* Benson, L. R. 2 P. & D. 172. The mutilated condition of a will may be shown to be the result of use or accident, not design. Bigge *v.* Bigge, 2 Notes of Cas. 601; Clarke *v.* Scripps, 2 Rob. 563.]

(*n*) 1 Sw. & Tr. 125; [Gullan *v.* Grove, 26 Beav. 64.]

each sheet in the presence of the attesting witnesses, who thereupon also subscribed each sheet in his presence, and on his death two of the middle sheets of the will only could be found; it was held that the signatures at the end of the will, being the only ones made in compliance of the statute, having been destroyed, the whole will was revoked, and the sheets that had been found, though duly attested, could not be admitted to probate. (n^1)

Inchoate and incomplete cancellation shall not revoke.

It must be here observed, that if the act of destruction or cancellation be inchoate and incomplete, it will not amount to a revocation. (n^2) Thus in Doe *v.* Perkes, (o) it appeared that the testator, being moved with a sudden impulse of passion against one of the devisees under his will, conceived the intention of cancelling it, and of accomplishing that object by tearing. Having torn it twice through, his arms were arrested by a bystander, and his anger mitigated by the submission of the party who had provoked him. He then proceeded no further, and after having fitted the pieces together, and found that no particular word had been obliterated, he said, "It is a good job it is no worse." Upon this evidence, it was left to the jury to say whether the testator had done all he intended, or whether he was prevented from completing the act of destruction he intended. They found that he was so prevented, and the court of king's bench * held, that their verdict was right, and that there was no revocation of the will. (p)

(n^1) [Drawing lines across the paper. Bethel *v.* Moore, 2 Dev. & Bat. 311.]

(n^2) [Means *v.* Moore, Harper, 314; Leaycraft *v.* Simmons, 3 Bradf. Sur. 35.]

(o) 3 B. & Ald. 489. See accord. In the Goods of Colberg, 2 Curt. 832; [Giles *v.* Giles, 1 Cam. & Nor. 174.]

(p) Mr. Justice Holroyd, before whom this case was tried, in summing up the evidence to the jury, observed that the sixth section of the statute of frauds does not make a tearing *merely* and *of itself* a revocation. "A tearing," said the learned judge, "is not a revocation since the statute, if the same effect could not be ascribed to it before the statute passed. In the case of Hyde *v.* Hyde (see *post*, 149), there was a tearing of the will; but it was held not to amount to a revocation, because there could not, from the circumstances of that case, be any inference of an intention to revoke. So the act of tearing may be intentional, and yet not amount to a revocation; if, as was the case in Onions *v.* Tyrer (*post*, 148), the tearing be ascribed to mistake. This, however, does not seem to be a case of mistake; for the tearing was in some degree, at least for some period of time, with the intention of destroying the effect of the will; and if the destruction were complete, the subsequent declarations of the testator would be of no avail, since the will could not be again set up, except by a codicil or republication of it in the presence of three witnesses. One question will therefore be, whether there has been such a complete destruction of the will as to amount to a revocation; and that is purely a question of fact. If the testator intended by his

In accordance with this authority, the case of Elms *v.* * Elms (*q*) was decided. In that case the testator tore the will almost in two, but was stopped by the exclamations of persons in the room as to the danger of destroying the existing will before making another. Sir Cresswell Cresswell laid down the law to be, that in order to revoke a will by tearing it, it is not necessary to rend the will into more pieces than it originally consisted of, but that it is sufficient if the testator intended the tearing actually done of itself to work a revocation without any further act — in other words, if when he ceased tearing, he had done all that he contemplated doing for the purpose of revoking. But the learned judge, having regard to all the evidence in the case, was not satisfied that the testator did so intend, and therefore held that the will was not revoked.

It should be borne in mind that to operate a revocation, the act of "burning, tearing, or otherwise destroying," is required by the 20th section to be done by the testator or by some person *in his presence*, and by his direction. (*r*) Therefore, in a case where

acte wholly to revoke, the revocation will be complete; but the question which arises upon the evidence, and which question alone renders the subsequent declarations of the testator admissible, is, whether he had proceeded as far as he intended in the destruction of the will. If, after he had torn the will in the manner in which it appears from the evidence that he did, he had thrown it upon the ground, that might have been a circumstance from which to have inferred that the act of destruction was complete. A case may be put of a person throwing his will on the fire, with the intention of burning it, and in consequence of some observation made by a bystander snatching it off again before it be burnt; there, although the will be scorched, I do not apprehend that it would amount to a revocation, since the act of destruction by the testator would not in such a case have been completed. The question of intention, however, is purely a question of fact; and, therefore, exclusively within the province of the jury to decide. If the jury think that what the testator intended at the time he tore the will was completed, the heir-at-law is entitled to recover; but if they think that his intention at the time was not completed, the question of law then arises; and I am of opinion that it will not in point of law amount to a revocation." Gow. 186. [The mere act of cancelling a will has no significance, unless it is done *animo revocandi*. Jackson *v.* Holloway, 7 John. 394; Bethel *v.* Moore, 2 Dev. & Bat. 311; Means *v.* Moore, 3 McCord, 282; Dan *v.* Brown, 4 Cowen, 490; Ex parte Brown, 1 B. Mon. 57. Whether the fact that the paper on which a will is written has been torn by the testator, operates as a revocation of the whole will, or of a codicil or single devise only, is a question of intention, to be determined by a view of the attending circumstances. Where the testator tore off his name, at the foot of the codicil, but in so doing carried away some words in the body of the will on the reverse side of the paper, it was held that the codicil only was revoked. In re Cook, 5 Pa. L. J. Rep. 1.]

(*q*) 1 Sw. & Tr. 155. [See Giles *v.* Warren, L. R. 1 P. & D. 401.]

(*r*) See *ante*, 127.

a codicil had been burnt by the testator's order with intent to revoke, *but not in his presence*, probate was decreed of a draft copy of the codicil. (*s*)

Effect (under the new wills act, s. 20) of mutilating part of the will.

It has already been pointed out, that under the 20th section of the new statute, a part only of a will may be revoked in the manner described. (*t*) Accordingly, it has been held that if the testator after the execution of the will destroy part only of it, by tearing or cutting away, or cutting out a portion of it, *animo revocandi* as to the parts so removed, this will amount to a revocation *pro tanto*. (*u*) But with respect to the destruction of a part, it should seem that the intention with which the act is done must govern the extent of operation to be attributed to the act, and determine whether it shall effect the revocation of the whole instrument, or only of * some and what portion of it. (*v*) And the intention to revoke wholly, or only in part, may be evidenced either by proof of the expressed declaration of the testator of his intention in doing the act, or by proof of circumstances from which it may be inferred, or by the state and condition to which the instrument has been reduced by the act itself. (*w*) Accordingly, in Clarke *v.* Scripps, (*x*) where a testator executed his will in 1843, and it remained in his custody until his death, when it was found in a mutilated state, torn and cut, but with the signatures of the testator and of the attesting witnesses remaining at the end of the will, it was held by Sir J. Dodson (after a full and able review of all the cases, and a statement of the principles to be derived from them), that in the absence of extrinsic evidence, it ought to be considered, from the peculiar manner in which the mutilations were effected, that the testator (who died suddenly) did not intend to revoke the whole will, but to revoke it in part only; and that the papers, as altered, were intended for a draft of a new

(*s*) In the Goods of Dadds, Dea. & Sw. 290.

(*t*) *Ante*, 128.

(*u*) In the Goods of Lambert, 1 Notes of Cas. 131; In the Goods of Cooke, 5 Notes of Cas. 390; Clarke *v.* Scripps, 2 Robert. 563, 572.

(*v*) 2 Robert. 567; In the Goods of Woodward, L. R. 2 P. & D. 206.

(*w*) 2 Robert. 568; Williams *v.* Jones, 7 Notes of Cas. 106. [The cancellation or cutting off a portion of the devises in the body of a will, leaving it otherwise complete, with a declaration of intention, by the testator, to annul only what was cancelled, leaves the residue a valid will. Ex parte Brown, 1 B. Mon. 56; Bradford's Will, 1 Parsons R. 165; Borden *v.* Borden, 2 R. I. 94; Wells *v.* Wells, 4 Monroe, 152; In re Kirkpatrick, 22 N. J. Eq. 463.]

(*x*) 2 Robert. 563.

will, and which should itself operate as his will, should he die without completing his object of making a formal one. Accordingly, in Christmas *v.* Whinyates, (*y*) where part of the top of the second sheet of a will with a codicil had been cut off, including the signature of the testatrix on the upper part of the second side, Sir Cresswell Cresswell, judging from the manner in which the will and codicil had been cut, care having been taken to avoid cutting off the names of the attesting witnesses on the sheet that had been mutilated, and the signature and attestation of the codicil being left untouched, that the intention of the testatrix was only to revoke as much of the will as had been cut off, and to preserve the codicil and so much of the will as remained; and probate was accordingly decreed of the will as it then stood and the codicil. (*z*)

Partial revocation by obliteration, destruction, interlineation or other alteration, under the old law.

*As to partial revocation by cancellation or obliteration. As the law stood at the time of the passing of the statute of Victoria (and as it still is with respect to acts done to wills before that statute came into operation), a testator might revoke his will *pro tanto*, by obliterating a particular clause or part. (*a*) So if a part of one sheet of a will, consisting of several sheets, were torn off, or cut through, the other sheets, together with the signature, attestation, and so forth remaining in their original state, this would only revoke the part actually cut or torn; and would not inure to a revocation of the whole. (*b*) And with respect to partial revocation by the latter means, it should seem that the new law has effected no change. (*c*) Again, a testator might, subsequently to the execution of his will, make any alterations in it he pleased, without any formalities whatever; and if the court was satisfied that such alterations contained the testator's final

(*y*) 3 Sw. & Tr. 81.

(*z*) See, also, In the Goods of Woodward, L. R. 2 P. & D. 206, that the mere cutting off three lines from the beginning of the will does not, in the absence of any evidence to the contrary, show an intention to revoke the whole will.

(*a*) Swinb. pt. 7, s. 16, pl. 4; Sutton *v.* Sutton, Cowp. 812; Humphreys *v.* Taylor, 7 Gwillim's Bac. Abr. 363; Scruby *v.* Fordham, 1 Add. 78. The law was the same with respect to devises of land. Larkins *v.* Larkins, 3 Bos. & Pull. 16; Short *v.* Smith, 4 East, 419; Dickinson *v.* Stidolph, 11 C. B. N. S. 360; [*ante*, 142, note (*w*); In re Kirkpatrick, 22 N. J. Eq. 463; In re Brown's Will, 1 B. Mon. 57; McPherson *v.* Clark, 3 Bradf. Sur. 92; Overall *v.* Overall, Litt. Sel. Cas. 504.]

(*b*) Scruby *v.* Fordham, 1 Add. 74, 78; Roberts *v.* Round, 3 Hagg. 552, by Sir J. Nicholl.

(*c*) *Ante*, 128, 141.

intentions, they were entitled to probate. (*d*) Alterations and obliterations, however, which appeared to be only cursory and deliberative, were not effectual to revoke the passages so altered or obliterated; (*e*) nor were alterations or obliterations preparatory to the * substitution of new dispositions, which the testator never carried into legal effect. (*f*)

New wills act, s. 21: formalities necessary for obliterations and other alterations:

With respect to alterations and obliterations made since the new statute came into operation (1st January, 1838), it is required (sect. 21), in order to give effect to any obliteration, (*f*[1]) interlineation, or other alteration, that such alteration shall be executed as is required for the execution of the will, with this difference, that the signature of the testator and the subscription of the witnesses need not be at the foot or end of the will, but may be made in the margin, or some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will. (*f*[2])

(*d*) Ravenscroft *v.* Hunter, 2 Hagg. 68. [See Cogbill *v.* Cogbill, 2 Hen. & Munf. 467.] So in Mence *v.* Mence, 18 Ves. 348, a residuary bequest was held to be revoked by striking through, with a pencil, all the disposing part, leaving only the general description, with notes in pencil, in the margin, indicating alterations and different dispositions of certain articles.

(*e*) Parkin *v.* Bainbridge, 3 Phillim. 321; Lavender *v.* Adams, 1 Add. 409; In the Goods of Rolls, 2 Add. 316. See Martins *v.* Gardiner, 8 Sim. 73.

(*f*) See *post*, 148 *et seq.*

(*f*[1]) [Under the Pennsylvania statute of wills (1833) providing for the repealing of a will, a careful interlineation is not an "obliteration." Dixon's Appeal, 55 Penn. St. 424.]

(*f*[2]) [Quinn *v.* Quinn, 1 N. Y. Sup. Ct. 437. A few days after a testator had made his will, and executed it in due form of law, in presence of the original witnesses to the will, he inserted therein an additional bequest, of which he requested them to take notice; and it was held that this act neither revoked the will, nor in any way invalidated it, and that the additional bequest became a part of the will. Wright *v.* Wright, 5 Ind. (Porter) 389. *Sed quære*, see Dixon's Appeal, 55 Penn. St. 424. As to alterations made by the testator himself, they are of course valid, if the requirements of the law in respect to them are complied with, and the will in its altered shape is duly attested. If alterations made by the testator or his direction fail to be effectual for want of proper forms of execution, they do not destroy the will; but the will may be permitted to remain valid, as it was before the alteration. Jackson *v.* Holloway, 7 John. 394; Quinn *v.* Quinn, 1 N. Y. Sup. Ct. 437. As, where after a will of real and personal estate had been duly executed, a scrivener, by direction of the testator, and in the presence of only one of the subscribing witnesses, interlined another legacy, it was held that the alteration did not make the will void. Wheeler *v.* Bent, 7 Pick. 61. See Jackson *v.* Hollaway, *supra;* Wright *v.* Wright, *supra;* Quinn *v.* Quinn, *supra.* In a state where a holograph will is valid without attestation, any alterations made by the testator in such a will, by striking out or adding, will be valid.

The language of this section makes it clear that the obliteration of a particular bequest in a will cannot be considered as a destruction of so much of the instrument, and therefore as a revocation of it *pro tanto*, under the 20th section, however apparent the intention of the testator may be to make a complete obliteration; because obliteration is a mode of alteration provided for by the 21st section; and, according to that section, no obliteration can be valid unless executed as a will. (*g*)

consequences of complete obliteration:

The statute contains an exception in this respect, viz: "except so far as the words and effect of the will before such alteration shall not be apparent." Consequently, if the words are completely obliterated, so that it cannot be made out what they originally were, the alteration is valid, and probate must then be granted, as if there were blanks in the will. (*h*)

* The words in this exception "shall not be apparent" seem to mean "apparent on an inspection of the instrument itself;" and not "capable of being made apparent by extrinsic evidence." And consequently it has been held that the court is not at liberty to resort to evidence *aliunde; e. g.* to refer to a draft copy or to the instructions for the will. (*i*) It was the intention of the legislature in this respect, that if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose, that those passages cannot be made out

Cogbill *v.* Cogbill, 2 Hen. & Munf. 467. As to alterations made in wills by strangers, Malin *v.* Malin, 1 Wend. 625; by party interested under it, Jackson *v.* Malin, 15 John. 297; 2 Pothier, by Evans, 179–181.]

(*g*) Lushington *v* Onslow, 6 Notes of Cas. 183; Greville *v* Tylee, 7 Moore P. C. C. 320. [See Re Cunningham, 1 Searle & S. 132.]

(*h*) In a case on motion, Sir H. Jenner Fust ordered that the erasures in a will should be carefully examined in the registry, with the help of glasses, by persons accustomed to writing, to ascertain whether they could be made out, and directed that probate should pass with the erased passages restored, unless they could not be made out, and then with those parts in blank. In the Goods of Ibbetson, Prerog. June 5, 1839; 2 Curt. 337. See, also, In the Goods of Beavan, 2 Curt. 369; In the Goods of James, Sw. & Tr. 248. Generally speaking, the court of probate will not, in the first instance, take upon itself to decide whether the words obliterated can or cannot be made out. If it be asserted in an allegation that they are capable of being distinguished on the face of the will, the court will refer such an allegation to proof, and then pronounce its judgment according to the testimony which may be offered at the hearing. Townley *v.* Watson, 3 Curt. 769.

(*i*) Townley *v.* Watson, 3 Curt. 761. The exception, as proposed by the real property commissioners, was "except if any words cannot be read *nor made out in evidence* in consequence of the obliteration." 4 Rep. 31.

on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in the act of parliament. (*k*)

consequences of complete obliteration with unattested substitution.

And in the earlier view taken by the prerogative court of this clause, it was considered as a consequence of this construction, that in a case where a legacy was given, and the amount was afterwards obliterated by the testator and another sum written by him over the obliteration, by way of substitution, but without the attestation required by the act, although the alteration would be wholly ineffectual, and the legacy would be pronounced for as originally given, should the will continue legible in this respect, (*l*) yet if the obliteration should be such that it could not be made out upon inspection of the will what was the amount of the sum originally given, the legacy would be lost altogether, * because the unattested substitution was not a valid alteration, and the original bequest was revoked by the obliteration which had rendered it illegible. This construction was, at first, unwillingly put on the act by Sir H. Jenner Fust, in a case upon motion, In the Goods of Rippin, (*m*) where the amount of a legacy was found obliterated in a will, and the word "thirty" written over the erasure in the deceased's hand, without any attestation, and it could not be made out, upon looking at the will, what the word was over which "thirty" was written. A witness, who had seen the will prior to the alteration, deposed that the word was "fifty." But the learned judge was of opinion that the court was not at liberty to supply by parol testimony what was not apparent on the will itself; and decreed probate without the word "thirty," and with the legacy in blank.

It was suggested, in a former edition of this treatise, that cases of this sort might admit of the application of the doctrine of dependent relative revocations, (*n*) and that consequently it might be properly held that where the testator's intention appears to have been only to revoke by the substitution of another bequest, which, in his apprehension, will be effectual, if such new bequest cannot take effect for want of compliance with the statute, the obliteration shall not operate as a revocation, but the will may be

(*k*) 3 Curt. 769.

(*l*) In the Goods of Beavan, 2 Curt. 369. [See Jackson *v.* Holloway, 7 John. 394; Wheeler *v.* Bent, 7 Pick. 71.]

(*m*) 2 Curt. 332. See, also, In the Goods of Brooke, Ib. 343; In the Goods of Livock, 1 Curt. 906.

(*n*) See *post*, 147 *et seq.*

pronounced for in its integral state, if that is ascertainable by any means of legal proof whatsoever. This view of the subject has been justified by the subsequent decision of the judicial committee of the privy council, in Brooke *v.* Kent. (*o*) And it is now settled, that where a testator entirely erases the original words, intending to revoke a legacy by substituting a different sum from that originally given, and such substituted legacy is not effectually given, the original legacy *is not revoked, and evidence *aliunde* is admissible to show what the words were. (*p*)

The acts prescribed for revocation must be done *animo revocandi.*

The statute provides (s. 20) that the acts prescribed for the revocation of wills must be done "with the intention of revoking the same." This enactment appears to have been unnecessary, inasmuch as the law was fully established to the same effect at the time of the passing of the act. An act done without the intention to revoke is wholly ineffectual. (*q*) It is clear that an insane person cannot have any intention. Where there is proof that the will was duly executed by the testator who afterwards became insane, the *onus* of showing that it had been mutilated by the testator when of sound mind is on the party alleging the revocation. (*r*)

Mutilation by testator who has become insane.

All questions of revocation of wills have ever been regarded

(*o*) 3 Moore P. C. C. 334.

(*p*) Soar *v.* Dolman, 3 Curt. 121; Townley *v.* Watson, Ib. 769. See In the Goods of Bedford, 5 Notes of Cas. 188; In the Goods of Harris, 1 Sw. & Tr. 536; In the Goods of Parr, 29 L. J., P. M. & A. 70; [1 Sw. & Tr. 56; 6 Jur. N. S. 56;] In the Goods of Harris, [29 L. J. Prob. 79; 1 Sw. & Tr. 536; In the Goods of McCabe, L. R. 3 P. & D. 94; Jackson *v.* Holloway, 7 John. 394; McPherson *v.* Clark, 3 Bradf. Sur. 92.]

(*q*) Clarkson *v.* Clarkson, 2 Sw. & Tr. 497; [*ante*, 140, note (*p*), *ad finem.*]

(*r*) Harris *v.* Berrall, 1 Sw. & Tr. 153. See, *ante*, 42; Benson *v.* Benson, L. R. 2 P. & D. 172, 176. See, also, Sprigge *v.* Sprigge, L. R. 1 P. & D. 608; [*post*, 381, and cases in note (*d*). A person who is incompetent to make a will seems to be equally incompetent to revoke a will previously made; and the destruction by him of a will, when so made, is not a revocation thereof, because it requires the same capacity to revoke a will as to make one. Thus, where a competent testator makes a will, and it is afterwards destroyed by his consent given when he has become *non compos*, the devises are not destroyed, but the will may be set up and established. Allison *v.* Allison, 7 Dana, 94; Idley *v.* Bowen, 11 Wend. 227; Rhodes *v.* Vinson, 9 Gill, 169; Smith *v.* Wait, 4 Barb. 28; Nelson *v.* M'Giffert, 3 Barb. Ch. 158; Ford *v.* Ford, 7 Humph. 92; Smithwick *v.* Jordan, 15 Mass. 115; Forman's Will, 54 Barb. 274; S. C. 1 Tuck. (N. Y. Sur.) 205; Collagan *v.* Burns, 57 Maine, 449; *post*, 159. A will is not revoked by a subsequent will or codicil obtained by undue influence. O'Neall *v.* Farr, 1 Rich. (S. Car.) 80; Parker C. J. in Laughton *v.* Atkins, 1 Pick. 546, 547.]

in the ecclesiastical courts as questions, to some degree, of intention, and every fact of revocation may in some sort be said to be equivocal. (*s*) But cancelling and obliterating have always been considered peculiarly as equivocal acts, which, in order to operate a revocation, must be done with intention to revoke. (*s*[1]) The presumption of law, *primâ facie*, is, that such acts are done *animo revocandi*. (*t*)

But this presumption may be repelled by evidence showing that the *animus* did not exist. (*t*[1]) As if a man was to throw ink upon his will instead of sand, though it might be a complete defacing of the instrument, it would be no revocation: or suppose a man, having two wills of different dates by him, should direct the former to be cancelled, and, through * mistake, the person directed should cancel the latter, such an act would be no revocation of the latter will. (*u*)

Dependent relative revocations:

This principle, that the effect of the obliteration, cancelling, &c. depends upon the mind with which it is done, having been pursued in all its consequences, has introduced the doctrine of dependent relative revocations, in which the act of cancelling, &c. being done with reference to another act, meant to be an effectual disposition, will be a revocation or not, according as the relative act be efficacious or not. (*x*)

cancellation dependent upon the efficacy of another act.

(*s*) Smith *v.* Cunningham, 1 Add. 455.

(*s*[1]) [See *ante*, 140, note (*p*), *ad finem*; Dan *v.* Brown, 4 Cowen, 490.]

(*t*) Rickards *v.* Mumford, 2 Phillim. 28; Lord John Thynne *v.* Stanhope, 1 Add. 52. See Shaw *v.* Thorne, 4 Notes of Cas. 649; In the Goods of Lewis, 27 L. J., P. M. & A. 31.

(*t*[1]) [Dawson *v.* Smith, 3 Houst. (Del.) 335. Even drawing lines across a will may be explained by circumstances not to be an intended revocation. Bethel *v.* Moore, 2 Dev. & Bat. 316. See Brown's Will, 1 B. Mon. 57; Lewis *v.* Lewis, 2 Watts & S. 455; Wikoff's Appeal, 15 Penn. St. 281; Means *v.* Moore, 3 McCord, 282; Smith *v.* Dolby, 4 Harring. 350; Boudinot *v.* Bradford, 2 Yeates, 170; Overall *v.* Overall, Litt. Sel. Cas. 504.]

(*u*) Onions *v.* Tyrer, 1 P. Wms. 345, in Lord Cowper's judgment; Burtenshaw *v.* Gilbert, Cowp. 52, in Lord Mansfield's judgment; 1 Saund. 280 *b*, *c*, note to Duppa *v.* Mayo; Lord John Thynne *v.* Stanhope, 1 Add. 53, in Sir J. Nicholl's judgment. See, also, Swinb. pt. 7, s. 16, pl. 4; In the Goods of Tozer, 2 Notes of Cas. 11; [In the Goods of McGabe, L. R. 3 P. & D. 94; Dancer *v.* Crabb, L. R. 3 P. & D. 98. Where a will is found torn, evidence is, of course, admissible to show that it is merely the effect of wear; Bigge *v.* Bigge, 9 Jur. 192; 3 Notes of Cas. 601; for mere tearing or destruction without intention to revoke is no revocation under the express terms of the act. Re Tozer, 2 Notes of Cas. 11; 7 Jur. 134; Re Hannam, 14 Jur. 558; Clarke *v.* Scripps, 16 Jur. 783; 2 Rob. 563.]

(*x*) 1 Powell on Devises, p. 600, ed. by Jarman; [Pringle *v.* M'Pherson, 2 Brevard, 279; McPherson *v.* Clark, 3 Bradf. Sur. 92. See Benning J. in Barksdale *v.* Hopkins, 23 Geo. 332, 341. If a

Thus, in Onions *v.* Tyrer, (*y*) a man made a second will, to the use of the same person to whom he had devised the land by the first will, with a variation only in the name of one of the trustees; but which second will was not good, because not duly attested according to the statute of frauds. After so executing the second will, he cancelled the first by tearing off the seal. One question was, whether the cancelling of the former will was a revocation thereof within the statute of frauds and perjuries. And it was held that it was not; because there was no self-substituting independent act, but done to accompany, or in way of affirmation of the second will; it was done from an opinion that the second will had actually revoked the first, which induced the testator to tear that, as of no use. Therefore, if the first was not effectually revoked by the second, neither ought the act of tearing the first to revoke it; for, though a man might, by the statute of frauds, as effectually destroy his will by tearing or cancelling it, as by making a second will, yet, when he intended to revoke the first will by the second, and it was insufficient for that purpose, as in the principal case, and the tearing and cancelling the first was only in * consequence of his opinion that he thereby made good the second will, the tearing and cancelling should not destroy the first, but it ought to be considered as still subsisting and unrevoked. (*z*) And the principle of this decision was recognized by Lord Mansfield in the case of Burtenshaw *v.* Gilbert; (*a*) by Lord Ellenborough in Perrot *v.* Perrot; (*b*) and by Sir John Nicholl in Lord John Thynne *v.* Stanhope. (*c*) So in the case of Hyde *v.* Hyde, (*d*) where the testator, having given instructions for some immaterial alterations in a properly executed will, read over a

will be once completely cancelled and revoked, it is a final act, even though the testator, at the time, intended afterwards to make a new will and never did so; or did so, and afterwards cancelled the second will; it will in such a case require a republication to restore the first will. Semmes *v.* Semmes, 7 Harr. & J. 388; Bohannon *v.* Walcot, 1 How. (Miss.) 336; 4 Kent, 531; Jones *v.* Hartley, 2 Whart. 103; Havard *v.* Davis, 1 Browne, 334; S. C. 2 Binn. 406; Flintham *v.* Bradford, 10 Penn. St. 82; *post*, 178–181; James *v.* Marvin, 3 Conn. 576.]

(*y*) 2 Vern. 742; S. C. Prec. in Chan. 459; 1 Eq. Cas. Ab. 408; 1 P. Wms. 343; 1 Saund. 280 *b*, note to Duppa *v.* Mayo.

(*z*) Powell on Devises, 601. It would have made no difference if the latter will had been in favor of another person from the former. See Sir William Grant's judgment in Ex parte the Earl of Ilchester, 7 Ves. 379.

(*a*) Cowp. 52.

(*b*) 14 East, 440.

(*c*) 1 Add. 53.

(*d*) 1 Eq. Cas. Abr. 409; S. C. 3 Chanc. Rep. 155.

draft of a new will made according to such instructions, and having signed such draft, tore the seals from his old will, under the impression that his new will was completely executed so as to pass lands; this was held to have been done *sine animo cancellandi*, and therefore to be no revocation of the original will.

Again, in Hyde *v.* Mason, (*e*) the testator duly, according to the statute of frauds, made and executed his will in duplicate, and one of the duplicates was delivered to one of the executors. The testator, about three weeks before his death, made several alterations and obliterations with his own hand, in the duplicate remaining in his own custody, making a new devise of his real estate, and a new residuary legatee, and a new executor, entirely striking out the names of the first devisees, residuary legatees, and executors, and altered several of the former legacies, and inserted or interlined new legacies. And soon after he wrote another will with his own hand, agreeable in great measure, but not altogether, to the will or duplicate so altered, with the * conclusion in these words: "In witness whereof I the said testator have to each sheet set my hand, and to the top where the sheets are fixed together, my hand and seal, and to the last thereof my hand and seal, and to a duplicate of the same tenor and date this day of 1730." But there was no signing or fixing together. The testator soon after began to write another will, word for word with the last, as far as it went, but proceeded no farther than devising his lands. The testator lived six days after, and was in good health, and might have finished and executed both or either of the later wills if he had thought fit. The testator never sent to or called upon the executor for the duplicate of the first will in his hands, though the executor lived in London, where the testator also resided. After the death of the testator all the testamentary papers or schedules were found lying all in loose and separate papers, upon a table in his closet, not signed or executed, and the duplicate of the first will was found on the same table, altered and obliterated (*ut supra*) with his name and seal thereto, whole and uncancelled. In the prerogative court sentence was given for the duplicate of the first will in the execu-

(*e*) Vin. Abr. Devise, R. 2, pl. 17, S. C. *nomine* Limbery *v.* Mason, Com. Rep. 451; S. C. 3 Eq. Cas. Abr. 776, and 4 Burr. 2515, cited by Lord Mansfield in Goodright *v.* Glazier; S. C. *nomine* Calamy *v.* Hyde, 1 Cas. temp. Lee, 423, note (*a*).

tor's hands; and upon appeal to the delegates the sentence was confirmed by Lord Raymond, Mr. Justice Probyn, Dr. Tyndall, and Dr. Brampton. A commission of review was afterwards applied for and obtained; and after further hearing, &c. before the commissioners of review, the former sentence of the prerogative court was again affirmed by all the delegates, except Dr. Pinfold, viz, by Reynolds C. B., Page J. and Comyns B., and two doctors of the civil law, chiefly on the reason that the testator did not intend an intestacy; and by the alterations and obliterations in his own duplicate of the first will, he appeared only to design a new will, *which, as he never perfected, the first ought to stand;* and his not calling for the duplicate in the executor's hands strengthened the presumption of his intent, not absolutely to destroy his first will till he perfected another, which he never did. (e^1)

* In the case of Winsor *v.* Pratt, (f) the testator, in July, 1812, made his will, by which he devised certain real estates to his wife for life, and on her death to her mother, and on the death of his wife and her mother to his executors, in fee upon certain trusts. In November, 1816, he made various interlineations and obliterations, the effect of which, as regarded his real estate, was, to confine the first devise to his wife for her widowhood, and to strike out the devise to her mother. The original date was struck out, and day of November, 1816, was substituted. The will was never resigned, republished, or reattested, but in the following month the testator caused a fair copy to be made, and added one interlineation not affecting his real estate, but the copy was never signed, attested, or published; and in December, 1816, the testator died. The court of common pleas were of opinion, that, under such circumstances, the interlineations and obliterations were inoperative, and that there was no revocation of the will as it originally stood. And Dallas C. J. in giving his judgment observed: "The effect of cancelling depends upon the validity of the second will, and ought to be taken as one act done at the same time; so that if the second will is not valid, the cancelling of the first, being dependent thereon, ought to be looked upon as null and inoperative."

(e^1) [See O'Neall *v.* Farr, 1 Rich. (S. Car.) 80; Burns *v.* Burns, 4 Serg. & R. 567; Johnson *v.* Brailsford, 2 Nott & McC. 272; Card *v.* Grinman, 5 Conn. 168.]

(f) 2 Brod. & Bing. 650; S. C. 5 Moore, 484.

In a modern case in the prerogative court, an executor, having, in pencil, altered a will (by the direction of the testator, who approved of it when so altered), and then cancelled it, only in order that another might be drawn up, the preparation of which was prevented by the death of the testator, Sir John Nicholl held, that such cancellation, being preparatory to the deceased making a new will, and conditional only, was not a revocation. (*g*)

* Further examples may be adduced with respect to obliteration. As where lands were duly devised to two trustees upon trust for certain purposes, and afterwards the testator struck out the name of one of the trustees, and inserted the names of two others, leaving the purposes of the trust unaltered, though varying in certain particulars, and did not republish his will: it was adjudged, that the testator's intent appearing to be only to revoke by the substitution of another good devise to other trustees, as such new devise could not take effect for want of the proper requisites of the statute of frauds, it should not operate a revocation. (*h*)

So in a later case, (*i*) a testator made his will, duly executed and attested so as to pass real estates, by which he gave to his younger sons 4,000*l.* each, and to his daughters 3,000*l.* each, payable exclusively out of his real estates; he afterwards obliterated "four" and "three," and wrote over them "three" and "one;" but the will was not reëxecuted or republished; he subsequently made a codicil, signed by him, but not executed or attested so as to pass real estates, by which he reduced the portions given to the younger sons and daughters, according to the alterations in the will. The younger sons and daughters were held to be entitled to the portions originally given to them by the will, on the ground that the testator, by the obliterations and interlineations, did not intend revocation, but a substitution which proved ineffectual. (*k*)

(*g*) In the Goods of Applebee, 1 Hagg. 143. See, also, In the Goods of De Bode, 5 Notes of Cas. 189, accord.; In the Goods of Eeles, 2 Sw. & Tr. 600; In the Goods of Mitcheson, 32 L. J., P. M. & A. 202.

(*h*) Short *v.* Smith, 4 East, 419; [Quinn *v.* Quinn, 1 N. Y. Sup. Ct. 437. Where, after a will of real or personal estate was duly executed, a scrivener, by direction of the testator and in the presence of only one of the subscribing witnesses, interlined another legacy, it was held that the alteration did not make the will void. Wheeler *v.* Bent, 7 Pick. 61. See Jackson *v.* Holloway, 7 John. 394.]

(*i*) Kirke *v.* Kirke, 4 Russ. 435.

(*k*) See, also, Locke *v.* James, 11 M. & W. 901, accord.

Cancellation, under the influence of a mistake in point of law, seems to be equally inoperative to revoke, as if made under a mistake of fact. "If a man," said Lord Ellenborough, in the case of Perrott *v.* Perrott, (*l*) "cancel his will under a mistake in point of fact that he has completed another, when he really has not, as was the case in Hyde *v.* Hyde, the cancellation is void; and if he cancel it under a *mistake in law, that a second will (complete as to the execution) operates upon the property contained in the first, when from some clerical rule it really does not, shall this be deemed a valid cancellation?"

General principle of the cases.

The general principle of the above cases was laid down by Lord Alvanley in Ex parte Lord Ilchester, (*m*) as completely established, that, where it is evident that the testator, though using the means of revocation, could not intend it for any other purpose than to give effect to another disposition, though, if it had been a mere revocation, it would have had effect, yet, the object being only to make way for another disposition, if the instrument cannot have that effect, it shall not be a revocation. (*n*)

In connection with this principle, it has been established (as will hereafter fully appear), (*o*) that a subsequent will made under the impulse of a mistaken notion of facts will not revoke a former one. (*o*[1])

The rule differs when the gift fails by incapacity of the legatee.

But where the second disposition fails for want of capacity in the legatee to take, it appears to be established (though it has been thought difficult to make a satisfactory distinction) that the revocation will be effectual. (*p*)

(*l*) 14 East, 440.

(*m*) 7 Ves. 372.

(*n*) See, also, the same rule laid down by Sir Wm. Grant in the same case, 7 Ves. 279. For other cases illustrating this rule, see Scott *v.* Scott, 1 Sw. & Tr. 258; In the Goods of Cockayne, Dea. & Sw. 177; Dickinson *v.* Stidolph, 11 C. B. N. S. 341; Williams *v.* Tyley, Johns. 535, per Wood V. C.; In the Goods of Middleton, 3 Sw. & Tr. 583; Powell *v.* Powell, L. R. 1 P. & D. 209. It seems that the rule only applies where the revocation is to be dependent on a future event. Dickinson *v.* Swatman, 30 L. J., P. M. & A. 34. But see Powell *v.* Powell, L. R. 1 P. & D. 209; In the Goods of Weston, L. R. 1 P. & D. 633.

(*o*) *Post*, 172.

(*o*[1]) [Where a testator executed a second will, supposing at the time that his first will was lost, and he subsequently found the first, and destroyed the second, declaring that he preferred the first, the latter may properly be admitted to probate. Marsh *v.* Marsh, 3 Jones Law (N. Car.), 77.]

(*p*) Tupper *v.* Tupper, 1 Kay & J. 665; Quinn *v.* Butler, L. R. 6 Eq. Cas. 225; [*post*, 186, note (*n*); Barksdale *v.* Barks-

A codicil is, *primâ facie*, dependent on the will; and the destruction or mutilation of the will is an implied revocation of the codicil. (*q*) But Lord Penzance appears to * have taken a different view of this subject, and to have held that since the passing of 1 Vict. c. 26, s. 20 (see *ante*, 127), the words of this statute are imperative, and, consequently, that when a testator has once executed a testamentary paper, that paper will remain in force unless revoked in the particular manner named in this section. (*r*) But it may be doubted whether the view above taken by his lordship is correct, and whether the destruction or mutilation of the will is not an implied revocation of the codicil by reason of the very nature of the instrument, just as the mutilation of the part of any duplicate will in the testator's own custody is a revocation of both duplicates. As to what is designated in the statute by the words "some writing," see In the Goods of Hicks. (*s*) And, independently of this statute, there have been cases where the codicil has appeared so independent of, and unconnected with the will, that, under the circumstances, the codicil has been established, though the will has been held invalid. It was regarded as a question altogether of intention. Consequently, the legal presumption in this case might be repelled, namely, by showing that the testator intended the codicil to operate, notwithstanding the revocation of the will. (*t*)

When a destruction or mutilation of the will is a revocation of the codicil.

If a will be executed in duplicate, and the testator keeps one

dale, 12 Leigh, 535; Laughton *v.* Atkins, 1 Pick. 548; O'Neall *v.* Farr, 1 Rich. (S. Car.) 80; Price *v.* Maxwell, 28 Penn. St. 23; Hairston *v.* Hairston, 30 Miss. 276; Clark *v.* Ehorn, 2 Murph. 235; 1 Jarman Wills (3d Eng. ed.), 156; Frenche's case, 8 Vin. Ab. Dev. O. pt. 4; Roper *v.* Constable, 2 Eq. Cas. Abr. 359, pl. 9; S. C. *nom.* Roper *v.* Radcliffe, 5 Bro. P. C. Toml. 360; 10 Mod. 233.]

(*q*) Coppin *v.* Dillon, 4 Hagg. 361; Grimwood *v.* Cozens, 2 Sw. & Tr. 364; In the Goods of Dutton, 3 Sw. & Tr. 66; [Re Greig, L. R. 1 P. & D. 72; unless it is of such a character as to be entirely independent of the will. Grimwood *v.* Cozens, 2 Sw. & Tr. 364; Black *v.* Jobling, L. R. 1 P. & D. 685; Goods of Turner, L. R. 2 P. & D. 403; 1 Jarman Wills (3d Eng. ed.), 131; Tagart *v.* Squire, 1 Curt. 289; Clogstoun *v.* Walcott, 5 Notes of Cas. 623; Re Halliwell, 4 Notes of Cas. 400.]

(*r*) In the Goods of Savage, L. R. 2 P. & D. 78; Black *v.* Jobling, L. R. 1 P. & D. 685.

(*s*) L. R. 1 P. & D. 683. See, also, *ante*, 127.

(*t*) Barrow *v.* Barrow, 2 Cas. temp. Lee, 335; Medlycott *v.* Assheton, 2 Add. 231; Tagart *v.* Hooper, 1 Curt. 289; In the Goods of Halliwell, 4 Notes of Cas. 400; Clogstoun *v.* Walcott, 5 Notes of Cas. 623; In the Goods of Ellice, 27 L. J., P. M. & A. 27; [Gage *v.* Gage, 12 N. H. 380, 381; Bates *v.* Holeman, 3 Hen. & Munf. 502.]

Duplicate wills: presumption that the destruction or mutilation of one revokes the other:

part himself, and deposits the other with some other person; and the testator mutilates or destroys the part in his own custody, it is a revocation of both. (*u*) The presumption of law in such case, liable of course to be * rebutted by evidence, is, that the destruction or mutilation of the one duplicate was done *animo revocandi* as to both. (*w*)

And in Pemberton *v.* Pemberton, (*x*) Lord Chancellor Erskine laid down that the same presumption holds, though in a much weaker degree, (*x*[1]) where both the instruments are in the testator's possession: and further, that in a third case, where the testator, having both duplicates in his possession, alters one, and then destroys that which he has altered, there also the same presumption holds, though weaker still. (*y*)

But in Roberts *v.* Round, (*z*) the testatrix executed her will in

(*u*) Sir Edw. Seymour's case, cited Com. Rep. 453; S. C. 1 P. Wms. 346; 2 Vern. 742; Onions *v.* Tyrer, 1 P. Wms. 346; Burtenshaw *v.* Gilbert, Cowp. 49; Bonghey *v.* Moreton, 2 Cas. temp. Lee, 532; S. C. 3 Hagg. 191; Rickards *v.* Mumford, 2 Phillim. 23; Colvin *v.* Fraser, 2 Hagg. 266.

(*w*) Swinburne seems to have been of opinion that it lay on the party relying on the revocation to prove the *animus*, otherwise the cancellation of one duplicate would not affect the other. See pt. 7, s. 16, pl. 4. But the modern authorities, cited in the preceding note, have now settled that the *animus* is to be presumed till the contrary is proved. As to the presumption, when a testator destroys a duplicate in the possession of his solicitor, and preserves that in his own custody, see Payne *v.* Trappes, 1 Robert. 583, 591; [O'Neall *v.* Farr, 1 Rich. (S. Car.) 80.]

(*x*) 13 Ves. 310. And in that case it also appears that Lord Ellenborough and Sir James Mansfield had each, in charging juries, stated the law to this effect. [The circumstances in Pemberton *v.* Pemberton, *supra*, were as follows: Two parts of a will were found in the possession of a testator at his death, the one cancelled, having various alterations in it, and the other not altered or cancelled; and the finding of the jury in three successive trials at law on these facts, and the evidence generally, was, that the will was not revoked; and in that conclusion the lord chancellor finally concurred. "Perhaps," says Mr. Jarman (Wills, vol. 1, 3d Eng. ed. 129), "in such a case, the presumption can hardly be said to lean in favor of the revocation at all; for the testator having made alterations in one part, and then cancelled the part so altered only, the conclusion would rather seem to be, that he merely intended, by the destruction of that part, to get rid of the alterations, and to restore the will to its original state."]

(*x*[1]) [Re Hains, 5 Notes of Cas. 621.]

(*y*) It was urged by counsel, in the course of the argument, that in this third case, as soon as one part has been altered, the two parts cease to be duplicates, and the altered one then becomes a new will of the latest date, and revokes all others. If that were so, upon the destruction of the altered will, the question would seem to resolve itself into the point whether the prior uncancelled, unaltered one is revived by the destruction of the latter altered one. As to which see the next section.

(*z*) 3 Hagg. 548.

duplicate in the year 1814. The will was kept by her, and the duplicate immediately after execution was left with her solicitor, who retained possession of it till the year 1827, when he delivered it to her, at her request. On her decease, in the year 1830, the will and duplicate were found in her portfolio, which was on her bed at the time of her death. The will was inclosed in an envelope, indorsed in her handwriting, "My will, dated the 11th of April, 1814," and with the word "mine" written by her in pencil on the * outer sheet of the will. The duplicate had been mutilated by cutting out the names of several of the devisees; and Sir John Nicholl held that such mutilation was neither a total or partial revocation. The learned judge, in pronouncing his judgment, made the following observations: "What, upon the face of the instrument, are the sound legal construction and presumptions? Suppose that the mutilated instrument alone had been found, and that no duplicate had ever existed. This mutilation of the first sheet, leaving the signature untouched, would not be a total revocation; it would be a revocation of those particular devises only; but there being two papers, both in the deceased's possession, *the presumption of law would be, that by the preservation of one duplicate entire, she did not intend a revocation of these particular devises*, otherwise she would have mutilated both duplicates. The construction then to be put upon this act of mutilation (for it clearly appears to have been her own act), is, that at most it was a preparation for a projected alteration, to which she had not finally made up her mind, or which she had abandoned; and, therefore, she preserved entire the duplicate which she had always retained in her own possession, and on which she had written the word "mine."

However, in Doe *v.* Strickland, (*a*) where the testator had died with two instruments both in his own keeping, the one a copy of the other, and which the jury (on the trial of an ejectment) found he intended should form his one will in two parts, and he had obliterated (it being a case before the wills act) certain passages in one of the two, leaving the other unaltered, and the jury also found *that the obliterations were meant by him to be final alterations and to stand as his last will*, the court of common pleas held that the obliterations in the one instrument operated as a revocation of the corresponding passages in the other.

(*a*) 8 C. B. 724.

an interlineation and a codicil to the same effect; by cancelling one, the other is cancelled:

In another case under the old law, where a father, after having made his will, being displeased with his son, by an *interlineation of his will, excluded him from all share in his property but one shilling, and also by a codicil made for that purpose, declared his determination to the same effect; but afterwards being reconciled to his son, the testator cancelled the codicil, by drawing his pen across it, but the interlineation was left standing in the will; (a^1) it was held by Sir W. Wynne, in the ecclesiastical court, and afterwards by Sir W. Grant M. R., that the cancellation of the codicil had the effect of cancelling the interlineation. (b) So it was held in the case of draft which a testator signed, and afterwards executed a will from it; if he should afterwards cancel the will *animo revocandi*, the draft would be thereby also revoked. (c)

cancellation of a will cancels the signed draft from which it was prepared.

Proof of mutilation:

If a will in testator's custody be found mutilated, the presumption is, that he mutilated it *animo revocandi:*

If a testament was in the custody of the testator, and upon his death it is found among his repositories mutilated or defaced, the testator himself is to be presumed to have done the act; (d) and it has already appeared that the law further presumes that he did it *animo revocandi*. (e) So where a testator has a will in his own custody, and that will cannot be found after his death, the presumption is that he destroyed it himself; (e^1) it

(a^1) [With regard to this act, Mr. Jarman (1 Jarman Wills, 3d Eng. ed. p. 130, note (f), takes occasion to observe: "Here it occurs to remark, that testators should be dissuaded from making or altering their wills (as they are often disposed to do) under the influence of any temporary excitement occasioned by the ill-conduct of a legatee; and still more from recording their resentment in their wills, which may have the effect of wounding the feelings of, and casting a stigma on, the offending party long after the transaction which gave occasion to the irritation has been effaced from recollection, or is remembered only to be regretted."]

(b) Utterson *v.* Utterson, 3 Vea. & B. 122.

(c) 1 Phillim. 400.

(d) Swinb. pt. 7, s. 16, pl. 5; Davies *v.* Davies, 1 Cas. temp. Lec, 444; Lambell *v.* Lambell, 3 Hagg. 568; [Baptist Church *v.* Robbarts, 2 Penn. St. 110.]

(e) *Ante*, 147; 3 Hagg. 568; [In re Will of Engelina S. White, 25 N. J. Eq. 501, 503; Smock *v.* Smock, 3 Stockt. 156; Baptist Church *v.* Robbarts, 2 Penn. St. 110.] And the law is not different though the testator appears to have gummed the signature on again in its original place. Bell *v.* Fothergill, L. R. 2 P. & D. 148.

[(e^1) Holland *v.* Ferries, 2 Bradf. Sur. 334; Jones *v.* Murphy, 8 Watts & S. 275; Steele *v.* Price, 5 B. Mon. 68; Bulkley *v.* Redmond, 2 Bradf. Sur. 281; Baptist Church *v.* Robbarts, 2 Penn. St. 110; Bound *v.* Gray, 1 Geo. 36; Weeks *v.* M'Beth, 14 Ala. 474; In re Johnson's Will, 40 Conn. 587, 588. But in order to raise this presumption the court must be satisfied that the will was not in existence at the time of the death of the testator.

cannot be presumed that the destruction has taken place by any other person without his knowledge or authority; for that would be presuming a crime. (*f*) And this presumption holds with respect to * duplicate wills: hence if a will was executed in duplicate, and the testator has the custody of one part, and it cannot be found after his death, the presumption of law is, that he destroyed it *animo revocandi;* and both parts are consequently to be considered revoked, unless such presumption be rebutted. (*g*)

if it cannot be found, the presumption is that he destroyed it *animo revocandi:*

so where the testator has the custody of one or two duplicate wills.

There can be no doubt, that if a will duly executed is destroyed in the lifetime of the testator without his authority, it may be established, upon satisfactory proof being given of its having been so destroyed, and also of its contents. (*h*) The law is the same, where a wife, having power to dispose of property by her will, makes her will and afterwards destroys it by the compulsion of her hus-

An unrevoked will, which has been unduly mutilated or destroyed, may be established:

Finch *v.* Finch, L. R. 1 P. & D. 371. Where the will has been removed from the custody of the testator without any act of his, it may be admitted to probate notwithstanding the presumption of revocation in ordinary cases. Minkler *v.* Minkler, 14 Vt. 128; Jackson *v.* Brown, 6 Wend. 173.]

(*f*) Helyar *v.* Helyar, 1 Cas. temp. Lee, 472; Mumford *v.* Rickards, 2 Phillim. 23; Loxley *v.* Jackson, 3 Phillim. 126; Lillie *v.* Lillie, 3 Hagg. 184; Wargent *v.* Hellings, 4 Hagg. 245; Welch *v.* Phillips, 1 Moore P. C. Rep. 299; James *v.* Cohen, 3 Curt. 770; Williams *v.* Jones, 7 Notes of Cas. 106; Brown *v.* Brown, 8 El. & Bl. 882; In the Goods of Mitcheson, 32 L. J., P. M. & A. 202; [Davis *v.* Sigourney, 8 Met. 487, 488; Eckersley *v.* Platt, L. R. 1 P. & D. 281; Wood *v.* Wood, L. R. 1 P. & D. 309; Finch *v.* Finch, L. R. 1 P. & D. 371; In re Johnson's Will, 40 Conn. 587, 588.] But this presumption may be rebutted, as by showing that he had no opportunity of so doing, or that it has been lost, or destroyed without his privity or consent. 3 Hagg. 184, 185; 4 Hagg. 249; Brown *v.* Brown, 8 El. & Bl. 876, 889; Patten *v.* Poulton, 1 Sw. & Tr. 55; Wood *v.* Wood, L. R. 1 P. & D. 308; [Davis *v.* Sigourney, 8 Met. 487, 488; Legare *v.* Ashe, 1 Bay, 464; Clark *v.* Wright, 3 Pick. 67; Bowen *v.* Idley, 11 Wend. 227; S. C. 1 Edw. Ch. 148; Patterson *v.* Hickey, 32 Geo. 156.] And for this purpose declarations of the testator to various members of his family down to a few days before his death, expressive of his satisfaction at having settled his affairs, and intimating that his will was left with his attorney, were held to have been properly admitted. Whiteley *v.* King, 17 C. B. N. S. 756; [In re Johnson's Will, 40 Conn. 587.] And this presumption does not apply to a case where the testator became insane after the execution, and continued insane until his death. Sprigge *v.* Sprigge, L. R. 1 P. & D. 608; see *ante*, 147. The evidence to rebut the presumption must be clear and satisfactory. Eckersley *v.* Platt, L. R. 1 P. & D. 281. See, also, In the Goods of Shaw, 1 Sw. & Tr. 62.

(*g*) Rickards *v.* Mumford, 2 Phillim. 23; Colvin *v.* Fraser, 2 Hagg. 266. See, also, Saunders *v.* Saunders, 6 Notes of Cas. 518.

(*h*) Trevelyan *v.* Trevelyan, 1 Phillim. 149; see *post*, pt. I. bk. IV. ch. II. § VII. p. 378.

band. (*i*) So where, after the death of the testator, his will and codicil were wrongfully torn by his eldest son; the court, by means of some pieces which were saved, and by oral evidence, having arrived at the substance of the instrument, pronounced for them. (*k*) So, in Podmore *v.* Whatton, (*l*) where there was satisfactory evidence that the defendant (the brother of the deceased, who had taken out letters of administration) had possessed himself of the will after the death of the testator, * and had suppressed or destroyed it, Sir J. P. Wilde granted letters of administration with the will annexed to the residuary legatee. It should be observed that the same judge, in Wharram *v.* Wharram, (*m*) appeared to doubt (but, it is submitted, without sufficient reason) whether the courts have been justified in allowing a will to be proved by parol evidence only, where it has been shown to be lost or destroyed, and to doubt the soundness of the doctrine laid down by the court of queen's bench in Brown *v.* Brown, (*n*) that parol evidence of the contents of a lost instrument may be received as much when it is a will as any other. This question will be considered more fully hereafter (*post*, pt. I. bk. IV. ch. II. § VII. p. 378), with the subject of the probate of lost wills generally. So if a will be wholly or partially mutilated or destroyed by the testator whilst of unsound mind, it will be pronounced for as it existed in its integral state, that being ascertainable. (*o*)

So a will mutilated by testator whilst *non compos*, may be established.

It must be borne in mind that the *onus* of making out that the cancellation of a will was the act of the testator himself, lies upon those who oppose the will. Accordingly, where a holograph instrument, purporting to be a codicil, was sent anonymously by the post to one of the legatees named therein, it was admitted to probate, though partially burnt and torn across, the handwriting being satisfactorily proved and the confirmatory and adminicular proof being sufficient to satisfy the court that it was a genuine instrument (*p*).

The *onus* of showing a cancellation to be the act of the testator lies on those who oppose the will.

(*i*) Williams *v.* Baker, Prerog. June 1, 1839.

(*k*) Foster *v.* Foster, 1 Add. 462. See, also, Knight *v.* Cook, 1 Cas. temp. Lee, 413.

(*l*) 3 Sw. & Tr. 449.

(*m*) 3 Sw. & Tr. 301.

(*n*) 8 El. & Bl. 876; [Sugden *v.* Lord St. Leonards, L. R. 1 P. D. 154;] *post*, 162.

(*o*) Scruby *v.* Fordham, 1 Add. 74; In the Goods of Brand, 3 Hagg. 754; In the Goods of Shaw, 1 Curt. 905; [Borlase *v.* Borlase, 4 Notes of Cas. 139; Re Downer, 18 Jur. 66; *ante*, 147, note (*r*).]

(*p*) Hitchins *v.* Wood, 2 Moore P. C. C. 355–447.

SECTION II.

Revocation by a Subsequent Testamentary Disposition.

"Concerning the making of a latter testament," says Swinburne, (*q*) "so large and ample is the liberty of making * testaments, that a man may, as oft as he will, make a new testament even until his last breath; neither is there any cautel under the sun to prevent this liberty. But no man can die with two testaments, and therefore the last and newest is of force; so that if there were a thousand testaments, the last of all is the best of all, and maketh void the former."

It is indeed a necessary consequence of the ambulatory nature of a will, that the *last* testamentary disposition of property by a testator shall be operative, to the exclusion of any previous contrary or inconsistent one. (*q*[1]) Consequently, before the passing of the new statute of wills, though in order that a subsequent will or codicil of *lands* might revoke a prior one, such later will or codicil must have been executed pursuant to the statute of frauds; yet a will of personalty, however solemnly and formally made, might have been totally or partially revoked by another subsequent will or codicil, or other instrument, however informal with respect to language or execution, provided it could be considered a testamentary paper, according to those rules of the ecclesiastical court which this treatise has already attempted to point out. (*r*) Nor was it necessary, in order to produce such effect, that in the latter testamentary paper there should be any mention of revoking the former. (*s*) And this is still the law with respect to the effect of subsequent testamentary dispositions, made before January 1, 1838; because the statute of Victoria does not extend to them. With respect, however, to cases within the operation of the new law, no revocation, either total or partial, can be effected by means of a subsequent will, or codicil, or other testamentary disposition, unless the same be executed with the solemnities required by that act. (*s*[1])

(*q*) Pt. 7 s. 14, pl. 1.

(*q*[1]) [Reese *v.* Probate Court of Newport, 9 R. I. 434; In re Fisher, 4 Wisc. 254; Simmons *v.* Simmons, 26 Barb. 68; Flood *v.* Howser, 1 Nott & McC. 321.]

(*r*) See *ante*, 66–110; Helyar *v.* Helyar, 1 Cas. temp. Lee, 472.

(*s*) Swinb. pt. 7, s. 14, pl. 4.

(*s*[1]) [*Ante*, 127, note (*h*[1]).]

The statute of frauds did not prevent a revocation by mere instructions for a subsequent will.

It had been sometimes objected, that although instructions neither reduced into writing in the presence of the *testator, nor read over to him, might operate as a will so long as they were put into writing in his lifetime, (*t*) yet that such testamentary paper could not revoke a prior will without violation of the twenty-second section of the statute of frauds, whereby it was provided, that "no will in writing, concerning any goods or chattels or personal estate shall be repealed, nor shall any clause, devise, or bequest therein be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least." But it was held that the statute did not prevent a revocation by such means. The case of Sellars *v.* Garnet (*u*) in the prerogative court, October 1748, was full to this point; for there an executed will was held to be revoked by a will written while the testator was alive; but he died before it was brought to him, and the contents thereof were proved by witnesses who heard him give the instructions agreeable to what was written down. It was insisted that this parol evidence could not be received; that it was to revoke a written will by parol, contrary to the statute; but both Dr. Bettesworth in the prerogative court, and the delegates who affirmed this sentence in 1751, were of opinion that it was a will in writing; that the parol proof of the instructions ought to be received; and that it was not a case within the statute of frauds.

A prior will revoked by a subsequent non-appearing will of different purport.

Nor did the statute interfere to prohibit the introduction of parol evidence to prove the fact of a non-appearing will having existed subsequent to the will found on the death of the testator. Accordingly, in Helyar *v.* Helyar, (*v*) Sir G. Lee held that the execution of a second will, with a different executor and residuary legatee, was by law a revocation of *the first, though the second did not then appear. (*x*) So in Brown *v.* Brown, (*y*) a testator,

(*t*) See *ante*, 70, 71.

(*u*) Cited by Sir George Lee in the case of Helyar *v.* Helyar, from his own MS. notes, 1 Phillim. 430; S. C. 1 Cas. temp. Lee, 509.

(*v*) 1 Cas. temp. Lee, 472.

(*x*) [See Jones *v.* Murphy, 8 Watts & S. 275.] See *post*, 178 *et seq.*, as to whether the first will would be revived by the revocation of the second.

(*y*) 8 El. & Bl. 876.

after the new wills act, executed a will, and afterwards a second one, which he took away with him. After his death the earlier will was found, but the second could not be found. Secondary evidence was given which showed that the second will was inconsistent with the first and revoked it; and it was held that the second will must be presumed to have been destroyed by the testator *animo revocandi*, (*z*) and that consequently, the first will having been revoked by it, the deceased died intestate. But where the revocation of an existing will is sought to be established by the proof of the execution of a subsequent will, not appearing, the evidence ought to be most clear and satisfactory, and if parol evidence alone be relied on, such evidence ought to be stringent and conclusive. (*a*)

A prior testamentary paper not revoked by a subsequent one, unless they be inconsistent:

But the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together, (*a*[1]) for though it be a maxim, as Swinburne says above, that "no man can die with two testaments," yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be all clearly testamentary), may be admitted to probate as together containing the last will of the deceased. (*b*) And if a subsequent testamentary paper be

(*z*) See *ante*, 157.

(*a*) Cutto *v.* Gilbert, 9 Moore P. C. 131, 140, 141. [See M'Beth *v.* M'Beth, 11 Ala. 596; Davis *v.* Sigourney, 8 Met. 487; Durfee *v.* Durfee, 8 Met. 490, note; Legare *v.* Ashe, 1 Bay, 464; Bowen *v.* Idley, 1 Edw. Ch. 148; S. C. 11 Wend. 227; Clark *v.* Wright, 3 Pick. 67; Weeks *v.* M'Beth, 14 Ala. 474; Brown *v.* Brown, 10 Yerger, 84; Clark *v.* Morton, 5 Rawle, 242; Betts *v.* Jackson, 6 Wend. 173; Steele *v.* Price, 5 B. Mon. 68; Jones *v.* Murphy, 8 Watts & S. 275.]

(*a*[1]) [See Reese *v.* Court of Probate of Newport, 9 R. I. 434. A will or codicil may operate as a revocation of a prior testamentary instrument, by the effect either of an express clause of revocation, or of an inconsistent disposition of the previously devised property. In re Fisher, 4 Wisc. 254. A legacy bequeathed to a granddaughter, by a codicil "in lieu" of a devise in the will to her mother, who had since deceased, is a revocation of the original devise to the mother. Brownell *v.* De Wolf, 3 Mason, 456.]

(*b*) See a strong instance of this in Masterman *v.* Maberly, 2 Hagg. 235; and for other examples, see *ante*, 107, note (*x*); Stoddart *v.* Grant, 1 Macq. H. of L. 163; Richards *v.* Queen's Proctor, 18 Jur. 540. See, also, *post*, 162, note (*c*); In the Goods of Graham, 3 Sw. & Tr. 69; Geaves *v.* Price, Ib. 71; In the Goods of Budd, Ib. 196; Birks *v.* Birks, 4 Sw. & Tr. 23; Lemage *v.* Goodban, L. R. 1 P. & D. 57, in which last case, by a blunder, clauses had been omitted in a subsequent copy made of a will, and the copy and the original will, having both been duly executed, were

* partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent. (b^1)

or unless the latter be a substantive will:

Where, however, a testator by a paper purporting to be "his last will," and in which executors were appointed, disposed of a *part* only of his personal estate, and did not expressly revoke a former testamentary paper, it was held by Sir Herbert Jenner Fust, in Plenty *v.* West, (c) that the earlier paper was nevertheless revoked by the later, notwithstanding the two were not wholly inconsistent; there being nothing to show that he intended them to be taken conjointly as his will. And it was said by the judge that he knew of no case where the testator called a will "his last will" in which the court has held former papers to be included. And this decision was recognized and acted upon, after much consideration, by Sir John Dodson, in Cutto *v.* Gilbert. (d)

effect of appointment of executors.

In Plenty *v.* West, the judge further remarked that the appointment of executors has always been considered to effect a complete disposition. But this, as it has been since held by Sir John Dodson, is by no means conclusive of the testator's intention to constitute a substantive will. (e) * Conversely, where by a testamentary paper, which was executed as a will and not as a codicil, all the testator's property is given to a particular person, without the appointment of any executor such paper will operate as

A paper disposing of all the estate without making

admitted to probate as together containing the will. See, also, In the Goods of Nickalls, 4 Sw. & Tr. 40.

(b^1) [Brant *v.* Wilson, 8 Cowen, 56; Joiner *v.* Joiner, 2 Jones Eq. (N. Car.) 68; Price *v.* Maxwell, 28 Penn. St. 23, 38; Fleming *v.* Fleming, 63 N. Car. 209.]

(c) 1 Robert. 264; S. C. 4 Notes of Cas. 103; S. C. *coram* M. R. 16 Beav. 173. But instances may be found where a paper calling itself a last will and testament has been admitted to probate as an addition to a former will. In the Goods of Luffman, 5 Notes of Cas. 183; In the Goods of Langborn, 5 Notes of Cas. 512. And see, further, In the Goods of Holt, 6 Notes of Cas. 93, 96; 2 East, 494, 595, by Lord Ellenborough and Lawrence J. And on the whole the decision of the privy council in Cutto *v.* Gilbert, *post*, 165, and of the lords justices in Freeman *v.* Freeman, *post*, 166, together with the cases cited above, appear to render the authority of Plenty *v.* West at the least doubtful. And in Lemage *v.* Goodban, *ubi supra*, Sir J. P. Wilde regarded it as overruled.

(d) Prerog. Nov. 23, 1853, and March 3, 1854, 18 Jur. 560; *post*, 165.

(e) Richards *v.* Queen's Proctor, 18 Jur. 540; Stoddart *v.* Grant, 1 Macq. H. of L. 163, 173. And where a second will appoints a fresh executor, if the wills are not inconsistent, probate may be granted to both the executors. In the Goods of Leese, 2 Sw. & Tr. 442; In the Goods of Graham, 3 Sw. & Tr. 69; Geaves *v.* Price, 3 Sw. & Tr. 71.

a total revocation of a prior will, even though an executor may have been appointed by such prior will. For the later paper being, in fact, a will disposing of all the property, although there is no express revocation of the former will or of the appointment of an executor, is, *ex necessitate*, a revocation of the former. (*f*)

an executor, wholly revokes a prior will, though appointing executors.

It may here be observed, that a paper of a date prior to a will with a revocatory clause may be admitted to probate, provided the court is satisfied that it was not the intention of the testator to revoke that particular legacy or benefit. Thus, in the case of Denny *v.* Barton, (*g*) where there was a letter to the executors directing the payment of a legacy, and a clause of revocation in a subsequent will, it was held that the legacy was not revoked by a general revocatory clause. So in Gladstone *v.* Tempest, (*h*) checks written in 1833 by the deceased on his banker, but not intended to have effect until after his death, were pronounced for as part of the testamentary disposition of the deceased, notwithstanding he had, in 1834, formally executed a will disposing of the whole of his property, and containing a full clause of revocation.

Effect of express revocatory clause in subsequent will.

Upon the same principles it has been decided, in the courts of common law, that a subsequent will is no revocation, unless the contents of it are known; and it is not to be presumed, from the mere circumstance of another will having been made, that it revoked the former. As where it was found by a special verdict that the testator after the * making of a former will made *another* will in writing; but what the contents and purport were the jury did not know. The second will was holden not to be a revocation of the first; for the other will might concern other lands, or no lands at all, or be a confirmation of the former. (*i*) And though a will

Mere fact of a later will existing will not operate a revocation, at least in the common law courts:

(*f*) Henfrey *v.* Henfrey, 2 Curt. 468; affirmed in the Privy Council, 4 Moore P. C. C. 29.

(*g*) 2 Phillim. 575.

(*h*) 2 Curt. 650.

(*i*) Hitchins *v.* Bassett, 3 Mod. 203; S. C. Comb. 90; 2 Salk. 592; 1 Show. 537, affirmed in the House of Lords, Show. Cas. Parl. 146. "Hence it seems to follow," says Mr. Serj. Williams, in his note to Duppa *v.* Mayo, 1 Saund. 279 *h*, "that what Lord Hale is said to have laid down in a former case upon the same will (Seymour *v.* Nosworthy, Hard. 376), namely, that 'a second substantive independent will, though it does not by express words import a revocation of a former will, or pass any land, amounts in law to a revocation,' is either not correctly reported, or if it be, is overruled by Hitchins *v.* Bassett." [Evidence that a subsequent will had been made by the

though it be expressly found to be different from a former will, if the particulars be unknown:

be expressly found to be different from a former, yet if it be declared that it is not known in what that difference consisted, it will be no revocation in law thereof. Thus, where it was found by a special verdict (*k*) that the testator did make and duly publish *another* will in writing in the presence of three subscribing witnesses who duly attested the same; that the disposition made by the testator by the second will *was different* from the disposition in the former will, but in what particular was unknown to the jury; but they did not find that the testator cancelled the second will, or that the devisee under the first will destroyed the same, but what was become of the second will the jury could not tell: it was adjudged in the king's bench, on error, reversing the judgment of C. B. to the contrary, that the second will was no revocation of the first; and the judgment of the court of king's bench was affirmed in the house of lords. (*l*)

a later will, of which nothing is known but that it was headed "last will," is no revocation.

However, in Cutto *v.* Gilbert, (*m*) Sir John Dodson declined to recognize these doctrines of the common law. In that case a testator, having duly executed his will, subsequently executed another testamentary paper, which was * not found at his death, and the contents of which were unknown, save that it was headed "last will;" and that learned judge, on the authority of Plenty *v.* West (already cited), held that the former will was revoked by the execution of the latter, being of opinion that the execution of a will of personalty amounts to a revocation of a former will, whether the contents of the later will are known or not, provided there be, in substance and effect, revocatory words. But this decision was reversed in the privy council; their lordships being of opinion that the words, "this is my last will," did not import

testator and had been stolen from him, together with proof of his declarations after the will was stolen, that he would die intestate and leave his property to be distributed according to the statute, was held, in the absence of all proof of the contents of the former will, not to be sufficient evidence of a revocation of such former will. Hylton *v.* Hylton, 1 Grattan, 161; Nelson *v.* McGiffert, 3 Barb. Ch. 158. But see Jones *v.* Murphy, 2 Watts & S. 275, with regard to the effect of spoliation or fraud in the suppression or destruction of a second will, upon the necessity of showing its contents.]

(*k*) Goodright *v.* Harwood, 3 Wils. 497; S. C. 2 Black. 937; Cowp. 87, affirmed in the house of lords, 7 Bro. P. C. 344; 1 Saund. 279 *h*.

(*l*) See, also, Dickinson *v.* Stidolph, 11 C. B. N. S. 357.

(*m*) Prerog. Nov. 23, 1853, and March 3, 1854, 18 Jur. 560.

that the paper contained a different disposition of the property; and that the mere fact of so calling it did not render it a revocatory instrument. (*n*) Again, in Freeman *v.* Freeman, (*o*) Lord Justice Knight Bruce said, that whatever might be the view of the ecclesiactical courts, he did not think a temporal court bound to say that when a man in an instrument, containing testamentary dispositions by him, describes it as his last will and testament, and otherwise calls it his will, he is to be taken *primâ facie* as meaning wholly to annul any former testamentary instrument made by him extending to matters to which the latter does not extend. And accordingly the lord justices held that the expression, "this is my last will and testament," does not operate as a revocation of a former will, without words to that effect, at all events as regards real estate.

Two inconsistent wills of the same date, or without any date.

If two inconsistent wills be found of the same date, or without any date, and no evidence can be adduced establishing the posteriority of the execution of either, both are necessarily void, and the deceased must be considered intestate. But in every case the courts will struggle to reconcile them, if possible, and collect some consistent disposition from the whole. (*p*) But if there is an express contradiction between * two clauses in a will, it is settled by law that the second part of the will must take effect over the first part; but it was held by Lord Romilly M. R. that this rule does not apply where a second bequest is made by implication, (*q*) but it may be doubted whether this decision was well founded. (*r*)

Clause in a will controlled by subsequent inconsistent clause.

Revocation of a prior disposition, by a *substituted* one in a later instrument.

It may sometimes become a question, in a case where there are several codicils, or other testamentary papers, of different dates, whether the dispositions of the latter are to be considered as additional and cumulative to those of the prior, or as a substitute for, and consequently revocatory of them. As if a testator, by a codicil to his will, should direct a certain mode of making a provision for his wife, and by another subsequent codicil should also direct a provision

(*n*) 9 Moore P. C. C. 131.

(*o*) 5 De G., M. & G. 704. See, also, Birks *v.* Birks, 34 L. J., P. M. & A. 90.

(*p*) Swinb. pt. 7, s. 11, pl. 1; Godolph. pt. 1, c. 19, s. 3; Phipps *v.* Earl of Anglesea, 7 Bro. P. C. 443, Toml. ed.; 1 Powell on Devises (by Jarman), 518, note (3).

(*q*) Kerr *v.* Clinton, 8 L. R. Eq. Cas. 462.

(*r*) See *post*, 186.

for her in another mode; on the face of these instruments it might be doubtful, whether by the latter codicil he intended to increase the provision made by the former, or to revoke it by substituting that contained in the latter. (*s*) In such cases, the ecclesiastical court will admit parol evidence, in order to investigate the *animus* with which the act was done; and if upon such evidence it should appear that the latter codicil, although containing no revocatory words, was intended by the testator as a substitute for the former, it shall be thereby revoked, though it remain uncancelled. (*t*) However, the general principle is, that bequests are, *primâ facie*, to be taken cumulatively, when they are on separate papers, unless they are revocatory of each other. (*u*) And in a late case (*v*) in the prerogative court, * it was said by Sir Herbert Jenner Fust, that, whether the case is to be governed by the old law, or by the new statute of wills, parol evidence is not to be admitted, unless there is such doubt and ambiguity *on the face of the papers* as requires the aid of extrinsic evidence to explain. (*w*)

A second will executed under an erroneous supposition that it was a copy of the former will is no revocation.

If a man executes a will, erroneously supposing it to be a copy of his former will, it will be no revocation as to the parts omitted in the supposed copy, and both instruments will be admitted to probate. (*x*)

In what cases instructions are revoked by a subsequent will.

Although a paper merely purporting to be instructions for a will may, under some circumstances, operate as fully as a will itself, (*y*) yet when a will has been subsequently executed, disposing of all the testator's personal estate, and operative by itself, the instructions must be regarded as having performed their duty, so that their effect is at

(*s*) See, also, Gladstone *v.* Tempest, 2 Curt. 650; Walsh *v.* Gladstone, 1 Phil. C. C. 294; S. C. 13 Sim. 261; In the Goods of Beetson, 6 Notes of Cas. 13. See, also, Frewen *v.* Relfe, 2 Bro. C. C. 221.

(*t*) Methuen *v.* Methuen, 2 Phillim. 416; Greenough *v.* Martin, 2 Add. 239. See *post*, pt. III. bk. III. ch. II. § VII. And as to the admissibility of parol evidence, see *post*, pt. I. bk. IV. ch. III. § V.

(*u*) Bartholomew *v.* Henley, 3 Phillim. 316, by Sir John Nicholl. See *infra*, pt. III. bk. III. ch. II. § VII. as to cumulative legacies.

(*v*) Thorne *v.* Rooke, 2 Curt. 799.

(*w*) As to what is to be regarded as such an ambiguity, see *post*, pt. I. bk. IV. ch. III. § V.

(*x*) Birks *v.* Birks, 34 L. J., P. M. & A. 90.

(*y*) See *ante*, 68, 69.

an end, and the will is *primâ facie* a revocation of them. (*z*) But it is otherwise where the subsequent will is operative only by reference to the instructions; for in such case the will and instructions may be admitted to probate as forming together the last will of the deceased. (*a*)

Revocation of a finished will by a subsequent unfinished one (if made before Jan. 1, 1838.)

Before the new statute of wills (1 Vict. c. 26) came into operation, a will of personalty might also have been partially revoked, in some instances, by a subsequent unfinished will, which the testator had been prevented, by the act of God, from completing. The rule was, that where there was a regular will, and another paper begun as a new will, which the testator had been prevented, by the act of God, from finishing, the two papers might be taken together as the will of the deceased, and operation *pro tanto* be given to the latter paper, provided the proof of final intention were clear; * but it would not wholly revoke the former paper. (*b*) Thus in Goldwyn & Aspenwall *v.* Coppell, (*c*) there was a will regularly executed in Jamaica. The deceased gave instructions for an entire new will; before he disposed of the residue he became incapable. The court pronounced for the two papers, as containing together the will. This had been the constant doctrine of the ecclesiastical court. Where instructions were finished, they were not revoked by an unfinished paper, except as far as it went; the law presumed that the testator would have adhered to the remainder. (*d*) And this continues to be the law with respect to papers made before January 1, 1838.

In these cases, it may be observed, that the unfinished instrument is not looked upon in the ecclesiastical court as a codicil,

(*z*) Wood *v.* Goodlake, 2 Curt. 129.

(*a*) Hitchings *v.* Wood, 2 Moore P. C. C. 355.

(*b*) Carstairs *v.* Pottle, 2 Phillim. 35; Reeves *v.* Glover, 2 Cas. temp. Lee, 270.

(*c*) Cited by Sir John Nicholl in Harley *v.* Bagshaw, 2 Phillim. 51.

(*d*) 2 Phillim. 51, 52. See, also, Masterman *v.* Maberly, 2 Hagg. 236. It is, however, necessary here to recur to the distinction between "unfinished" and "unexecuted" wills; see *ante*, 73; for it should seem that there is no instance where two papers, both complete as to the disposition of personalty, and where the only defect of the second paper is want of due execution, have been admitted to probate. See Henfrey *v.* Henfrey, 4 Moore P. C. 29, 35, accord. Such an admission would indeed be contrary to the principle on which two papers are incorporated for the purpose of probate, viz, in order that the prior paper may supply imperfections in the disposition of the latter. Where the subsequent paper is merely codicillary, then no difficulty arises. 2 Hagg. 236.

to be taken in addition to the will, but revocative as far as it goes, and to be taken in conjunction with the will. "If this principle," said Sir John Nicholl, in Ingram *v.* Strong, (*e*) was rightly understood in other courts, there would seldom be much question about cumulative legacies; for where a paper is codicillary, and two legacies are given to the same person, they are cumulative: where instructions are pronounced for, as *containing together* a will, (*f*) that is, where there is a complete will, and an instrument * intended as an inception of a new will, but not completed, the latter legacy supersedes and revokes the former, and is substituted in the place of it." (*g*)

Accordingly, in Brine *v.* Ferrier, (*h*) a testator, by his will, gave all his property to his wife absolutely. By a subsequent incomplete testamentary paper, he gave all his property to his wife and two other persons, in trust to sell and pay the interest of the proceeds to his wife for her life, and, after her decease, to dispose of the principal to the purposes after mentioned. The testator then gave several legacies and annuities, and directed that, after the death and failure of issue of one of the annuitants, the annuity should be paid to his residuary legatee, but he did not name any. In another testamentary paper, the testator gave legacies and annuities to the legatees and annuitants named in the former paper, and also to other persons. Probate of the will and testamentary papers, *as containing together the testator's will*, was granted to his widow. And Sir L. Shadwell held, that the three papers formed together the testator's will; that the bequest to his wife in the first paper was not revoked, except so far as it was necessary to provide for the legacies and annuities; and that the legacies given by the second and third papers were single and not cumulative.

Case of a regularly executed will of realty and personalty, and a subsequent unexecuted paper.

Where there is a regularly executed paper disposing both of real and personal estate, and an unexecuted paper of later date, in which the disposition of real and personal estates is blended, so that the realty and personalty are dependent on each other (as where the testator gives real property to A., because he has given personal property to B.), the court will not grant probate of such

(*e*) 2 Phillim. 312.

(*f*) See *ante*, 107.

(*g*) Sec, also, 4 Hagg. 198, *per curiam*; Walsh *v.* Gladstone, 1 Phil. C. C. 294; Kidd *v.* North, 2 Phil. C. C. 91; and *post*, pt. III. bk. III. ch. II. § VII.

(*h*) 7 Sim. 549.

unexecuted paper; for it would defeat the intention and be injustice to give effect to the one disposition, unless it could be given to the other. But where it is clearly shown that the testator has finally * made up his mind, and that the execution of the latter instrument was prevented by the act of God, and the devise of the realty is perfectly independent of the disposition of the personalty, the court will give effect to the unexecuted will, in order to carry the deceased's intention *pro tanto* into effect. (*i*)

In Elsden *v.* Elsden, (*j*) a testator, having executed his will disposing of realty and personalty, and duly attested, subsequently wrote, signed, and dated a paper complete in disposition, but unattested, having the appearance of a draft, and spoken of in a memorandum subjoined, as intended to be settled and transcribed by his attorney, but "if he should have no opportunity, to be acted upon if it could be done fairly; if not, the former will to be resorted to:" the testator having had the opportunity of completing such paper, which, if admitted to probate, would have been inoperative totally as to the realty, and partially as to the personalty, it was held that he must be presumed to have abandoned it, and to have reverted to the regular will.

Again, in Gillow *v.* Bourne, (*k*) the deceased, in 1812, regularly executed a will, and, in 1818, two codicils, to carry real estate; he, in February, 1828, gave instructions for a new will, disposing both of real and personal estate, the will was prepared for execution, read over to him, and altered; the sheets altered, recopied, and the will again read over, after an interval of some days; the deceased postponed the execution, and in March the will was again read over to him; pencil alterations of slight importance were then made; on the 14th of November, 1829, further alterations were alluded to; the deceased said he would call and "finish" it on the 19th; he died suddenly on the 17th. The court refused probate of this instrument, holding final intention not proved.

Presumption of law against an unfinished instrument

* It must be observed that the strong presumption of law is always averse to an unfinished instrument materially altering and controlling a will deliberately framed, regularly executed, recently approved, and supported by

(*i*) Tudor *v.* Tudor, 4 Hagg. 199, note (*a*). See, also, Reynolds *v.* White, 2 Cas. temp. Lee, 214; Reeves *v.* Glover, Ib. 359; Douglas *v.* Smith, 3 Knapp, 1; *ante*, 70.

(*j*) 4 Hagg. 183.

(*k*) 4 Hagg. 192.

controlling a deliberate will.

previous and uniform dispositive acts; and this presumption is stronger in proportion to the less perfect state of, and the small progress made in, such instruments. (*k*[1]) To establish such a paper, there must be the fullest proof of capacity, volition, final intention, and interruption by the act of God. (*l*)

A subsequent will or codicil, made under the impulse of a mistaken notion of facts, will not revoke a former one.

It has already appeared that a cancellation of a will, under an erroneous assumption of facts, may not operate as a revocation. (*m*) Upon the same principle, if a man, by a subsequent will or codicil, make a disposition different from a former one, under a false impression, the *impulse of which is the foundation of his wish to change his former intent*, such an act will be considered only as effecting a contingent presumptive revocation, depending on the existence or non-existence of that fact. (*n*) As if one having previously devised to A., afterwards by another will, without destroying the first, or by codicil, devise to B., stating her to be his wife, so that it may be understood that he intended her to be benefited in that character only, and it turn out that she was married before, and had a husband living, neither of which facts were in the devisor's knowledge, (*o*) such devise or codicil will not operate as a revocation of the former will, because it depends on a contingency which fails. (*p*) It has been said that care must be

(*k*[1]) [It was declared, in a late case in New Jersey, that where two wills of the same testator are found after his decease, if the will of later date is incomplete and not duly executed, it will not affect the one of earlier date, but that will remain the last will of the testator, unless revoked in some other manner. Boylan *v.* Meeker, 2 Dutcher, 274. See Hollingshead *v.* Sturgis, 51 La. Ann. 450.]

(*l*) Blewitt *v.* Blewitt, 4 Hagg. 410.

(*m*) *Ante*, 148 *et seq.*; [Pringle *v.* M'Pherson, 2 Brevard, 279; Gifford *v.* Dyer, 2 R. I. 99.]

(*n*) 1 Powell on Dev. 524, 3d ed. See, also, Birks *v.* Birks, 34 L. J., P. M. & A. 90.

(*o*) An appointment by a will to a husband, under circumstances of this nature, occurred in Kennell *v.* Abbott, 4 Ves. 802.

(*p*) 1 Powell on Dev. 524. So where a testator, by will dated in 1849, bequeathed the interest of a fund to Charlotte Lee, "but in case the said Charlotte Lee should marry or die unmarried," the fund was to go over. Charlotte Lee was the maiden name of the testator's daughter, who had been married in 1828, and it was found that the testator knew of her marriage, but that it could not be shown under what circumstances he knew it. It also appeared that Charlotte's husband had, in 1849, not been heard of for many years. After the testator's death the husband appeared, and on the death of Charlotte claimed the fund. It was held by Page Wood V. C. that the circumstances were sufficient to show that the testator, in 1849, believed his daughter's husband to be dead, and that he intended that no husband of her's should have the benefit of

taken to * distinguish between cases where the testator acts under a false impression, originating from a deceit practised upon him, and those where, although the reason which he gives for his subsequent devise is false, yet no deceit is practised on him. (*q*) But there seem to be no grounds for any such distinction. Thus, where a testator gave legacies to the grandchildren of his sister, and afterwards, by codicil, revoked the legacies, giving as a reason, that the legatees were dead; upon its being proved that the fact of their death was not true, Lord Loughborough held, that the legacies were not revoked, on the ground that the cause of the revocation was false; and said, whether it was by misinformation or mistake was perfectly indifferent. (*r*) So in a modern case in the prerogative court, (*s*) the deceased supposing his will, appointing his wife sole executrix and universal legatee for life, to be lost, made, in Peru, a nuncupative will (not in conformity with the statute of frauds) with a general revocation clause, and appointing two executors, and his wife universal legatee, absolutely. The executors renounced, and she took probate of that will in Peru. The former will being found (of which fact he was ignorant at the time of his death), probate thereof, at the wife's prayer, was granted to her; and Sir John Nicholl observed that it was unnecessary to decide the question (about which there might be some doubt), whether the statute of frauds would apply to the nuncupative will made in Peru, (*s*[1]) because it appeared that the deceased did not * intend to revoke the former will; but, supposing it to be lost and being unwilling to die intestate, he made the nuncupative will. Accordingly, in Doe *v.* Evans, (*t*) where a testatrix by her will devised all her estate to L. E. for life, and to his sons and daughters successively, in strict tail, and L. E. and his only son died in the lifetime of the testatrix, but he left a daughter E. E., of whose birth she knew nothing, and she thereupon made a codicil, in which she recited her former will, and that L. E. had died without leaving any issue, and then devised over. It was held, that as this codicil was made in ignorance of the existence of E. E., it was only a conditional revocation. (*u*)

the fund; and, accordingly, that on her death it passed by the gift over. Crosthwaite *v.* Dean, L. R. 5 Eq. Cas. 245.

(*q*) 1 Powell on Dev. 525.

(*r*) Campbell *v.* French, 3 Ves. 322.

(*s*) In the Goods of Moresby, 1 Hagg. 378.

(*s*[1]) [See *ante*, 123, and note (*d*).]

(*t*) 10 Ad. & El. 228; 2 Per. & Dav. 378.

(*u*) Some time after making the codicil,

But there does seem to be a distinction between cases where the testator refers to a fact as having actually happened, and where he merely expresses his doubt, supposition, or advice of the fact. (*v*) Thus, in the case of the Attorney General *v.* Lloyd, (*x*) the testator, by his will, dated 8th February, 1734, gave particular lands and his personal estate, to be laid out in lands, to charitable uses. He afterwards made a codicil, dated 12th July, 1736, in which, after reciting his doubt whether such devise would be good, he gave the lands to M. B. and his heirs, if by the mortmain act they could not pass according to his will. * On 17th March, 1737, he made another codicil, the terms of which were, that the testator, "being advised" that the devise of his lands was void, and it being his intention that the charity should be continued, and being advised that his personal estate could be given, he did, by that codicil, give his personal estate to the charitable uses, and his real estate to M. B. The former part of this advice seems to have been ill-founded; for in Ashburnham *v.* Bradshaw, (*y*) it had been certified by the opinion of all the judges, to Lord Hardwicke, that a devise of lands under a will to charitable uses, made before the statute of mortmain (which was enacted in 1736), notwithstanding the testator survived the enactment, passed the land. But Lord Hardwicke observed, that the testator had put the devise on the fact of his being advised; and that he was so advised was a fact in his own knowledge; and he had grounded his devise upon this advice, and not upon the reality of the law, though that should come out in the event, one way or another; upon that he made his determination, which he might do to quiet a doubtful question, — "I will not have this litigated after my death, but I will settle it myself, upon some

the testatrix was made acquainted with the existence of E. E., but made no further testamentary disposition. It was held, that this did not set up the codicil; for, having been once inoperative, it could only be republished according to the statute of frauds. In Parker *v.* Nickson, 1 De G., J. & S. 177, the words in a will, "I acknowledge N., my second cousin, to be my next of kin and heir-at-law to all my real and personal property, situate in the parish of M.," were held by Lord Westbury, to be an effectual gift to N., who was, in fact, neither heir nor next of kin of the testator. The will concluded, "N., my second cousin, is my next of kin and heir-at-law, as my brother John is dead and has left no issue." The testator had another brother, named William, and his lordship held, that these words must not be taken as proving that the testator was under the erroneous belief that his brother William was dead without issue.

(*v*) 1 Powell on Dev. 525.

(*x*) 3 Atk. 515.

(*y*) 2 Atk. 36.

certain foundation." (*z*) His lordship afterwards ordered a case to be stated for the opinion of the judges of the king's bench, and they certified that the real estate was well devised to M. B., under the second codicil. So, in the Attorney General *v.* Ward, (*a*) the testatrix, having by her will given 300*l.*, to be divided among such of the children of E. D. as should be living, by a codicil gave to her brother's son "the 300*l.* designed for E. D.'s children, as I know not whether any of them are alive, and if they are well provided for." Lord Alvanley held that this operated as a complete * revocation of the legacy, though the children of E. D. were alive and claimed the legacy. The learned judge observed, that it had been argued, and with some ground, that if it had rested upon her not knowing whether they were living, there would be good reason to contend, that it fell within the case of "*Pater credens filium suum esse mortuum, alterum instituit hæredem; filio domum redeunte, hujus institutionis vis est nulla;*" (*b*) but she went farther: that she doubted, if they were living, whether they might not be well provided for; and the court would not inquire whether they were well provided for or not.

[Where a testator, by a codicil to his will, revoked a legacy in express terms, alleging as a reason for such revocation that he had provided the legatee with a permanent home, when, in fact, the testator had not provided a permanent home for the legatee, the court refused to declare such codicil to be inoperative, on the ground of mistake. It will be presumed that the testator knew whether or not he had provided such a home. (*b*[1]) But where a bequest to A. in a will was in a codicil treated as a bequest to B., and as lapsed by the death of B., and a new disposition was therefore made by a codicil, it was held that the will was not revoked. (*b*[2])]

In Richardson *v.* Barry (*c*) (a case before the new statute of wills), the deceased had power, under a trust deed, to dispose of

(*z*) His lordship afterwards said his principal doubt in this case was, whether the new disposition by the second codicil was put singly upon the point of law; the testator might have been advised that his personal estate had so much increased since making the will as to be sufficient to support the charity.

(*a*) 3 Ves. 327.

(*b*) Cicero de Oratore, lib. 1, c. 38.

(*b*[1]) [Hayes *v.* Hayes, 21 N. J. Eq. 265.]

(*b*[2]) [Barclay *v.* Maskelyne, 1 Johns. (Eng.) 124.]

(*c*) 3 Hagg. 249.

Will executing a power when revoked by subsequent will.

certain effects by a will, attested by two witnesses. And it was held, that a will, executed accordingly, was revoked by a subsequent will *directly referring to the trust deed*, and containing an express revocatory clause duly executed, but attested by *one* witness only.

In Hughes *v.* Turner, (*d*) the testatrix, possessing a power of appointment, duly by will executed that power. By a later will duly executed and attested according to the power, but without any recital of, or reference to, the power, she disposed of a real estate over which the power extended, bequeathed all the rest, residue, and remainder of her estates and effects, real or personal, plate, &c. or other property, whether in possession, reversion, or expectancy, or held in trust for her; revoked and made void all and every other will and wills by her at any time theretofore made, and declared this only to be her last will and testament. The court of delegates, holding that the intention to revoke the former will was, taking all the contents of the later will together, clear, refused probate of the two papers as together containing her will, and granted probate of the later paper * alone. But it has been understood (*e*) that the ground of this decision was, that the contents of the later will taken altogether clearly showed a departure from the original intention of the prior one, and therefore revoked that will, but that the clause of revocation, taken *per se*, and without a clear intention, would not have had that effect. It was argued that by refusing probate of the earlier papers, the question was shut out, whether they were not a good execution of the power. (*f*) But it was holden, notwithstanding, that the court of probate must decide, according to its ordinary rules, whether the last paper was revocatory or not, and decree probate accordingly in the ordinary course. (*g*)

Again, in Brenchley *v.* Lynn, (*h*) a woman, having a power to appoint certain property by will, made a will previously to her marriage in 1834, and by her marriage settlement, of even date with her will, *covenanted not to revoke that will*. After her marriage she executed many testamentary papers, but did not, as alleged, thereby in any way revoke the will. Subsequently, she

(*d*) 4 Hagg. 52.
(*e*) See 4 Hagg. 71.
(*f*) See *post*, pt. I. bk. IV. ch. III. § IX.
(*g*) See this case again cited, *post*, pt. I. bk. IV. ch. III. § IX.; and also pt. I. bk. V. ch. III. § VI.
(*h*) 2 Robert. 441.

executed "a codicil" to "her last will," whereby she revoked her "said will in toto," "so that I may die intestate." And Dr. Lushington held that, notwithstanding an averment of the necessity of probate being granted of certain former testamentary papers in addition to the last "codicil," in order that the court of equity might construe them in reference to the covenant in the settlement, the ecclesiastical court was bound, by the authority of the above mentioned case of Hughes *v.* Turner, to decree probate of the last testamentary paper alone; for it appeared from that case that the duty of deciding whether the "last codicil" was meant to revoke all the other papers, was thrown on the latter court; and upon the facts before him it could not be doubted that it was so meant. (*i*)

* From these cases, Sir C. Cresswell, in the case of In the Goods of Merritt, (*k*) appears to have deduced the rule, and acted upon it, that a general clause revoking all former wills was not sufficient to manifest an intention to revoke a will made in execution of a power.

Question whether on the revocation of a latter will a former uncancelled will is revived?

It has long been a *vexata quæstio*, whether the principle of law is, that, on the revocation of a latter will, a former uncancelled will shall revive or not. In the common law courts, it has certainly been laid down as an absolute proposition, excluding all questions of intention, that the former will shall revive. Thus, in Goodright *v.* Glazier, (*l*) the former will (being a will of lands) was made in 1757; the second in 1763. The former was never cancelled; the second was cancelled by the testator himself. Both wills were in the testator's custody at the time of his death; the second cancelled, the first uncancelled. It was held that the first will was valid, because the second, being cancelled before the testator's death, had no operation whatever, and therefore the first stood unrevoked. (*m*) So, in Harwood *v.* Goodright, (*n*) Lord

(*i*) See In the Goods of Holt, 6 Notes of Cas. 93.

(*k*) 1 Sw. & Tr. 112, 116, 117. See, also, In the Goods of Meredith, 29 L. J., P. M. & A. 155; In the Goods of Joys, 30 L. J., P. M. & A. 160; In the Goods of Fenwick, L. R. 1 P. & D. 319.

(*l*) 4 Burr. 2512.

(*m*) In the report of this case in Burrow, it is not mentioned that the second

(*n*) 1 Cowp. 91.

Mansfield said that it had been settled, that "if a man, by a second will, even revoke a former, yet if he *keep the first will undestroyed, and afterwards destroy the second, the first will is revived;" and in giving his judgment in the same case, his lordship again laid down that "if a testator makes one will, and does not destroy it, though he makes another at any time, virtually or expressly revoking the former; if he afterwards destroy the revocation, the first will is still in force, and good. (n^1) However, when in the case of Moore *v.* Moore, (o) these authorities were cited before the delegates, Lord Tenterden (then Mr. Justice Abbott) appeared to doubt whether it ought to be laid down as a decided principle of law without limitation, that the cancellation of the second will revives the first; and Mr. Baron Richards observed, that he thought he might venture to say it had not been universally so considered. (p)

In the ecclesiastical courts, it seems that a different doctrine from that laid down in the common law courts had prevailed; for it has been decided in a variety of cases, that the presumption is *against* the revival of the prior will, and that the *onus* is thrown on the party setting it up, to rebut that presumption. (q)

It is a question of intention

But the judgment of the delegates in the above cited case of Moore *v.* Moore, where the point was very ably argued and fully considered, has been understood to establish,

will expressly revoked all former wills. It appears, however, from the quotation of the case in Bull. N. P. 256, and from 3 Hill's MSS. 433, that such a clause was in fact contained in the second will. See note (a) to Burr. 2513, 3d ed. This omission in the report by Burrow may have led to the distinction which is to be found in Powell on Devises, where, after citing Goodright *v.* Glazier, it is said to be the better opinion, that if the subsequent will expressly revoke the former, the cancellation of the latter does not set the former up again. See, also, Roper on Revocation, p. 24, to the same effect. This distinction, as well from the fact above stated as from the principle upon which the case was decided, appears to have no foundation; and the *dicta* of Lord Mansfield in Harwood *v.* Goodright, cited in the text above, expressly negative it.

(n^1) [See Taylor *v.* Taylor, 2 Nott & McC. 482; Lively *v.* Harwell, 29 Geo. 509; Bates *v.* Holman, 3 Hen. & Munf. 502; Marsh *v.* Marsh, 3 Jones Law (N. Car.), 77; Flintham *v.* Bradford, 10 Penn. St. 82; James *v.* Marvin, 3 Conn. 576; Bohannon *v.* Walcott, 1 How. (Miss.) 336; *ante*, 148, note (x); Boudinot *v.* Bradford, 2 Dallas, 268; Lawson *v.* Morrison, 2 Dallas, 289; Havard *v.* Davis, 2 Binn. 406.]

(o) 1 Phillim. 419.

(p) See, also, Sir John Nicholl's observations in Wilson *v.* Wilson, 3 Phillim. 554, [Lively *v.* Harwell, 29 Geo. 509.]

(q) See the different cases cited in Moore *v.* Moore, 1 Phillim. 412; Helyar *v.* Helyar, 1 Cas. temp. Lee, 472. See also, Sir John Nicholl's remarks in Wilson *v.* Wilson, 3 Phillim. 554, and Sir Wm. Wynne's in Wright *v.* Netherwood, 2 Phillim. 276, in a note to Taylor *v.* Diplock.

that it is to be regarded as a question of intention, to be collected from all the circumstances of the case, (*r*) and that the legal presumption is neither adverse to, nor in favor of, the revival of a former uncancelled upon the cancellation of a latter revocatory will. Having furnished this principle, the law withdraws altogether, and leaves the question, as one of * intention purely, and open to a decision, either way, *solely* according to facts and circumstances. (*s*)

to be collected from all the circumstances of the case.

With respect to wills which are within the operation of the stat. 1 Vict. c. 26, it is enacted by s. 22 of that act, that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the reëxecution thereof, or by a codicil executed as required by the act, and showing an intention to revive the same. (*s*[1])

1 Vict. c. 26.

This section was probably intended by the framers of it to put an end for the future to all discussion as to the validity of a former will after the revocation of a subsequent inconsistent one. And it may be expected, that, in construing the statute, such an

(*r*) By Sir John Nicholl in Hooton *v.* Head, 3 Phillim. 32; Wilson *v.* Wilson, 3 Phillim. 554. [See Flintham *v.* Bradford, 10 Barr, 82.]

(*s*) By Sir John Nicholl in Usticke *v.* Bowden, 2 Add. 125. And the law as thus laid down was acted upon by Sir H. Jenner Fust in James *v.* Cohen, 3 Curt. 770. However, in the case of Wilson *v.* Wilson, 3 Phillim. 554, and Kirkcudbright *v.* Kirkcudbright, 1 Hagg. 326, Sir J. Nicholl considered the point as still unsettled, whether the presumption of law is in favor of a revival or a revocation; and in the former of these cases, 3 Phillim. 454, he expresses his own opinion, that good sense, and the reason of the thing, seem rather in favor of the presumption, as taken in the ecclesiastical courts, *against* the revival. But, perhaps, the point is of no great importance; for it is now clearly settled, that, whether the legal presumption is in favor of revival or revocation, it may be repelled by parol evidence of circumstances; see Welch *v.* Phillips, 1 Moore P. C. C. 209, 301; and a case can hardly be so destitute of all circumstances as to require a decision upon mere legal presumption and nothing else. See 3 Phillim. 554. The nature and contents of the will themselves may, it should seem, furnish grounds for deciding the question of intention, exclusive of circumstances *dehors* the will. Thus, if the latter will contains a disposition of quite a different character, this may be looked upon as such a complete departure from the former intention, that the mere cancellation of the latter instrument may not lead to a revival of the former, but intestacy may be inferred. If, however, the two wills are of the same character, with a mere trifling alteration, it is the rational probability that when the testator destroyed the latter, he departed from the alteration, and reverted to the former disposition remaining uncancelled, and consequently that he intended a revival. See Kirkcudbright *v.* Kirkcudbright, 1 Hagg. 327.

(*s*[1]) [See Beaumont *v.* Keim, 50 Missou. 28. A similar provision had been previously adopted in New York. Rev. Sts N. Y. vol. ii. 66, § 53; 4 Kent, 532.]

effect will be given to the * enactment. At the same time it may be observed that the language employed in it is not calculated to exclude all controversy on the subject; because it was put by Lord Mansfield in Goodright *v.* Glazier, that the second will is ambulatory till the death of the testator. If he lets it stand till he dies, it is his will; if he does not, it is not his will, *and has no effect, no operation;* it is no will at all, being cancelled before his death. If, therefore, such cancellation totally prevents its operation, it may be argued that the previous will continues valid; because it has not been in any manner revoked; inasmuch as the subsequent will in its ambulatory state had no effect whatever. (s^2) If, however, the true principle is that put by Mr. Justice Yates in the same case, viz, that the first will is good because the revocation of it by the second will was itself revocable, and the testator has revoked the revocation by cancelling the second will, then the above clause of the new statute of wills clearly applies; and the prior will cannot be valid unless revived by some of the modes prescribed. Where the second will contains a revocatory clause, the point has lately been regarded in the prerogative court as free from all difficulty. Thus in Major *v.* Williams, (t) a testatrix, after the new act came into operation, executed a will, and subsequently thereto two other wills, in each of which was contained a clause revoking all former wills. She afterwards destroyed the two later wills, and it was held very clearly by Sir H. Jenner Fust, that the first will was not thereby revived, and that parol evidence was not admissible to show an intention to revive. (u) And in Brown *v.* Brown, (x) it was treated as clear law, that the destruction of a second will, itself revoking one of prior date, cannot reinstate the first will, even

(s^2) [See the remarks of M'Kean C. J. in Lawson *v.* Morrison, 2 Dallas, 286, and of Shaw C. J. in Bayley *v.* Bailey, 5 Cush. 245, 261, touching this point. James *v.* Marvin, 3 Conn. 576. An instrument purporting to be a will, with a clause of revocation, cannot be offered in evidence as a revocation only, without a probate. Laughton *v.* Atkins, 1 Pick. 535. See Bayley *v.* Bailey, 5 Cush. 245; *ante*, 127, note (i); Rudy *v.* Ulrich, 69 Penn. St. 177. But it is not necessary that a will made to revoke a former will should contain any provision for disposing of the property, devised or bequeathed, in such former will. See Bayley *v.* Bailey, 5 Cush. 245; In re Thompson, 11 Paige, 453.]

(t) 3 Curt. 432.

(u) See, also, the judgment of the same judge in Saunders *v.* Saunders, 6 Notes of Cas. 524.

(x) 8 El. & Bl. 876. See, also, In the Goods of Brown, 1 Sw. & Tr. 32; Dickinson *v.* Swatman, 30 L. J., P. M. & A. 84.

though it may be in existence at the time of the testator's death. (x^1)

* It may here be mentioned, that it has been held, that a codicil which shows an ineffectual intention to revive an earlier will, which was destroyed, does not thereby revoke a will made subsequently to the destroyed will. (y)

A codicil referring to a will destroyed by testator does not revoke a later will.

SECTION III.

By Express Revocation.

According to the new statute of wills (1 Vict. c. 26, s. 20), an express revocation of a will or other testamentary instrument cannot be effectual unless it be contained in a will or codicil executed as required by the act, or in "some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed." (z)

Revocations after Jan. 1, 1838: 1 Vict. c. 26.

By sect. 34 it is enacted, that "this act shall not extend to any will made before January 1, 1838." The construction of which clause has been understood to be, with reference to the subject of the present inquiry, that the statute shall not extend to any act of revocation done with respect to a will before January 1, 1838. (a)

As to an express revocation, contained either in a will or codicil, or in any other distinct writing, before January 1, 1838, it was provided by the 6th section of the statute of frauds (29 Car. 2, c. 3), that if a revocation of a will of *lands* was to arise from another will or codicil inconsistent with the first, such will or codicil must be executed according to the solemnities of the 5th section: and if the revocation was to arise from some other *distinct writing*, *not being a will or codicil*, such writing must be signed by the testator in the presence of three witnesses. (b) This provision, * however, did not extend to a will of personal estate.

Revocation before Jan. 1, 1838.

(x^1) [See *ante*, 148, note (x), 149; James *v.* Marvin, 3 Conn. 576.]

(y) Rogers *v.* Goodenough, 2 Sw. & Tr. 342. See *post*, pt. I. bk. II. ch. IV. § II.

(z) See this section *verbatim*, *ante*, 127, [and see note (h^1), on same page.]

(a) Hobbs *v.* Knight, *ante*, 130.

(b) 1 Saund. 276 *h*, 860, note to Duppa *v.* Mayo.

But by the 22d section of the statute of frauds it was enacted, that "no will in writing, concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be, in the life of the testator, committed to writing, and after the writing thereof, read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least."

29 Car. 2, c. 3, cannot be by words only:

This clause of the statute, it has already been remarked, did not operate to prevent a revocation by an instrument which amounted, according to the rules of the ecclesiastical court, to a subsequent will, although such instrument was never read over to the testator, or allowed by him. (*c*)

But it must be observed, that a declaration of an *intention* to revoke, though reduced into writing, according to the direction of the statute of frauds, would not amount to a revocation. (*c*[1]) Words declaring only a future intention to revoke, were not considered a revocation before that statute; as if the testator had said, "I will alter my will," or, "it shall not stand," these words being indicative only of an intention to revoke at some future time, were holden not to be a revocation. (*d*) And so it is since the statute of frauds, notwithstanding the instrument containing words of an intention to revoke be executed according to the directions of the statute. As where a testator by a subsequent will, duly executed and attested, devised away a reversion in fee, which had been given to him since the making of a former will, and at the conclusion of the subsequent will, added, that as to the rest of his real and personal estate, he intended to dispose of the same by a codicil to that his will thereafter to be made, and afterwards died without * doing any other act to revoke his will; it was adjudged that these words, declaring only an *intention* to revoke, though reduced into writing, with all the formalities of the statute, did not amount to a revocation, any more than a parol declaration of the same words would have done before the statute. (*e*)

declaration of *intention* to revoke, though in writing, does not amount to a revocation.

(*c*) *Ante*, 160, 161.

(*c*[1]) [See Brown *v.* Thorndike, 15 Pick. 388; Semmes *v.* Semmes, 7 Harr. & J. 388; Ray *v.* Walton, 2 A. K. Marsh. 71; Gaines *v.* Gaines, 2 A. K. Marsh. 190.]

(*d*) Cranvel *v.* Saunders, Cro. Jac. 497; 1 Roll. Abr. 615, P. pl. 1; Moor, 874, 875; 1 Saund. 279 *g*, note to Duppa *v.* Mayo.

(*e*) Thomas *v.* Evans, 2 East, 448. [In Brown *v.* Thorndike, 15 Pick. 388, the testator wrote on his will, "It is my in-

However, in Walcott *v.* Ochterlony, (*f*) the deceased having made a will, which she deposited with a Mr. George, one of her executors, for safe custody, caused a letter to be written, desiring that the will might be destroyed. The executor did not destroy the will, and the deceased was not informed down to the time of her death, whether the will had been destroyed or not; but died without having altered her intention to revoke, and in the belief that she had done so; and Sir Herbert Jenner Fust held, that, under the circumstances, the will was revoked. The learned judge said that "there could be no doubt of her *animus revocandi;* and having established this point, what does the law require to give effect to such intention? The statute of frauds provides that no will in writing of personal estate shall be repealed, nor any clause or bequest therein altered or changed, by any words. Is this a revocation by words? I apprehend not. The deceased did not say, 'I revoke my will,' but in effect says, 'Mr. George is in possession of my will; I am not able to destroy it myself, but I desire that he will destroy it;' and this amounted to a present intention absolutely to revoke, which was written down at the time, approved of by the deceased, and by her direction communicated to the person in whose custody the will was; it was an absolute direction to revoke, reduced into writing in the deceased's lifetime. There is nothing in the statute of frauds which prevents such revocation having effect, and it is clear that, prior to the statute, a will might be so revoked." (*g*)

* Where a testatrix devised real estates, and by a subsequent void deed, attested by two witnesses, conveyed them to other trusts, it was held by Romilly M. R. that the deed was not a writing declaring an "intention to revoke" within the 23d section of the new statute of wills. Such a declaration need not be

tention at some future time to alter the tenor of the above will, or rather to make another will; therefore, be it known, if I should die before another will is made, I desire that the foregoing be considered as revoked and of no effect;" and this was held to be a present revocation and not the declaration of an intent to revoke by some future act. See Semmes *v.* Semmes, 7 Harr. & J. 388; Reid *v.* Borland, 14 Mass. 308; Jones *v.* Murphy, 8 Watts & S. 275; Lawson *v.* Morrison, 2 Dallas, 289; Witter *v.* Mott, 2 Conn. 67. Of course the above would now operate as a revocation in Massachusetts only upon compliance with some one of the formalities required by the statute. *Ante,* 127, note (*h*[1]).]

(*f*) 1 Curt. 580.

(*g*) See, also, Doe *v.* Harris, 8 Ad. & El. 1; S. C. 2 Nev. & P. 615; *ante,* 137; [Shaw C. J. in Bayley *v.* Bailey, 5 Cush. 261; In the Goods of Gentry, L. R. 3 P. & D. 80.]

in terms, *i. e.* "I do declare that I intend to revoke my will," but must be in equivalent terms amounting to that. (*h*)

To revoke a clear devise, the intention to revoke must be as clear as the devise.

In the case of Doe *v.* Hicks, (*i*) it was stated by Tindal C. J. in delivering the opinion of the judges in the house of lords, that the principle on which that opinion proceeded was, that where a devise in a will is clear, it is incumbent on those who contend that it is not to take effect by reason of a revocation in a codicil, to show that the intention to revoke is equally clear and free from doubt as the original intention to devise. (*j*) And the law thus laid down has been recognized and acted upon as an established rule in numerous subsequent cases. (*k*)

(*h*) Ford *v.* De Pontes, 30 Beav. 572.

(*i*) 8 Bing. 479; [S. C. 1 Cl. & Fin. 20.]

(*j*) See accord. Cleoburey *v.* Beckett, 14 Beav. 587, per Romilly M. R.; Williams *v.* Evans, 1 El. & Bl. 739.

(*k*) Patch *v.* Graves, 3 Drew. 348, 376; Robertson *v.* Powell, 2 H. & C. 762; Butler *v.* Greenwood, 22 Beav. 303; Norman *v.* Kynaston, 29 Beav. 96; S. C. 3 De G., F. & J. 29; Molyneux *v.* Rowe, 8 De G., M. & G. 368; [*ante*, 8, note (*q*); Hearle *v.* Hicks, 1 Cl. & Fin. (Am. ed.) 20, 24, 25; Kellett *v.* Kellett, L. R. 3 H. L. 167; Robertson *v.* Powell, 2 H. & C. 762; Williams *v.* Evans, 1 El. & Bl. 727; Evans *v.* Evans, 17 Sim. 86; 1 Jarman Wills (3d. Eng. ed.), 168 *et seq.*; Ives *v.* Harris, 7 R. I. 413; Quincy *v.* Rogers, 9 Cush. 295, 296; In re Arrowsmith's Trusts, 2 De G., F. & J. 474; Lemage *v.* Goodban, L. R. 1 P. & D. 57; Wetmore *v.* Parker, 15 N. Y. 450; Pickering *v.* Langdon, 22 Maine, 430; Tilden *v.* Tilden, 13 Gray, 108; 4 Kent. 531; Jenkins *v.* Maxwell, 7 Jones Law, 612; Conover *v.* Hoffman, 1 Bosw. 214; Boyd *v.* Latham, Busbee (Law), 365; Homer *v.* Shelton, 2 Met. 202; Nelson *v.* McGiffert, 3 Barb. Ch. 158; Bosley *v.* Bosley, 14 How. (U. S.) 390; Kane *v.* Astor, 5 Sandf. 467; Brant *v.* Wilson, 8 Cowen, 56; Alt *v.* Gregory, 8 De G., M. & G. 221; Joiner *v.* Joiner, 2 Jones Eq. 68; Bradley *v.* Gibbs, 2 Jones Eq. 13; Read *v.* Manning, 30 Miss. 308; Larrabee *v.* Larrabee, 28 Vt. 274; Pillsworth *v.* Morse, 14 Ir. Ch. 163; Collier *v.* Collier, 3 Ohio N. S. 369. Thus, if there is a bequest of specific property and also of the residue by will to A., and by a codicil the residue is given to B., the specific bequest will remain unaffected. Clarke *v.* Butler, 1 Mer. 304. See Hill *v.* Walker, 4 Kay & J. 166. A specific bequest will be revoked by a bequest of all personalty, but a general legacy charged on land will be unaffected. Kermode *v.* Macdonald, L. R. 3 Ch. Ap. 584. Cases as to the combined effect of a will and several codicils are frequently not only very long, but are too special to be of much use as general authorities. Hearle *v.* Hicks, 8 Bing. 475; S. C. 1 Cl. & Fin. 20; Hicks *v.* Doe, 1 You. & J. 470; Alexander *v.* Alexander, 6 De G., M & G. 593; Agnew *v.* Pope, 1 De G. & J. 49; Patch *v.* Graves, 3 Drew. 348. The question whether a codicil was wholly or only partially revocatory, was much discussed in the case of Cookson *v.* Hancock, 1 Keene, 817; S. C. 2 My. & Cr. 606. A question often arises, whether the whole or only a part of a series of limitations is revoked by a codicil, as to which see Philips *v.* Allen, 7 Sim. 446; Murray *v.* Johnston, 3 Dru. & War. 143; Fry *v.* Fry, 9 Jur. 894; Twining *v.* Powell, 2 Coll. 262; Sandford *v.* Sandford, 1 De G. & S. 67; Ives *v.* Ives, 4 Y. & C. 34; Daly *v.* Daly, 2 J. & Lat. 753; Morrison *v.* Morrison, 2 Y. & C. C. C. 652; Boulcott *v.* Boulcott,

Indeed, it may be stated generally as a canon of construction, that a clear gift cannot be cut down by any subsequent words unless they show an equally clear intention. (*l*) But in applying this rule it is sufficient that the subsequent words indicate the tes-

2 Drew. 25, 35; Wells *v.* Wells, 17 Jur. 1020; Alt *v.* Gregory, 2 Jur. N. S. 577. A gift of residue in a codicil revokes a gift of the residue in a will. Earl of Hardwicke *v.* Douglas, 7 Cl. & Fin. 795. But where there is a gift by codicil of the residue of a particular fund only, and then by a subsequent codicil a general gift of residue, as the two gifts are not necessarily inconsistent, the latter will not revoke the former. Inglefield *v.* Coglan, 2 Coll. 247; Evans *v.* Evans, 17 Sim. 108. A power of sale in a will is not revoked by a different disposition made of the estate by a codicil, unless there is some inconsistency between the exercise of the power and some part of the codicil. Conover *v.* Hoffman, 1 Abb. (N. Y.) App. Dec. 429.]

(*l*) Kiver *v.* Oldfield, 4 De G. & J. 30. [The differents parts of a will, or of a will and codicil, shall be reconciled if possible, and where a bequest has been once made it shall not be considered as revoked unless no other language can be put upon the language used by the testator. Thus, in Colt *v.* Colt, 32 Conn. 422, the testator, being the owner of a large number of shares of the stock in Colt's Fire Arms Company, bequeathed five hundred shares of the stock to his brother James B. Colt for life, and made bequests of other shares to other legatees. In the residuary clause he bequeathed his remaining stock in said company to the several persons to whom "I have hereinbefore given legacies of stock," in proportion to the amount bequeathed. By a codicil the testator, "for reasons growing out of his late unbrotherly conduct," afterward revoked the legacy of five hundred shares to his brother and gave shares to another legatee. It was held that the legacy of the share of the residue was not to be regarded as a dependent or auxiliary legacy, but as an independent one, and consequently was not to be affected by the revocation of the first legacy. The court treated it as a settled rule that a second legacy will never be presumed to be a dependent legacy. To make it dependent a clear intention to that effect must appear on the face of the will. This case was followed in one, depending on similar principles, recently decided in New York. The will of C., among other bequests, contained one to the Utica Female Academy of $10,000, to be expended in the erection of a new building, &c. and one to the Reformed Dutch Church of $10,000 to be expended in the erection of a church edifice. The residuary clause of the will gave the residue of the estate to the several legatees therein before named in proportion to the amount of the specific bequests. In a codicil C. stated that she had advanced $3,000 upon the legacy to the Utica Female Academy, and therefore she revoked so much thereof. She also stated that it appearing probable that the purpose of the bequest to the Reformed Dutch Church would soon be accomplished, and having concluded to give at that time $3,000, she therefore revoked the legacy to said church. It was held that the reference in the residuary clause of the will to the prior legacies was simply for the purposes of identity and description; that the prior legacies though revoked might be referred to for the purposes suggested; that the said clause spoke from the date of the will; that the legacies were independent; that the revocations did not affect the interests of the two legatees named in the residuary clause; but that they were entitled to their proportion thereof, the same as if no codicil had been executed. Wetmore *v.* Parker, 52 N. Y. 450. See Conover *v.* Hoffman, 1 Bosw. (N. Y.) 214.]

tator's intention to cut the gift down with reasonable certainty, and the rule does not mean that you are to institute a comparison between the two clauses as to lucidity. (*m*)

Express revocation subservient to another disposition.

It may be deduced from the case of Onions *v.* Tyrer, and the authorities which have been cited in a previous section * (with respect to the doctrine of cancellation, dependent on the efficacy of another act), that even an express revocation of all former wills, though not wanting in any circumstance for a revocation, will not operate as such, if only subservient to another subsequent disposition, which fails. (*n*)

Effect of a general revocatory clause in a will.

Generally speaking, where a will contains a general revocatory clause, it operates a revocation of all prior testamentary acts. But there has already been occasion to point out, (*o*) that probate may be granted of a paper of a date prior to such a will, provided the court is satisfied that it was not the intention of the deceased to revoke the particular legacy which is the subject of the earlier paper.

A codicil intending to revive a destroyed will no revocation of an intermediate will.

A codicil, which ineffectually intends to revive a prior will which the testator has destroyed, does not operate as a revocation of an intermediate will, if it is not inconsistent therewith, and does not show any intention to revoke. (*p*)

(*m*) Randfield *v.* Randfield, 8 H. L. Cas. 225, 235, 238, by Lords Campbell and Wensleydale.

(*n*) By Sir W. Grant, 7 Ves. 379; unless it fails by reason of the incapacity of the legatee. Tupper *v.* Tupper, 1 Kay & J. 665; *ante*, 153; [Barksdale *v.* Barksdale, 12 Leigh, 535. In Laughton *v.* Atkins, 1 Pick. 543, Parker C. J. said: "An instrument intended to be a will, but failing of its effect as such on account of some imperfection in its structure or for want of due execution, cannot be set up for the purpose of revoking a former will, for this substantial reason, that it cannot be known that the testator intended to revoke his will except for the purpose of substituting the other, and that it would be making the testator die without a will though it was clearly his design not to do so." See O'Neall *v.* Farr, 1 Rich. (S. Car.) 80; Hairston *v.* Hairston, 30 Miss. 276; Reid *v.* Borland, 14 Mass. 208; Clark *v.* Ehorn, 2 Murph. 235. But it has been held that if a second will is properly executed, according to the provisions of the statute, and contains an express clause of revocation of the former will, the revocation continues valid and binding, although the second will fails of its intended effect by reason of the incapacity of the devisee to take, or any other matter *dehors* the will. Price *v.* Maxwell, 28 Penn. St. 23; Hairston *v.* Hairston, 30 Miss. 276. See Laughton *v.* Atkins, 1 Pick. 535, 543; Pringle *v.* M'Pherson, 2 Brevard, 279; Greer *v.* M'Crackin, Peck, 301; Walton *v.* Walton, 7 John. Ch. 269; Carpenter *v.* Miller, 3 W. Va. 174.]

(*o*) *Ante*, 16.

(*p*) Rogers *v.* Goodenough, 2 Sw. & Tr. 342; *post*, 224. But see Hall *v.* Tokelove, *post*, 224. [A determination expressed by a testator, in a codicil to his will, to

SECTION IV.

Revocation by the Republication of a Prior Will.

If a man make a will, and at a future period republish it, such republication will revoke any will intermediate to the original date of the prior will and the date of its republication. (*q*) But this subject will be more conveniently discussed hereafter, when the doctrine of republication, generally, is considered. (*r*)

SECTION V.

Revocation by Marriage or other Change of Circumstances, and therewith of Presumptive or Implied Revocation.

The different methods of *expressly* revoking a will having been now considered, it remains to treat of presumed or implied revocation.

1 Vict. c. 26, s. 19: no will after Jan. 1, 1838, to be revoked by presumption.

It is enacted by the new statute of wills (1 Vict. c. 26, s. 19), that "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances." (*r*[1])

The general rule has been, from the earliest periods of the ecclesiastical law, in accordance with this enactment, that a will once executed remains in force, unless revoked by some act done by the testator, *animo revocandi*, — such as burning, cancel-

make an alteration in his will in one particular, negatives by implication any intention to alter it in any other respect. Quincy *v.* Rogers, 9 Cush. 291; Church C. J. in Wetmore *v.* Parker, 52 N. Y. 450, 462.]

(*q*) Rogers *v.* Pittis, 1 Add. 38; Jansen *v.* Jansen, 1 Add. 39; Walpole *v.* Lord Cholmondeley, 7 T. R. 138. [See Havard *v.* Davis, 2 Binn. 406; Wikoff's Appeal, 15 Penn. St. 281.]

(*r*) *Post*, pt. I. bk. II. ch. IV. § II. p. 205 *et seq.*

(*r*[1]) [But in the statute of Massachusetts, which prescribes the acts and formalities necessary to the revocation of wills, it is expressly provided that nothing there in contained shall prevent the revocation implied by law from subsequent changes in the condition or circumstances of the testator. Genl. Sts. c. 92, § 11; *ante*, 127, note (*h*[1]). What those changes are, the statute does not intimate; it is left to be decided by the general rules of law. Shaw C. J. in Warner *v.* Beach, 4 Gray, 163. On the other hand, cases of implied or constructive revocation from change of circumstances, are very much limited and restrained by the New York Revised Statutes, vol. ii. 66, §§ 45–48, 53; 4 Kent, 532, 533.]

ling, making a new will, or the like. "No man," says Swinburne, (*s*) "is presumed to have revoked his testament once made, unless it be proved, (*s*[1]) insomuch that if a man do live by the space of forty years after he have made his testament, yet is not the testament presumed to be revoked by the course of so long time. And albeit, during the same time his wealth and substance do greatly increase, yet is not the testament presumed to be revoked. And albeit the testament be in prejudice of such as otherwise were to have the administration of the goods of the deceased, yet all those things occurring, viz, the long time, the increase of the testator's wealth and the prejudice of such as are to have the administration of the testator's goods, the testament is not presumed to be revoked. And albeit the testament be made in time of sickness, and peril of death, when the testator doth not hope for life, and afterwards the testator recover his health, yet is not the testament revoked by such recovery: or albeit the testator make his testament by reason of some great journey, yet it is not revoked by the return of the testator." (*t*)

* Again, it has never been held that the removal by death of the object of the testator's bounty and affection could operate as a revocation of the will: on the contrary, it was decided in the modern case of Doe *v.* Edlin, (*u*) where a testator devised lands to a trustee in fee, in trust to receive and apply the proceeds to the use of the sister of the testator, being a married woman, for life, for

(*s*) Pt. 7, s. 15, pl. 2, s. 3.

(*s*[1]) [Jackson *v.* Betts, 9 Cowen, 208; Irish *v.* Smith, 8 Serg. & R. 573; Warner *v.* Beach, 4 Gray, 162.]

(*t*) Swinburne proceeds (pl. 4) to put several cases where revocation shall he presumed, such as executor becoming the enemy of the testator, and other instances, which are certainly not law at the present day. [An entire revocation of a will by implication of law is limited to a very small number of cases. A revocation cannot be implied by law from the death of the testator's wife, and one of his children leaving issue; and the birth of another child contemplated in the will; and the testator's insanity, for forty years, commencing soon after the making of the will and continuing until the testator's death; and a fourfold increase in the value of his property, so as greatly to change the proportion between the specific legacies given to some children and the shares of other children who were made residuary legatees. Warner *v.* Beach, 4 Gray, 162. ee Sherry *v.* Lozier, 1 Bradf. Sur. 437; Graves *v.* Sheldon, 2 D. Chip. 74; Wogan *v.* Small, 11 Serg. & R. 143; Barksdale *v.* Barksdale, 12 Leigh, 535; Bethell *v.* Moore, 2 Dev. & Bat. 311; Clark *v.* Ehorn, 2 Murph. 235; Verdier *v.* Verdier, 8 Rich. (S. Car.) 135; Blandin *v.* Blandin, 9 Vt. 210; In re Cooper's Estate, 4 Penn. St. 88; Marshall *v.* Marshall, 11 Penn. St. 430; *post*, 204, note (*c*[1]).]

(*u*) 4 Ad. & El. 582; S. C. 1 Nev. & P. 582.

her separate use, and from and immediately after her death, to convey the same to such uses as she should by deed or will appoint, that the death of the sister in the testator's lifetime was not an implied revocation of the will.

Here it may not be improper to take notice of the case of a *contingent will*, where, whether it will eventually take place as a will or not, depends upon the happening or not happening of a certain event. As where a person intending to go to Ireland, made his will in these words: "If I die before my return from my journey to Ireland, that my house and land at F., and all the appurtenances and furniture thereto belonging, be sold as soon as possible after my death, and thereout all my debts and funeral charges be paid. Item, 1,000*l.* to A. out of the said money arising by the said sale, and 100*l.* to B." The testator, after making the said will, went to Ireland, and returned to England, lived some years afterwards, and died. It was held by Lord Hardwicke that the will was contingent, depending upon the event of the testator's returning to England, or not; and that as he did return, the will could have no effect, but was void. (*x*) The courts, however, are cautious how they construe conditions of this sort. Therefore, where a testator by three letters gave certain testamentary directions, "In case I should die on my travels;" it was held, that, although he *returned, and lived many years afterwards, yet as, by subsequent acts, he recognized the papers two years before his death, his return was not such a defeasance as to invalidate the disposition of his property directed by

Contingent will.

(*x*) Parsons *v.* Lanoe, 1 Ves. sen. 190; In the Goods of Smith, L. R. 1 P. & D. 717; 1 Saund. 279 *d*, note to Duppa *v.* Mayo; [Wagner *v.* M'Donald, 2 Harr. & J. 346; Todd's Will, 2 Watts & S. 145; Hunt *v.* Hunt, 4 N. H. 434; Sinclair *v.* Hone, 6 Ves. 607; Damon *v.* Damon, 8 Allen, 192; Vickery *v.* Hobbs, 21 Texas, 570; Johnstone *v.* Johnstone, 1 Phillim. 485; Magee *v.* McNeil, 41 Miss. 17. A testator made a will dated November 20, 1871; he made another dated January 13, 1873; he made a "codicil to my last will and testament," dated "this —— day of January, 1873." By the codicil, after referring to the law relating to bequests to charities, he provided: "Now I declare said will of November, 1871, to be my last will should I die before the 1st of March, 1873, otherwise the will of 13th January, 1873, shall be my last will." He died on the 23d of January, 1873, and it was held that the paper of November, 1871, was his will; and that the paper of January 13, 1873, was not his will, the contingency on which it was to become so never having happened, and it did not therefore revoke the will of 1871. The codicil was held to be an addition or supplement to the will of 1873, and the two were to be construed together. Hamilton's Estate, 74 Penn. St. 69. See Rudy *v.* Ulrich, 69 Penn. St. 177.]

them. (*y*) In Burton *v.* Collingwood, (*z*) a will written eighteen years before the testator's death, containing this passage, "Lest I die before the next sun, I make this my last will," was admitted to probate, the court holding the disposition not contingent; and adherence to it being shown by careful preservation. (*a*) But since the new wills act it is clear that no evidence of adherence can establish the will where it is in its terms conditional, as where the will is expressed to take effect "in case of the testator's decease during his absence on a particular voyage," (*b*) or "should anything happen to me on my passage to Wales or during my stay;" (*c*) for in such cases if the testator's parol declarations were admitted, it would be nothing less than making a will by word of mouth; and the act of adherence cannot carry the case farther than a parol declaration. But where a testator wrote and merely signed a will on 14th of August, 1858, beginning, "in the prospect of a long journey, should God * not permit me to return to my home, I make this my last will," and he afterwards went on a journey, and returned on September 25, 1858, and in February, 1859, for the first time, duly executed his will; it was held that it was entitled to probate. (*d*) So where the deceased directed that his will was to take effect only in the event of his son dying under twenty-one years of age, and his daughter dying under that age and unmarried, and then went on to leave various legacies, and appointed an executor; general probate of the will was decreed although both the children were then living. (*e*) A will made in

(*y*) Strauss *v.* Schmidt, 3 Phillim. 209. See, also, Ingram *v.* Strong, 2 Phillim. 294. In Forbes *v.* Gordon, 3 Phillim. 625, Sir John Nicholl said that where a paper begins, "In case of my inability to make a regular codicil to my will, I desire the following to be taken as a codicil thereto," the court had in many instances decided that it means no more than, "Till I make a regular will, so long I adhere to this paper."

(*z*) 4 Hagg. 176; [Maesie *v.* Griffin, 2 Met. (Ky.) 364.]

(*a*) See, also, Bateman *v.* Pennington, 3 Moore P. C. C. 223; In the Goods of Tylden, 18 Jur. 136. But in another case, an unattested letter purporting to dispose of realty and personalty, and conditional on the deceased's dying during a visit to Ireland, was not admitted to probate in common form (the parties prejudiced being minors), the deceased having returned from Ireland, and having subsequently executed a will attested by three witnesses, disposing of land (purporting to be bequeathed in the letter), appointing his wife executrix and guardian to his children, but not referring to the letter, nor to his personalty. In the Goods of Ward, 4 Hagg. 179.

(*b*) In the Goods of Winn, 2 Sw. & Tr. 147.

(*c*) Roberts *v.* Roberts, 2 Sw. & Tr. 337.

(*d*) In the Goods of Cawthron, 3 Sw. & Tr. 417.

(*e*) In the Goods of Cooper, Dea. & Sw. 9. [It is presumed, though it is not so

Africa and commencing, "In the event of my death whilst serving in this horrid climate, or any accident happening to me, I leave, &c." was held not to be conditional on the death of the deceased happening in Africa. (*f*)

A contingent or conditional codicil may, it should seem, operate as a republication of a will, or to make a will valid if it has not been duly executed; and it is on that ground entitled to probate. (*g*)

Evidence of the testator's intention that the will should be contingent.

Under the old law, if the testator had indorsed on his will after its execution a memorandum, that it was only to take effect on the happening of a particular contingency, such an indorsement would have been in itself testamentary, and would have expressed his intentions in a legal form, so as to have given effect to them. But since the new wills act, such a memorandum, unless it be duly executed and attested, is wholly unavailing as part of the will, and cannot be used as evidence of the testator's intention that the will should be contingent only. (*h*)

* It may here be remarked, that if a paper is to be considered as

stated in the report, that the children were minors. Of course the question still remains open what effect the will is to have.]

( ) In the Goods of Thorne, 34 L. J. (N. S.) P. M. & A. 131; [In re Dobson, L. R. 1 P. & D. 88; Tarver *v.* Tarver, 9 Peters, 174. In Damon *v.* Damon, 8 Allen, 192, 194, Hoar J. said: "There seems to be no reason upon principle why an instrument cannot be made which is to take effect as a will only on the happening of a contingency named in it. As every devise or legacy, and the appointment of an executor, may be made conditional, if the same condition applies to all, it may be as well annexed to the entire instrument as to a single provision; and the happening of the condition can then be ascertained when the will is offered for probate. But there are two points to be settled before a will can be rejected from probate on the ground that it is a conditional will, and that the condition has failed; first, whether the intention of the testator is to make the validity of the will dependent upon the condition, or merely to state the circumstances and inducements which lead to make a testamentary provision; and, secondly, if the language clearly imports a condition, whether it applies to and affects the whole will, or only some parts of it." In this case the testator commenced his will thus: "I, A. B., being about to go to Cuba, and knowing the danger of voyages, do make this my last will and testament, in manner and form following: First, if by any casualty or otherwise I should lose my life during this voyage, I give and bequeath to my wife," &c.; and afterwards gave independent bequests, and spoke of the instrument as his last will and testament. He made the voyage and returned, and afterwards died; it was held that the will should be admitted to probate.] But see In the Goods of Robinson, L. R. 2 P. & D. 171, for an instance of a contingent will. See, also, In the Goods of Porter, L. R. 2 P. & D. 22.

(*g*) In the Goods of Da Silva, 2 Sw. & Tr. 315; *post*, pt. 1. bk. II. ch. IV. § 1.

(*h*) Stockwell *v.* Ritherdon, 1 Robert. 661; S. C. 6 Notes of Cas. 409.

an actual testamentary disposition, *proprio vigore*, though informal, it must take effect as such, and is not subject to be defeated either by presumption or evidence of abandonment. (*i*) But a mere paper of instructions, or other paper in its nature preparatory to a regular will or codicil, and not a will or codicil in itself, may be abandoned, and will be presumed from lapse of time to be abandoned, notwithstanding that such paper might be admitted to probate (in a case not within the operation of the new wills act), if the intentions therein expressed were shown to have been final, and to have been adhered to up to the period of the death of the deceased, the formal execution of those intentions having been prevented by the act of God. (*j*)

Paper of testamentary instructions may be abandoned.

If a man, being possessed of a sound mind, makes his testament, and afterwards is overtaken with insanity, yet that subsequent disability does not disannul the preceding testament or last will. (*k*)

A will not revoked by subsequent insanity.

Where two sisters, being then unmarried, made mutual wills, and the will of one of them was afterwards revoked by her marriage, it was held that the other remained unrevoked. (*l*)

Mutual wills.

Though it should appear from the contents of a codicil that the testator had forgotten the appointment of an executor, by a prior codicil, this shall not amount to a revocation of such appointment. (*m*)

Will forgotten by testator.

A strong example of the rule, that mere change of the condition of the testator could not work an implied revocation, occurs in the fact, that before the new statute of wills (1 Vict. c. 26, s. 18), his subsequent marriage did * not in itself produce that effect. (*n*) It is true, that if a woman made a will, and afterwards married, the marriage alone was a revocation of the will. (*n*[1]) But this was on a different

Marriage of testator did not revoke his will, prior to the stat. 1 Vict. c. 26:

(*i*) See Andrew *v.* Motley, 12 C. B. N. S. 514.

(*j*) 2 Moore P. C. C. 154, 156. See *ante*, 70, 110.

(*k*) Swinb. pt. 2, s. 2, pl. 3; Forse & Hembling's case, 4 Co. 61 *b*; [Warner *v.* Beach, 4 Gray, 162; Hughes *v.* Hughes, 2 Munf. 209; *ante*, 147, note (*r*).] See In re Thompson, 1 Russ. & M. 355, where the will of a testator subsequently found to be lunatic was directed to be deposited in the custody of the master.

(*l*) Hinckley *v.* Simmons, 4 Ves. 160; [*ante*, 10, 124.]

(*m*) Sherard *v.* Sherard, 2 Phillim. 251.

(*n*) 1 Phillim. 467, *post*, 197.

(*n*[1]) [4 Kent, 527, 528; Davis's Estate, 1 Tuck. (N. Y. Sur.) 107; Lathrop *v.* Dun-

principle from presumption, viz, that as it is in the nature of a will to be ambulatory during the testatrix's life, and marriage disables her from making any other will, the instrument ceases to be any longer ambulatory, and must consequently be void. (n^2) Therefore, generally speaking, the will of a *feme sole* ceased to have any operation after she became covert. (o) And although the wife should survive the husband, yet the will would not survive after the husband's death without a republication. (p) But where an estate was limited to uses, and a power was given to a *feme covert* before marriage to declare those uses, such limitation of uses might take effect notwithstanding her subsequent marriage. (q)

secus, of a testatrix.

With respect, however, to revocation by the alteration of the condition of the testator, a rule, borrowed from the civil law, (r) had been in modern times introduced into our courts, that, where a man made his will, and afterwards married and had issue, and died without expressly revoking his will, leaving his issue and wife unprovided for, this should be considered as an implied revocation of his will. (r^1) The * rule is of modern origin, and it is not to be found

Implied revocation (before stat. 1 Vict.) by marriage and birth of child:

lop, 11 N. Y. Sup. Ct. 213; Loomis *v.* Loomis, 51 Barb. 257; Miller *v.* Phillips, 9 R. I. 141, 143. But in Rhode Island marriage is presumptive only of revocation, and evidence of the declarations of the testator or testatrix is admissible to rebut the presumption. Miller *v.* Phillips, 9 R. I. 141; Wheeler *v.* Wheeler, 1 R. I. 364.]

(n^2) [See Morton *v.* Onion, 45 Vt. 145, 152, 153.]

(o) Forse & Hembling's case, 4 Co. 60 *b*; Doe *v.* Staple, 2 T. R. 667, 695; Cotter *v.* Layer, 2 P. Wms. 624; Hodsden *v.* Lloyd, 2 Bro. C. C. 544; 1 Saund. 279 *c*. [Where a married woman declared before three witnesses, that she desired her property should go as directed by her will, executed before coverture, it was held not to be either an execution of her will under the Pennsylvania act, 1848, nor a republication of the old will. Fransen's Will, 26 Penn. St. 202.] Lord Coke, in Forse & Hembling's case, takes a distinction, when the disability is to be imputed to the act of God, and when to the act of the party. In the former case, as in the instance just stated above, of subsequent insanity, no revocation is worked.

(p) Lewis *v.* Bulkeley, Delegates, 1732, cited 1 Cas. temp. Lee, 513; Lewis's case, 4 Burn E. L. 51, 8th ed.; Long *v.* Aldred, 3 Add. 48; [In re Wollaston, 12 W. R. 18.] As to what amounts to such republication, see *post*, ch. IV. p. 207. A will of a *feme covert* made during marriage, is not revoked by her surviving her husband. Morwan *v.* Thompson, 3 Hagg. 239; Trimmell *v.* Fell, 16 Beav. 537.

(q) Doe *v.* Staple, 2 T. R. 695; 1 Saund. 279 *c*; Logan *v.* Bell, 1 C. B. 872; *post*, 202, note (*u*). [See Morton *v.* Onion, 45 Vt. 145.]

(r) Instit. l. 2, tit. 13; De exheredatione liberorum, Cod. l. 6, t. 29, de posthumis hæredibus, &c.

(r^1) [Brush *v.* Wilkins, 4 John. Ch. 506; Wilcox *v.* Rootes, 1 Wash. (Va.) 140; Shaw C. J. in Warner *v.* Beach, 4 Gray, 163; Deupree *v.* Deupree, 45 Geo. 415; Miller *v.* Phillips, 9 R. I. 141; Bloomer

in Swinburne, (*s*) or any of our ancient text writers, but is the result of modern decisions; the first reported of which is the case of Overbury *v.* Overbury, decided on appeal to the delegates in 1682. (*t*) It was subsequently adopted in the common law courts, where it was first solemnly applied to the revocation of a will of real property, in the case of Christopher *v.* Christopher, in the year 1771. (*u*)

v. Bloomer, 2 Bradf. Sur. 339; Jacks *v.* Henderson, 1 Desaus. 543, 557; Tomlinson *v.* Tomlinson, 1 Ash. 224; *post*, 201, note (*s*); Walker *v.* Hall, 34 Penn. St. 483. The rule applies as well to a case where the testator had children by a former marriage, who are provided for in the will, as where he was without children at the time the will was made. Havens *v.* Van Den Burgh, 1 Denio, 27. See, also, Yerby *v.* Yerby, 3 Call, 334. But it was ruled in Coates *v.* Hughes, 3 Binn. 489, that a subsequent marriage and birth of a child, did not amount to a total revocation of a will. The appointment of an executor, with power to sell, was held good, notwithstanding; upon the principle, that the subsequent marriage and birth of a child amount to a revocation *pro tanto* only. And in Tomlinson *v.* Tomlinson, 1 Ash. 224, it was held that, upon the construction given to the Pennsylvania act of 1794, the subsequent birth of issue is, *in itself*, a revocation of a previous will, so far only as regards such issue, on the ground that it produces a change in the obligations and duties of the testator.]

(*s*) Swinburne, indeed, in pt. 7, s. 16, pl. 3, says: "Albeit the testator, after the making of the testament, have a child born unto him, I suppose that the testament is not presumed thereby to be revoked, especially if the testator did live a long time after the birth of the child, and might have revoked the testament, and did not."

(*t*) 2 Show. 242. The report of this case does not state that the marriage, as well as the birth of the children, was subsequent to the will; but on looking into the proceedings, it appears that the fact was so. See 1 Phillim. 479. The other principal decisions to the same effect in the ecclesiastical courts are, Lugg *v.* Lugg, before the Delegates, 2 Salk. 592; S. C. Ld. Raym. 441; 12 Mod. 236; Meredith *v.* Meredith, Prerog. 1711, cited by Sir John Nicholl, in Johnston *v.* Johnston, 1 Phillim. 460; Braddyll *v.* Jehen, 2 Cas. temp. Lee, 193; Eyre *v.* Eyre, cited in Cook *v.* Oakley, 1 P. Wms. 334; Emerson *v.* Boville, 1 Phillim. 342, where Sir William Wynne, in delivering his judgment in 1802, states the rule to have been established by an uniform course of decisions for above a century.

(*u*) Cited in 4 Burr. 2171, note, 2181. Although Sir John Trevor M. R. in Brown *v.* Thompson, 8 Dec. 1701 (cited in 1 P. Wms. 304, note), held that a subsequent marriage and having children, was a revocation of a will of *land*, yet this was afterwards in some degree denied by the court of common pleas in Driver *v.* Standring, 2 Wils. 90, and much doubted by Lord Hardwicke in Parsons *v.* Lanoe, 1 Ves. sen. 191; S. C. 1 Wils. 243; Ambl. 557, and was not finally settled till the above mentioned case of Christopher *v.* Christopher. That case was decided by Parker C. B. and Smith and Adams, Barons, against Perrot B.. who thought the words of the statute of frauds too strong to be got over. The statute, it must be allowed, is very strongly worded, "*no devise of lands shall be revocable except*" by certain modes prescribed by the statute, "*any former law or usage to the contrary notwithstanding.*" See, also, the observations of Lord Alvanley, in Gibbons *v.* Caunt, 4 Ves. 848. The words of the 22d sect. respecting wills of *personalty* are merely restrictive of revocation by *any words or will by word of mouth only*. Upon the authority of Christopher *v.* Chris-

*The rule was afterwards extended to marriage and the birth of a *posthumous* child. As where A., being unmarried, devised lands to B. and his heirs; after the making of the will, A. married, and his wife was pregnant, which being known to him, he expressed an intention to revoke his will, and gave directions to an attorney to prepare another will, but died before any other will was prepared; and after his death his wife was delivered of a son. This was holden to be a revocation of the will. (*x*)

so of a posthumous child:

It must be here observed that different views have been entertained of the principle on which this species of revocation rested. On the one hand it was considered that the revocation was grounded on the implied intention of the testator to revoke his will under the new state of circumstances which had taken place since the will was made, and upon such implied intention only, and, although, perhaps, no direct assertion to this effect can be attributed to any of the ecclesiastical judges, (*y*) it is difficult, if not impracticable, to draw any other conclusion from the numerous decisions of the prerogative court connected with this subject, than that the revocation was to be regarded as grounded on an *intention*, to be implied from the new state of circumstances and new moral testamentary duties which had taken place since the will was made. (*z*)

the principle on which this species of revocation rested.

topher, the same point was afterwards ruled by De Grey C. J., Parker C. B., and Sir Eardly Wilmot, in the cock-pit, in Spragge *v.* Stone, cited in Brady *v.* Cubitt, Dougl. 35; Ambl. 721.

(*x*) Doe *v.* Lancashire, 5 T. R. 49. [See Warner *v.* Beach, 4 Gray, 163; 4 Kent, 522.]

(*y*) See the judgment of Sir H. Jenner Fust, in Fox *v.* Marston, 1 Curt. 498, 499.

(*z*) "Intention is the principle of *factum*, and of revocation. [4 Kent, 523.] It is the principle of revocation whether it be direct by act, or implied by circumstances; the *animus testandi* or *revocandi* is the governing principle. By courts holding that marriage and the birth of children are not an absolute revocation, but only an implied revocation, by their inquiring, in the manner I have already stated, into all the circumstances, it is quite obvious that they examined into and endeavored to get at the real intention; but it might be opening too wide a door, if this inquiry were to be directed to every change of circumstances. Those loose rules which prevailed in Swinburne's time are no longer admitted. Courts have, therefore, required that the rule shall have for its basis a change of intention, produced by, and to be presumed from, some new moral obligation arising after the will was made; marriage and issue are supposed to produce those new moral duties; every man is presumed to intend the making of a provision for his family." *Per curiam*, 1 Phillim. 473, 474. "The principle is this, that marriage and the birth of issue create such a change in the condition of

* On the other hand it was contended that the revocation was a consequence of a rule of law, or of a condition tacitly annexed by law to the execution of a will, that, when the state of circumstances under which the will was made became entirely altered by a subsequent marriage and the birth of a child, the will should become void; and that the operation of this rule of law was altogether independent of any intention on the part of the testator. And of this opinion were all the judges of England (assembled in the exchequer chamber, *absente* Lord Denman) in the great case of Marston *v.* Roe dem. Fox, (*a*) where it was solemnly decided that the revocation of the will took place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself.

It follows, as an obvious consequence of this conflict of doctrine between the courts of ecclesiastical and common law jurisdiction, that, in the former courts, in order to rebut the presumption of an intention to revoke, it has always been held that any evidence is admissible, in support of the will, which shows a contrary intention; (a^1) so that not only the evidence of circumstances has been received for * this purpose, but also parol evidence of the testator's declarations in favor of his will. (*b*) Whereas in the temporal courts, it was finally settled that no evidence of the testator's intention that his will should not be revoked was admissible to rebut the presumption of law that such revocation should take place. (*c*)

There seems, however, to be no doubt that the principle of the

the deceased, such new obligations and duties, that they raise an inference that a testator would not adhere to a will made previous to their existence, considering it an act of moral duty to revoke that disposition, in order to make provision for his new wife and new issue; but on the other hand, if there does not arise such a state of circumstances as to produce new duties, if the change is provided for, there is no reason to presume a revocation. The question, after all, is one of presumed intention, whether to die intestate, or, notwithstanding the change of circumstances, to leave the former will existing and effective." *Per curiam*, 1 Hagg. 711, 712. [In Warner *v.* Bates, 4 Gray, 163, Shaw C. J. said the rule "is founded on the presumption, that, if the will had been made under the altered circumstances, it would not be made as it was. It might exclude one who would be heir to the whole estate."]

(*a*) 8 Ad. & El. 14; S. C. 2 Nev. & P. 504.

(a^1) [See Brush *v.* Wilkins, 4 John. Ch. 510; Yerby *v.* Yerby, 3 Call, 334; Havens *v.* Van Den Burgh, 1 Denio, 27; 4 Kent, 527.]

(*b*) 1 Phillim. 469; Ib. 472; Gibbons *v.* Cross, 2 Add. 455; Fox *v.* Marston, 1 Curt. 494; Tapster *v.* Holtzappfell, 5 Notes of Cas. 554.

(c) Marston *v.* Roe dem. Fox, 8 Ad. & El. 14; S. C. 2 Nev. & P. 504.

decision of Marston *v.* Roe dem. Fox will in future be applied for the decision of cases of this description in the ecclesiastical as well as the temporal courts. (*d*)

With reference to this difference in the decisions of the ecclesiastical and common law courts, it should be remarked, that these questions of implied revocation of wills *of personal property* came before the spiritual judges wholly unencumbered with those provisions of the statute of frauds which anxiously and carefully excluded parol evidence, both with respect to the original making and the revoking of wills *of land.*

A will of personalty in favor of children by a former marriage so revoked:

Marriage and the birth of issue who were unprovided for, was equally a revocation of a will of personalty, though the testator at the time of the making was a widower, and the will was in favor of children by a former marriage. (*e*) But these events would not revoke a will of *land* in favor of children by a former marriage, one of whom is heir apparent; because such revocation would operate only to let in the heir to the whole of the estate, and the after born children would derive no benefit whatever from it. (*f*)

no revival of the will by the death of issue:

If a man, after making his will, married and had a child, the subsequent death of the child would not have revived * the will, without some act or recognition showing the testator's intention that it should take effect. (*g*)

marriage alone, or birth of child alone, no revocation:

Marriage *alone*, or birth of a child *alone*, was not, without other special circumstances, sufficient to operate a revocation. (*h*) In the latest case on this part of the subject, (*i*) it was held that the birth of a posthumous child was no revocation of a will made after marriage, although there had been no other child of the marriage; and although neither the testator nor his wife, at the time of his death, were

(*d*) Israell *v.* Rodon, 2 Moore P. C. C. 51, 63, 64; Walker *v.* Walker, 2 Curt. 854; Matson *v.* Magrath, 1 Robert. 680; S. C. 6 Notes of Cas. 709.

(*e*) Hollway *v.* Clarke, 1 Phillim. 339; Walker *v.* Walker, 2 Curt. 854.

(*f*) Sheath *v.* York, 1 Ves. & B. 390.

(*g*) Emerson *v.* Boville, 1 Phillim. 342. See Wright *v.* Sarmuda, reported in a note to Taylor *v.* Diplock, 2 Phillim. 266; Braddyll *v.* Jehen, 2 Cas. temp. Lee, 193.

(*h*) Wellington *v.* Wellington, 4 Burr. 2171; Jackson *v.* Hurlock, Ambl. 495; Shepherd *v.* Shepherd, cited in Doe *v.* Lancashire, 5 T. R. 53, note; Wells *v.* Wilson, 5 T. R. 52, note; [4 Kent, 523; Yerby *v.* Yerby, 3 Call, 334; Church *v.* Crocker, 3 Mass. 17, 21; Wheeler *v.* Wheeler, 1 R. I. 364; Brush *v.* Wilkins, 4 John. Ch. 510; M'Cay *v.* M'Cay, 1 Murph. 447; Howens *v.* Van Den Burgh, 1 Denio, 27.]

(*i*) Doe *v.* Barford, 4 M. & Sel. 10.

aware that she was *enciente*. But although these decisions have settled that the mere subsequent birth of children, *unaccompanied by other circumstances*, proving intention, did not amount to a presumed revocation, yet they certainly did not go the length of establishing that subsequent marriage was an essential requisite. And in the important case of Johnston *v.* Johnston, (*k*) in the ecclesiastical court, it was held that a will, made by a married man having several children, was revoked by the subsequent birth of other children left unprovided for, *aided by other circumstances clearly concurring to show that it was the intention of the testator that the will should not operate*. The learned judge (Sir John Nicholl), in giving his judgment in this case, after showing the foundation of presumed revocation to be a change of intention produced by, and to be presumed from, some new moral obligation, proceeds to observe: "The birth of children, after making a will by a married man, may have imposed as strong a moral duty upon him, forming the groundwork of *presumed* intention, and may be accompanied by circumstances, furnishing as indisputable proof of *real* intention, as if the will had been * made previous to the marriage. Marriage, alone, may possibly stand upon a different foundation and footing from after-born issue. Marriage is a civil contract; the wife may make her own conditions before marriage, in order to provide against the negligence or injustice of the husband. Marriage settlements are usual; the law out of the real property makes a provision for the wife by dower. If she enters into the contract, and takes no precaution of this sort, she takes her chance either of the husband providing for her, or of providing for herself. But after-born issues are parties to no contract; they come into the world entirely dependent upon the parent; and if it is the legal duty of a father, while living, to maintain his children, so it is a strong moral obligation upon him not to exclude them from a provision after his death. It is true he has a right to do it; though at one time, at least in particular districts, he had not the right of excluding them; the law did not allow him to dispose of his whole property; at present he may if he pleases, and the law can afford no relief; but by moral obligation there is a strong foundation laid for presuming that he

but the birth of children accompanied by other circumstances might revoke:

distinction in this respect between marriage and birth of issue.

(*k*) 1 Phillim. 447.

did not intend to exclude them. In point, then, of true reason and sound sense, the concurrence of subsequent marriage is not essential in all cases. (*k*[1])

birth of issue and subsequent second marriage:

In Gibbons *v.* Caunt, (*l*) Lord Alvanley expressed a strong opinion that a revocation would be presumed from the birth of children by a first wife, after the date of the husband's will, and second marriage, although he had no children by that marriage.

no implied revocation unless there were a disposition of the whole estate, and the wife and children were wholly unprovided for:

The rule of implied revocation was applied only in cases where the wife and children, the new objects of duty, were wholly unprovided for, and where there was an entire disposition of the whole estate to their exclusion and prejudice. (*m*) Therefore, in a case where a will was made by a * married man in favor of his then wife and his children by her, and he afterwards married again and had children of the second marriage, it was held by Sir J. Nicholl that the will was not revoked, because provision was made for the second wife and the children of the second marriage by a settlement entered into before it. And the learned judge said, that it did not appear to him materially to vary the case, whether the provision was out of the husband's or out of the wife's property. (*n*) So it was holden by the same judge, that a second marriage and the birth of a child was not a revocation of a will made by a widower in favor of the children of a former marriage and an illegitimate child, where the second wife's fortune, taken under her father's will, was so placed as to form a provision for her and her children. (*o*)

However, in the before mentioned case of Marston *v.* Roe dem.

(*k*[1]) [Bloomer *v.* Bloomer, 2 Bradf. Sur. 339. Under the statute of Indiana, the birth of a child of a testator, after the execution of his will, works an entire revocation of his will, unless provision shall have been made in the will for such issue. Hughes *v.* Hughes, 37 Ind. 183. So in Ohio, Illinois, and Connecticut; 4 Kent, 526, note (*d*); Ash *v.* Ash, 9 Ohio (N. S.), 383; Tyler *v.* Tyler, 19 Ill. 151. As to Pennsylvania, see Tomlinson *v.* Tomlinson, 1 Ash. 224; Young's Appeal, 39 Penn. St. 115; and Iowa, McCullum *v.* McKenzie, 26 Iowa, 510.]

(*l*) 4 Ves. 840.

(*m*) Kennebel *v.* Scrafton, 2 East, 541; 1 Saund. 279; Doe *v.* Edlin, 4 Ad. & El. 587; [4 Kent, 521, 522; Jackson *v.* Jackson, 2 Penn. St. 212.] So Lord Mansfield, in Brady *v.* Cubitt, Dougl. 40, says, "Upon my recollection, there is no case in which marriage and the birth of a child have been held to raise an implied revocation, where there has not been a disposition of *the whole* estate."

(*n*) Talbot *v.* Talbot, 1 Hagg. 705. See, also, Ex parte Lord Ilchester, 7 Ves. 348.

(*o*) Johnson *v.* Wells, 2 Hagg. 561.

Fox, (*p*) the common law judges appear to have expressed a strong opinion, that, if there were a child of the marriage, the revocation could not be prevented by the circumstance of an estate, acquired by the testator after the making of the will, descending upon the child, and thereby becoming a provision for him; because this would be incompatible with the nature of a condition annexed to the will, which, so far as relates to the existence or extent of the provision, must, in its own nature, have reference to the existing state of things at the time the will itself was made.

It was, however, unnecessary to decide that point expressly, because, in the case before the court, the beneficial interest in the estate which had descended on the child of the marriage passed under the will; and it was held that the subsequent descent of the mere legal estate on him could *not be regarded as having formed any provision for him, but that he must be considered as left wholly unprovided for, as he neither took anything under the will, nor anything (if that could have been sufficient) by descent from his father.

The point has since been again considered before the judicial committee of the privy council, in Israell *v.* Rodon. (*q*) And their lordships appear to have adopted the opinion above expressed by the common law judges, and to have applied it to a will of personalty. And Sir H. Jenner Fust, in delivering the judgment of their lordships (on appeal from the court of ordinary in Jamaica), after referring to the judgment of the exchequer chamber, in Marston *v.* Roe dem. Fox, continued thus: "Therefore the existing circumstances, with reference to which the tacit condition is supposed to be annexed to the will, must be those which existed *at the time when the will itself was made*, and when the condition was annexed to it." And after adverting to the decisions in the ecclesiastical courts, and particularly those of Johnson *v.* Wells, and Talbot *v.* Talbot, and to the reliance placed by the court in those cases on the amount of the property, and the division of it made under the settlement on the second marriage, the learned judge added, "All those circumstances were made to bear upon the question, whether the deceased could be supposed to have intended to revoke his will; and in those cases, under all the circumstances, the court was of opinion that the will was not re-

(*p*) 8 Ad. & El. 14; *ante*, 195. (*q*) 2 Moore P. C. C. 51.

voked. But that would not bear upon the question *of annexed condition;* because, if the annexed condition is, that the will should not operate upon the occurrence of certain circumstances, then when those circumstances have occurred, the will itself is revoked. And looking to the decision of Marston *v.* Roe dem. Fox, it appears to us that that is the rule which must be applied for the decision of these cases for the future." (*r*)

* It is, however, to be feared, that if this rule is pursued into all its consequences — if, whenever a will disposes of the whole of the property of the deceased, his subsequent marriage and the birth of a child is to be received as amounting to a total revocation, without any regard to the state of his family, or to the terms of his marriage settlement — cases may occur in which the court will find the application of the rule not a little distressing.

It was further solemnly decided, in Marston *v.* Roe dem. Fox, that in order to take the case out of the general rule, and to prevent the revocation of the will, it was not sufficient that a provision was made for the *wife only*, but that such provision must also extend to the children of the marriage. And Tindal C. J. in delivering the judgment of the common law judges, said, "Upon a careful examination of the several cases which have been decided on this point, we take the rule of law, so far as it is material to the present inquiry, to be this: that, in the case of the will of an unmarried man having no children by a former marriage, whereby he devises away the whole of his property which he has at the time of making his will, and leaves no provision for any child of the marriage, the law annexes the tacit condition that subsequent marriage and the birth of a child operates as a revocation." (*s*)

the children as well as the wife must have been provided for, in order to prevent the revocation.

(*r*) See accord. In the Goods of Cadywold, 1 Sw. & Tr. 34.

(*s*) It was held by Lord Keeper Wright, in Brown *v.* Thompson, 1 Eq. Cas. Abr. 413, pl. 15; S. C. 1 P. Wms. 302, note †, 6th ed., which was the case of a will before marriage made in favor of a woman whom the testator afterwards married, that the will was not revoked by such marriage and issue, upon the ground that the will made a provision for the wife, and through her for her son, the devise being to her *and her heirs*. But the propriety of this decision is very much questioned in the judgment of Tindal C. J. in Marston *v.* Roe dem. Fox, 8 Ad. & El. 62. [There has been much legislation upon this subject in the American States. "There is no doubt," says Chancellor Kent, "that the testator may, if he pleases, devise all his estate to strangers, and disinherit his children. This is the English law, and the law in all the states, with the exception of Louisiana. Children are deemed to have sufficient security in the natural affection of parents, that this unlimited

But now, by the 18th section of the new statute of wills (1 Vict. c. 26), it is enacted, "that every will made by a man or woman shall be revoked by his or her marriage (*t*)

1 Vict. c. 26, s. 18:

power of disposition will not be abused. If, however, the testator has not given the estate to a competent devisee, the heir takes, notwithstanding the testator may have clearly declared his intention to disinherit him. The estate must descend to the heirs, if it be not legally vested elsewhere. Denn *v.* Gaskin, Cowp. 657, 661; Jackson *v.* Schauber, 7 Cowen, 187; S. C. 2 Wend. 1. This is in conformity to the long established rule, that in devises to take place at some distant time, where no particular estate is expressly created in the mean time, the fee descends to the heir. But by the statute laws of the states of Maine (Waterman *v.* Hawkins, 63 Maine, 156), Vermont, New Hampshire, Massachusetts (Genl. Sts. Mass. c. 92, §§ 25–28), Connecticut, New York (Rev. Sts. ii. 65, § 49; Bloomer *v.* Bloomer, 2 Bradf. Sur. 339), New Jersey, Pennsylvania, Delaware, Ohio, and Alabama, a posthumous child, and, in all of those states except Delaware and Alabama, children born after the making of the will, and in the lifetime of the father, will inherit in like manner as if he had died intestate unless some provision be made for them in the will, or otherwise, or they be particularly noticed in the will. The reasonable operation of this rule is only to disturb and revoke the will *pro tanto*, or as far as duty requires. See Walker *v.* Hall, 34 Penn. St. 483. The statute law of Maine, New Hampshire, Massachusetts, and Rhode Island goes farther, and supplies the same relief to all children, and their legal representatives, who have no provision made for them by will, and who have not had their advancement in their parent's life, unless the omission in the will should appear to have been intentional. 4 Kent, 525, 526. See Blagge *v.* Miles, 1 Story, 426; Doane *v.* Lake, 32 Maine, 268. Parol evidence is admissible to show whether the omission was intentional or by mistake; Wilson *v.* Fosket, 6 Met. 400; Bancroft *v.* Ives, 3 Gray, 367; Converse *v.* Wales, 4 Allen, 512; Ramsdill *v.* Wentworth, 101 Mass. 125; Lorings *v.* Marsh, 6 Wallace, 337; Wilder *v.* Thayer, 97 Mass. 439; or it may appear on the face of the will; Prentiss *v.* Prentiss, 11 Allen, 47; and the burden of proof is on those who allege that the omission was by design. Ramsdill *v.* Wentworth, 106 Mass. 320. "In South Carolina, the interference with the will applies to posthumous children, and it is likewise the law, that marriage and a child work a revocation of the will. In Virginia and Kentucky a child born after the will, if the testator had no children before, is a revocation, unless such child dies unmarried, or an infant. If he had children before, after-born children, unprovided for, work a revocation *pro tanto*. In the states of Maine, Massachusetts, Rhode Island, Connecticut, New York, Maryland, and probably in other states, if the devisee or legatee dies in the lifetime of the testator, his lineal descendants are entitled to his share, unless the will anticipates and provides for the case. This is confined, in Connecticut, to a child or a grandchild; in Massachusetts, Rhode Island, and Maine, to them *or their relations*; and in New York, *to children or other descendants*. The rule in Maryland goes farther, and by statute no devise or bequest fails by reason of the death of the devisee or legatee before the testator; and it takes effect in like manner as if they had survived the testator. By the New York Revised Statutes (vol. ii. 64, § 43), if the will disposes of the whole estate, and the testator afterwards marries, and has issue born in his lifetime, or after his

(*t*) Where the husband was domiciled in this country, and had been naturalized, it was held that his marriage with his deceased wife's sister was void, and did not revoke his will, under this enactment. Mette *v.* Mette, 1 Sw. & Tr. 416.

* (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions)." (*u*)

every will to be revoked by the marriage of the testator or testatrix:

This section obviously puts to rest (with respect to wills within its operation) all questions as to implied revocations, by marriage, and the birth of issue, by enacting positively that marriage alone shall be an absolute revocation. (*u*[1])

death, and the wife or issue be living *at his death*, the will is deemed to be revoked, unless the issue be provided for by the will or by a settlement, or unless the will shows an intention not to make any provision. No other evidence to rebut the presumption of such revocation is to be received." 4 Kent, 526, 527. See Brush *v.* Wilkins, 4 John. Ch. 506. In Arkansas, Missouri, Indiana, and Michigan, the language of their statutes is substantially the same as in New York. In Iowa, posthumous children unprovided for by the father's will shall inherit the same interest as though no will had been made. If the devisee die before the testator, his heirs shall inherit the amount so devised to him unless from the terms of the will a contrary intent is manifest. Laws of Iowa (Revis. of 1860), p. 407, §§ 2316, 2319. In Georgia, the will is revoked if the testator shall marry or have a child born after making it; no provision being made for either wife or child in the will, and no alteration being made in the will subsequent to the marriage or birth of the child. Rev. Sts. Geo. 1845, p. 457, § 16. See Holloman *v.* Copeland, 10 Geo. 79. A testator, in Maine, by his will left certain real and personal estate to his widow during her life and widowhood, to revert to his heirs upon her death or marriage, and bequeathed the residue of his estate to his father. Two months after the testator's death, a daughter was born of his widow, and it was held that the reversionary clause above mentioned was not a provision for the child, under R. S. Maine, c. 74, § 8, and that by virtue of that section, she took the same share of the estate that she would had her father died intestate. Waterman *v.* Hawkins, 63 Maine, 156. The statute of Massachusetts gives to a child of the testator, who is born after his father's death, and who has no provision made for him by his father, in his will or otherwise, the same share of his father's estate, both real and personal, that he would have been entitled to, if his father had died intestate. Genl. Sts. c. 92, § 26. This provision is absolute, and leaves no opening for proof, that the omission was intentional, and not caused by accident or mistake. Such is also the law in Maine. Waterman *v.* Hawkins, 63 Maine, 156.]

(*u*) See Logan *v.* Bell, 1 C. B. 872; *ante*, 192, note (*q*). The reason for this exception is, that a revocation of the will in a case to which the exception applies, would operate only in favor of those entitled in default of appointment, and the new family of the testator would derive no benefit whatever from it. See In the Goods of Fitzroy, 1 Sw. & Tr. 133; In the Goods of McVicar, L. R. 1 P. & D. 671. See, also, In the Goods of Fenwick, L. R. 1 P. & D. 319. [In Vermont, where a *feme sole* made a will, and married, and a considerable portion of the property disposed of by the will remained in her unaffected on her death by any marital rights of her husband, who survived her, it was held that the will was entitled to probate. Morton *v.* Onion, 45 Vt. 145.]

(*u*[1]) [In New York "a will executed by

But it possibly might not apply to every instance of implied revocation by a change of condition in the testator; because it has been held, at least in the ecclesiastical courts, that the concurrence of marriage is not essential for the presumption of revocation in all cases. (*v*)

s. 19: no will to be revoked by presumption:

All such cases, however, appear to be provided for by the 19th section, which enacts, that "no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances. (*v*[1]) For although, after the passing of this statute, it was held (as there has already been occasion to state) (*x*) by the common law judges, in Marston *v.* Roe dem. Fox, that the revocation consequent on marriage and the birth of issue was not, in fact, grounded on "any presumption of an intention" of the testator to revoke, but took place in consequence of a rule or principle of law independently of any question of intention; yet in all cases of implied revocations in the ecclesiastical court the basis of the revocation has always been held to be the intention * of the testator presumed from the alteration in circumstances, (*y*) and consequently the 19th section of the new statute will prevent such revocation in future.

The enactments contained in these two sections lead to consequences which may be considered as somewhat harsh; for, by reason of the former, a man's will must be revoked by his marriage without the birth of children, in a case where he had no intention to revoke it, nor any testamentary duty demanding the revocation; whereas, by the operation of the latter, a will made by a married testator must stand unrevoked, notwithstanding that the subsequent birth of children unprovided for, and other concurrent circumstances, may raise a case (as in Johnston *v.* Johnston (*z*)) of the strongest inference that the testator did not mean to adhere to the will.

an unmarried woman shall be deemed revoked by her subsequent marriage." 2 Rev. St. 64, § 39. A., while a resident of New York, made her will. Subsequently, in Canada, she entered into an ante-nuptial agreement, by the terms of which she retained full control of her own property. Afterwards she married and died. It was held that by the above provision of the statutes the will was revoked. The expression of the statute "deemed to be revoked" is positive, and does not create a mere presumption in favor of revocation, subject to be explained. Lathrop *v.* Dunlop, 11 N. Y. Sup. Ct. 213.]

(*v*) See *ante*, 197.

(*v*[1]) [See 4 Kent, 532, 533; *ante*, 187, and note (*r*[1]).]

(*x*) *Ante*, 195.

(*y*) But see *contra*, per Sir H. Jenner Fust, *ante*, 200.

(*z*) *Ante*, 197.

to what cases the stat. 1 Vict. c. 26, extends.

It remains to be considered to what cases these enactments of the new statute extend.

The 34th section enacts, "that this act shall not extend to any will made before the 1st day of January, 1838." And the language here employed seems to show, that if a will were made at any time before that date, and the testator were to marry after the act came into operation, the statute would not apply, and the will would not be revoked thereby; while on the other hand, such a will might be revoked by the alteration of the condition of the testator taking place at any time during the life of the testator, though after January 1, 1838. The construction at first put upon the statute appears to have been, that wills made previously to 1838, with respect to revocations to be effected subsequently, are subject to the provisions of the act. (*a*) But on a late occasion (*b*) Sir Herbert Jenner Fust, in a case on motion, held the contrary, and allowed probate to pass on a will made before the 1st of January, 1838, as *unrevoked, though the testator had married in 1839. And the learned judge said, that notwithstanding the court had held, with regard to *alterations* in any will after January, 1838, that they must be made with reference to the provisions of the act, yet, as to the present point, he was of opinion, by reason of the 34th section, that the will was not revoked.

Implied revocation by ademption.

There is another sort of implied revocation, in the nature of ademption; which arises either when the subject of the bequest is altered or parted with, or when the purpose, for which it was bequeathed has been provided for by the testator by other means. (*b*[1]) But it will be convenient to postpone treating of this mode of revocation, till the subject of legacies, generally, is considered. (*c*)

It may be proper, however, here to point out a material difference with respect to this species of revocation, between wills of realty and wills of personalty, arising from the office of executor. If the whole subject of a will of realty be adeemed, the will is completely revoked, and is wholly ineffectual; (*c*[1]) but should the

(*a*) See Hobbs *v.* Knight, 1 Curt. 750; *ante*, 129, 130, and the cases there cited in note (*m*).

(*b*) In the Goods of Shirley, 2 Curt. 657.

(*b*[1]) [See In re Nan Mickel, 14 John. 324.]

(*c*) See *post*, pt. III. bk. III. ch. III.

(*c*[1]) [See Gage *v.* Gage, 12 N. H. 371.

same thing happen with respect to a will of personalty, in which an executor is appointed, the will must still be proved in the

Under the law in England previous to 1 Vict. c. 26, it was necessary that the testator should be seised of the very *same estate* in the devised real property, both at the time of the will and at the time of his death. If, therefore, a testator, subsequently to his will, by deed conveyed lands which he had disposed of by such will, and afterwards acquired a new freehold estate in the same lands, such newly acquired estate did not pass by the devise, which was necessarily void; and this was the effect, even though the testator took the estate, conveyed by him, back again by the same instrument, and had no intent to revoke his will. Walton *v.* Walton, 7 John. Ch. 258; Ballard *v.* Carter, 5 Pick. 112; Graves *v.* Sheldon, 2 D. Chip. 71; Herrington *v.* Budd, 5 Denio, 321; Kean's Will, 9 Dana, 25; Woolery *v.* Woolery, 48 Ind. 523, 531; Beck *v.* McGillis, 9 Barb. 35; McNaughton *v.* McNaughton, 34 N. Y. 201. Thus a devise of the fee was revoked by a subsequent conveyance of the estate to trustees for a term to secure a jointure, though it was relimited to the devisor in fee, subject to the jointure term. Goodtitle *v.* Otway, 2 H. Bl. 516; Cave *v.* Holford, 3 Ves. 650. A revocation by alienation may be either partial or total. A conveyance by the testator in his lifetime of a part only of the estate devised, revokes the will only to the extent of that part, and does not prevent probate of the will. Hawes *v.* Humphrey, 9 Pick. 350; Brown *v.* Thorndike, 15 Pick. 388; Skerrett *v.* Burd, 1 Whart. 246; M'Taggart *v.* Thompson, 14 Penn. St. 149; Epps *v.* Dean, 28 Geo. 533; Carter *v.* Thomas, 4 Greenl. 341; Floyd *v.* Floyd, 7 B. Mon. 290; Bowen *v.* Johnson, 6 Ind. 110; Wells *v.* Wells, 35 Miss. 638; Brush *v.* Brush, 11 Ohio, 287; Graves *v.* Sheldon, 2 D. Chip. 71; Parkhill *v.* Parkhill, Brayt. 239; In re Cooper's Estate, 4 Penn. St. 88; 1 Jarman Wills (3d Eng. ed.), 137; Balliett's Appeal, 14 Penn. St. 451; Wogan *v.* Small, 11 Serg. & R. 141; Ferry *v.* Edminster, 9 Pick. 355, note. In Marshall *v.* Marshall, 11 Penn. St. 430, it was held that when the alteration in the testator's circumstances is such as to render it impossible to execute any part of his will, as in Cooper *v.* Cooper, 4 Penn. St. 88, it will be considered as entirely revoked. But when it can be partially executed, the revocation is *pro tanto* merely as to that part which cannot be carried into effect. Balliett's Appeal, 14 Penn. St. 451, 459. This doctrine, however, of revocation by alienation, did not apply to copyholds; Vawser *v.* Jeffery, 3 Russ. 479; nor to the devise of an estate held in common or coparcenary, where afterwards there was a *partition* under which the testator took in severalty part of the very property devised. Luther *v.* Kidby, 8 Vin. Abr. 148, pl. 30; S. C. cited 3 P. Wms. 170; Knollys *v.* Alcock, 7 Ves. 564; Risley *v.* Baltinglass, Sir T. Ray. 240; Walton *v.* Walton, 7 John. Ch. 265, 266; Barton *v.* Croxall, Tamlyn, 164. The manner in which the partition is made might, however, have revoked the devise; as if a testator, having an undivided share of lands in A. and B., devise all lands in A. and upon partition only lands in B. are allotted to him; in such case nothing passes by the devise. Knollys *v.* Alcock, 7 Ves. 558; 5 Ves. 648. But it was held in Duffel *v.* Burton, 4 Harring. 290, that if in the partition the testator becomes seised of the whole estate in severalty, it will not revoke the devise, but the additional title acquired does not pass under the will. Another and more considerable exception is, that the doctrine did not apply to the devise of an estate which the testator subsequently mortgaged. Hall *v.* Dench, 1 Vern. 329, 342; S. C. 2 Ch. Rep. 54; Baxter *v.* Dyer, 5 Ves. 656; Perkins *v.* Walker, 1 Vern. 97; 1 Jarman Wills (3d Eng. ed.), 140, 141. A mortgage of a portion of the estate devised will revoke the devise only *pro tanto*. M'Taggart *v.* Thompson, 14

ecclesiastical court, as if its dispositions had never been revoked. Thus in Beard *v.* Beard, (*d*) where the testator, by a will, gave

Penn. St. 149. A conveyance in trust for sale and payment of debts only partially revoked a prior will of the same property. Temple *v.* Chandos, 3 Ves. 685; Jones *v.* Hartley, 2 Whart. 103. See Hughes *v.* Hughes, 2 Munf. 209; Girard *v.* Philadelphia, 4 Rawle, 323; Clingan *v.* Mitcheltree, 31 Penn. St. 25; Stubbs *v.* Houston, 33 Ala. 555. Bankruptcy had the same partial effect; the surplus, after payment of creditors, went to the devisee. Charman *v.* Charman, 14 Ves. 580. But in these excepted cases, if the testator had at the time of the devise a *simple estate in fee*, and under the particular deed; Tickner *v.* Tickner, cited 3 Atk. 742; Grant *v.* Bridger, L. R. 3 Eq. 347; or mortgage, or trust for sale; Harwood *v.* Oglander, 6 Ves. 199; Hodges *v.* Green, 4 Russ. 28; there was a limitation creating a *new estate*, or a proviso for redemption, conferring a *new and different estate* on the devisor; for instance, to such uses as he should by deed or will appoint with remainder to him in fee, the will was revoked. This, however, was not the case if the re-conveyance was to be to the mortgagor in fee, or to such uses as he should appoint. Brain *v.* Brain, 6 Madd. 221. Where a testator, having an equitable estate, devised it, the mere subsequent conveyance to him of the *legal* estate, *exactly coextensive* with the equitable estate, or, as it is often expressed, where his equitable was simply clothed with the legal estate, there was no revocation. 1 Jarman Wills (3d Eng. ed.), 144. As when, before 1 Vict. c. 26, a person bought an estate and then devised it, but died before completion, if there was a valid and binding contract of purchase, the devisee of the estate was entitled to have the estate paid for out of his testator's personal estate. Broome *v.* Monck, 10 Ves. 608. The law is not altered, either by the wills act (see Hood *v.* Hood, 3 Jur. N. S. 684), or Locke King's act (17 & 18 Vict. c. 113), but by the act amending the last cited, viz, the 30 & 31 Vict. c. 69, the devisee takes subject to the lien, unless there is a contrary intention expressed in the will, and such an intention is not to be inferred from a mere direction to pay debts. Although the title may be imperfect at the death of the purchaser, if afterwards perfected, the devisee will be entitled to have the estate conveyed (Garnett *v.* Acton, 28 Beav. 333), subject, however, to the last cited act. Where, under the old law, there was a valid and binding contract *before* the will to convey in fee, the conveyance of the estate after the will to the testator was no revocation of it (Rose *v.* Cunningham, 11 Ves. 550; Parker C. J. in Ballard *v.* Carter, 5 Pick. 119,) and the property passed by it, unless the conveyance of the legal estate was not *exactly coextensive* with the entire equitable interest which the testator took by the contract, as where the conveyance was to uses to bar dower (Rawlings *v.* Burgis, 2 Ves. & B. 382; Bullin *v.* Fletcher, 2 My. & Cr. 432; see Plowden *v.* Hyde, 2 De G., M. & G. 684; Ward *v.* Moore, 4 Madd. 368), the contract being to convey in fee; for in such case the conveyance operated as a revocation, though now the will operates on the estate of the testator at the time of his death. 1 Vict. c. 26, § 24. Where, under the old law, the contract was *after* the will, the property would not pass by it (1 Jarman Wills (3d Eng. ed.), 150), as the will spoke from the date (Langford *v.* Pitt, 2 P. Wms. 629), unless republished by a codicil (Monypenny *v.* Bristow, 2 R. & My. 117; Re Earl's Trusts, 4 Kay & J. 673), although a case of election might sometimes have been raised; but now the power of disposition extends over property of every kind, legal, equitable, &c. (1 Vict. c. 26, s. 3), and the will speaks from the testator's death (Ib. s. 24); and no conveyance or other act, subse-

(*d*) 3 Atk. 72.

his brother all his real and personal estate, and made him executor; and afterwards, by a deed-poll, gave his wife all the substance he had, and might thereafter have; Lord Hardwicke held, that although the deed-poll, according to the law of husband and wife, could not take effect as a grant or gift to the wife, yet it operated as a revocation to the will as to the whole of the personal property; but as the executor continued, the will must of necessity be proved in the commons, and the executor would become trustee for the next of kin. (*e*)

quently to the execution of a will, except an act *revoking* it, prevents the operation of the will with respect to such estate or interest as the testator has power to dispose of by will at the time of his death. Ib. s. 23; 1 Jarman Wills (3d Eng. ed.), 151, 152; Woolery *v.* Woolery, 48 Ind. 523. If a testator, after devising or bequeathing a mortgage, forecloses or takes a release of the equity of redemption, it is a revocation of the devise. Ballard *v.* Carter, 5 Pick. 112. See Brigham *v.* Winchester, 1 Met. 390; Beck *v.* M'Gillis, 9 Barb. 35; Swift *v.* Edson, 5 Conn. 531. A devise of an estate is revoked by a subsequent voluntary settlement of the same estate. Lowndes *v.* Norton, 33 L. J. Ch. 583. See Pettinger *v.* Ambler, L. R. 1 Eq. 510. But a will is not revoked by a subsequent invalid deed affecting to dispose of the same property as that devised by the will. Ford *v.* De Pontes, 30 Beav. 572. See Beard *v.* Beard, 3 Atk. 72; Doe *v.* Llandaff, 2 B. & P. N. R. 491; Shove *v.* Pinke, 5 T. R. 124, 310; Vawser *v.* Jeffery, 2 Sw. 274; Eilbeck *v.* Wood, 1 Russ. 564; Matthews *v.* Venables, 9 J. B. Moore, 286; Simpson *v.* Walker, 5 Sim. 1; 1 Jarman Wills (3d Eng. ed.), 153, 154; Walton *v.* Walton, 7 John. Ch. 269. In Brown *v.* Brown, 16 Barb. 569, it was held that if a testator, after the execution of a will by which he devised land, sell and convey the land, it works a revocation of the devise, even though he takes back a mortgage to secure the purchase-money; but if the land be reconveyed to the testator by absolute deed, and he be the owner at the time of his death, the devise will not be revoked and republication of the will is not necessary. If a testator devises both real and personal estate, and by an alienation of the real estate revokes the will *pro tanto*, it then stands as a will of personal estate only, and is revocable accordingly, by any writing sufficient to revoke a will of personal estate. Brown *v.* Thorndike, 15 Pick. 388; Glasscock *v.* Smithers, 1 Call, 479; Clark *v.* Eborn, 2 Murph. 235; Witter *v.* Mott, 2 Conn. 67; Walls *v.* Stewart, 16 Penn. St. 275; Balliett's Appeal, 14 Penn. St. 449, 450, 451; Cryder's Appeal, 11 Penn. St. 72. If the devisor, after the execution of his will, purchases land which would be included in the general description of the land devised by the will, it is no revocation of the will either in whole or in part. Blandin *v.* Blandin, 9 Vt. 210.]

(*e*) See Henfrey *v.* Henfrey, Moore P. C. C. 29, 32; *ante*, 164. See In the Goods of Lancaster, 1 Sw. & Tr. 464.

*CHAPTER THE FOURTH.

OF THE REPUBLICATION OF WILLS.

By stat. 1 Vict. c. 26, s. 22, "no will or codicil, or any part thereof, *which shall be in any manner revoked*, shall be revived otherwise than by the reëxecution thereof, (a^1) or by a codicil executed in manner hereinbefore required, *and showing an intention to revive the same;* and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

1 Vict. c. 26: No will revoked to be revived (after Jan. 1, 1838) otherwise than by reëxecution or a codicil showing an intention to revive it.

In order to examine the effect of this and other clauses of the statute on the doctrine of republication, it is necessary to consider the law as it stood at the time of the passing of the act.

SECTION I.

How a Will may be Republished or Revived.

First, as to republications earlier than January 1, 1838 (when the new act came into operation). By reason of the enactments of the 5th section of the statute of frauds (29 Car. 2, c. 3), no will of lands could be republished, except by reëxecution in the presence of three attesting witnesses, or by a codicil duly executed according to the statute. (a) But as that section did not apply to wills of personalty, such a will might be republished, not only by an *unattested codicil, or other writing, but by the mere parol acts or

What will amount to a republication of a will of personalty, if it took place before Jan. 1838:

(a^1) [See Barker *v.* Bell, 46 Ala. 216.]

(a) 1 Saund. 268; 1 Powell on Devises, 609, 3d ed.; [Jackson *v.* Potter, 9 John. 312; Jackson *v.* Holloway, 7 John. 394; Love *v.* Johnston, 12 Ired. 355.]

declarations of the testator. (*b*) It has indeed been said, that there must be some difficulty in holding that the statute, by the prohibition, in section 19, of nuncupative wills, has not in effect prohibited nuncupative republications. (*c*) But, upon a closer examination of the subject, it should seem that the statute does not affect the question. (*d*) It must be remembered, that no publication nor formalities of execution are required either by the statute of frauds, or the general law, for the validity of a will of personalty, if made before the statute of Victoria came into operation. (*e*) It has already been shown that such a will need not be executed by the testator; it is sufficient if it be in writing, and approved of by him before his death. (*f*) Hence, it should appear, that if a will of personalty, which has been revoked, or made at a distant period, be afterwards sufficiently recognized as his operative will, by the parol acts or declarations of the testator, the will so recognized becomes, as any other written document would, his legal will of the date of the recognition. A will of personalty (not within the operation of stat. 1 Vict. c. 26) appears to stand nearly in the same situation as a will of lands did before the statute of frauds; it must have been in writing, by the provisions of the statute of wills, but no other formalities were necessary; and we find that, before the statute of frauds, and after the passing of the statute of wills, it was holden that a written will of lands might be republished by parol; (*g*) as where, after a will had been revoked by operation of law, the testator *allowed* it to be his will, without writing it anew, it was held a republication, and that the land should pass by the will as much as if it had never been revoked. (*h*)

(*b*) Wentw. Off. Ex. c. 1, p. 60, 14th ed.

(*c*) Roberts on Wills, vol. 2, p. 167.

(*d*) See Serocold *v.* Hemming, 2 Cas. temp. Lee, 494.

(*e*) See *ante*, 66.

(*f*) See *ante*, 68.

(*g*) Jackson *v.* Hurlock, Amb. 494; Beckford *v.* Parnecott, Cro. Eliz. 493; 1 Saund. 277 *c*, *d*; [Havard *v.* Davis, 2 Binn. 425.]

(*h*) 1 Roll. Abr. 617, Z. pl. 2. [Republication is of two kinds, express and constructive. Express republication occurs where a testator repeats those ceremonies which are essential to constitute a valid execution, with the avowed design of republishing a will. Constructive republication takes place where a testator, for some other purpose, makes a codicil to his will, in which case the effect of the codicil, if not neutralized by internal evidence of a contrary intention, is to republish the will. 1 Jarman Wills (3d Eng. ed.), 178; Murray *v.* Oliver, 6 Ired. Eq. 55; Love *v.* Johnston, 12 Ired. 355. It is unnecessary for the testator to re-sign the will; if he acknowledges the signature with the proper formalities, it is enough. Reynolds *v.* Hurley, 7 Ham. 79; Jackson *v.* Potter, 9 John. 312; Witter *v.* Mott, 2 Conn. 67; Musser *v.* Curry, 3 Wash. C. C. 481; Deane *v.* Deane, 27 Vt. 746. As

* A formal republication, therefore, was never necessary in cases of wills of personal property. It would have been a strange doctrine to hold that a former republication was necessary for a will of personalty, where no publication was ever necessary. Before the statute of frauds, it was holden that anything which showed an intent that a will of lands should be of a subsequent date, was a sufficient republication. (*i*) In Long *v.* Aldred, (*k*) Sir John Nicholl observed, that the mere conservation of a will for many years might, under circumstances, amount to a republication. In another case in the same court, (*l*) where the question was whether a widow had republished a will made before her marriage, it appeared that the testatrix, being confined to her room through illness, desired her nurse to bring her a mahogany box in which she kept her important papers, for the purpose of looking at her marriage bond; whilst engaged in looking at the papers therein, she took out the will, and observed to the nurse, "Nurse, this is my will;" and upon the nurse remarking that it was not a will, and that it was all eaten by mice, the deceased replied "that it was eaten by cockroaches — that it was the will she should abide by — that people wished her to make another; but that she would not, and, if she did, she should not alter it." That the deceased began to read the will aloud, but on some one coming into the room, she replaced it in the box, desiring the nurse not to mention that she had a will, and adding, "Now, nurse, if anything should happen to me, you know where it is;" and it further appeared, that the deceased had on several occasions, since the death of her husband, declared to different persons that she had a will, naming the executor, and she intended the same to operate, and that her affairs were to be settled according to the directions contained in such a will. The court held, that these facts and circumstances clearly amounted to a *republication. So in Miller *v.* Brown, (*m*) which also was a question whether a widow had republished a will made during her

parol acts or declarations amounting to a republication:

to the formalities required, and the necessary proof of republication, see Jones *v.* Hartley, 2 Whart. 103; Havard *v.* Davis, 2 Binn. 425; Musser *v.* Curry, 3 Wash. C. C. 481; Reynolds *v.* Curry, 7 Ham. 39; Witter *v.* Mott, 2 Conn. 67; Bagwell *v.* Elliot, 2 Rand. 190; Jack *v.* Shoenberger, 22 Penn. St. 416; Gable *v.* Danh, 40 Penn. St. 217; Geddes's Appeal, 9 Watts, 284.]

(*i*) 1 Roll. Abr. 618, pl. 7; Barnes *v.* Crowe, 1 Ves. jun. 497; Cotton *v.* Cotton, cited in Alford *v.* Earle, 2 Vern. 209; Anon. 2 Show. 48.

(*k*) 3 Add. 48.

(*l*) Braham *v.* Burchell, 3 Add. 264.

(*m*) 2 Hagg. 209.

coverture; the evidence established that after the death of her husband she frequently recognized the instrument as her will, and expressed her satisfaction that it was made; and that three months before her death, and eighteen months after that of her husband, she delivered to one of the executors a tin box, which she told him contained her will (and in which it was found after her death); and on the same day told the father-in-law of the executor that she had that day deposited her will with him. Sir John Nicholl held that this was a republication to all intents and purposes, as far as regarded the personalty.

But where the testator was in search of another paper, and a person who was assisting him took up the will by mistake, whereupon the testator said, "That is my will." This was held by Lord Hardwicke C. not to amount to a republication; and his lordship observed, that to make it a republication there must be *animus republicandi* in the testator. (*n*) And where there are two wills of different dates, both remaining uncancelled, some direct and very unequivocal act of republication is required to set up the will of the earlier date, and so revoke that of the later; for the presumption of law is strongly in favor of the last dated will uncancelled. (*o*) "If a man," says Wentworth, (*p*) "having made a former will, do make a later, which is more than a bare revocation; yet if afterwards, lying upon his death-bed and speechless, both these wills be delivered into his hand, and he required to deliver to one of his friends about him that will which he would have to stand, and he thereupon delivereth to the minister or other his neighbors the first-made will, retaining in his hand the later, as was done in the time of Edward the Third; * here the former will, though made void many years before by the later, is revived, and shall stand as the party's will." Upon this passage Sir John Nicholl observed, in Stride *v.* Cooper, (*q*) that it was putting an extreme case, and in his mind went a great way to show that there must be some direct and unequivocal act.

there must be *animus republicandi:*

the *animus* must be very clearly established, where there are two wills of different dates, to set up the earlier:

Again, it should seem that there is no case where a later will, with a revocatory clause remaining uncancelled, and in the same repository with a former will, has been set aside

mere declarations ineffectual

(*n*) Abney *v.* Miller, 2 Atk. 599.
(*o*) Stride *v.* Cooper, 1 Phillim. 336.
(*p*) Off. Ex. c. 1, p. 61, 14th ed.
(*q*) 1 Phillim. 336.

where a later will contains a revocatory clause and is uncancelled:

on the ground of the republication of the prior will by mere declarations. (q^1) In Daniel *v.* Nockolds, (r) the deceased, by a will made in the year 1819, attested by three witnesses, gave his brother a legacy of 100*l.*, and after bequeathing further legacies left the residue to Mary Tomkins, and appointed Daniel and Bush his executors, without a legacy to either. In the year 1823 he made a new will, in which he devised a small freehold to Tomkins, and appointed Parkinson sole executor and residuary legatee. This will contained a clause of revocation, and was duly executed. Both Tomkins and Parkinson died in the testator's lifetime. In 1827, the deceased on several occasions, during his last illness, conversed with different persons respecting his affairs, produced and read to them his will of 1819, declared that it was his last will, and what he wished to be carried into effect; and that Daniel and Bush were his executors, and would have the management of his affairs. After his death the will of 1819 was found carefully deposited and locked up in one of the drawers in his bed-room, and that of 1823 at the bottom of the same drawer, but much soiled and crumpled amongst old and useless papers. It was held that the will of 1819 was not revived, and administration with the will of 1823 annexed was decreed to the brother; and Sir John Nicholl, in giving judgment, said, "This is not like the case of a later cancelled will, because then the very act of cancellation revokes the latter, and lays a foundation * for an inference that the testator intended the former will to operate; but here is a later revocatory will entire, and in force as a revocation of the former, though the devises and bequests may have lapsed. Can the former will be revived without an act of republication, or indeed of reëxecution; or rather, can the latter will be revoked by mere declarations? If it were merely a will of realty, it clearly could not have been contended that there had been a republication of the former will, because the words of the sixth section of the statute of frauds are express. (s) It is clear, also, under s. 22, (t) that the latter will could not have been revoked by mere declarations unaccompanied by some writing; but here is no declaration in writing; nothing reduced into writing during the deceased's lifetime; nor are there any acts;

(q^1) [Witter *v.* Mott, 2 Conn. 67; Battle *v.* Speight, 9 Ired. 288; 10 Ired. 459; Richardson *v.* Richardson, C. W. Dud. Eq. 184; Dunlap *v.* Dunlap, 4 Desaus. 305, 321.]

(r) 3 Hagg. 777.

(s) See *ante*, 183.

(t) See *ante*, 205.

the circumstances of the finding are too slight — they might be merely accidental. The latter will was in an envelope; and there is no appearance that it was rumpled. Why did not the deceased, a professional man, cancel, if he intended to revoke it, and revive the former will? Declarations without acts are always dangerous evidence; they are frequently insincere — liable to be misapprehended — not accurately recollected. The case of Miller *v.* Brown (*u*) does not apply. In that case there had been no revocation; all that was there required was to show adherence. In this case there is an express revocation, and that revocation is to be removed by parol — that is the difficulty."

republication of a cancelled or obliterated will:

If a will be actually cancelled, it should seem, upon principle, that it would be considered as republished, upon satisfactory proof of recognition, *animo republicandi*, by the testator (before the statute of Victoria came into operation), provided it continues legible. "If one of the executors' names be stricken out," says Wentworth, (*x*) "and afterwards a *stet* be written over his head by the testator, * or by his appointment, now he is a revived executor. So if the testator express by word, in the presence of witnesses, that the party put out shall be executor. But now I mean where the executor's name is not so blotted out but that it may be read and discerned, for else the *stet* is upon nothing: and if the verbal reaffirmance should renew his executorship, then must the will be partly in writing, and partly nuncupative, his name not being to be found in the written will."

In Slade *v.* Friend, (*y*) the will was found locked up in the deceased's trunk, of which she kept the key, and it did not appear that anybody had access to it but herself; the will was fair and entire, except that lines were drawn over the testatrix's name, Elizabeth Hutton, which was held to be a cancellation; but it being proved that she on her death-bed being asked whether she had made a disposition of her affairs, answered "Yes," and said it was in that trunk, pointing to the trunk where it was found, this declaration was held to be a revival of the will, and it was pronounced for both in the prerogative and the delegates.

So in Brotherton *v.* Hellier, (*z*) the will was found cancelled,

(*u*) See *ante*, 208.
(*x*) Off. Ex. e. 1, p. 65, 14th ed.
(*y*) Cited by Sir G. Lee, in 2 Cas. temp. Lee, 84.
(*z*) 2 Cas. temp. Lee, 55.

the name and seal being torn off; it was doubtful whether it might have been cancelled by accident or by the deceased himself. But Sir G. Lee held that the declaration of the deceased, and the giving of orders by him for making a codicil, would have been sufficient to have revived the will even if it had been certain that he himself cancelled it. (z^1)

republication by a codicil:

A codicil will amount to a republication of the will to which it refers, whether the codicil be or be not annexed to the will, (z^2) or be or be not expressly confirmatory of it; for every codicil is, in construction of law, part of a man's will whether it be so described in such codicil or not; and, as such, furnishes conclusive evidence of the testator's considering * his will as then existing. (a) But although the effect of a codicil, as to republication, is by no means de-

it need not be *annexed* to the will, or expressly confirm it:

(z^1) [See Battle *v.* Speight, 10 Ired. 459; S. C. 9 Ired. 288; Love *v.* Johnston, 12 Ired. 355; Jones *v.* Hartley, 2 Whart. 163; Campbell *v.* Jamison, 8 Barr, 498.]

(z^2) [Van Cortlandt *v.* Kip, 1 Hill (N. Y.), 590; S. C. 7 Hill, 346; Wikoff's Appeal, 15 Penn. St. 281; Harvey *v.* Chouteau, 14 Missou. 587.]

(a) Acherly *v.* Vernon, Com. Rep. 381; S. C. 3 Bro. P. C. 107; Potter *v.* Potter, 1 Ves. sen. 437; Jackson *v.* Hurlock, Ambl. 487; S. C. cited 1 Ves. jun. 492; S. C. 2 Eden, 263; Gibson *v.* Lord Montford, 1 Ves. sen. 485; S. C. Amb. 93; Serocold *v.* Hemming, 2 Cas. temp. Lee, 490; Doe *v.* Davy, Cowp. 158; Barnes *v.* Crowe, 1 Ves. jun. 486; S. C. 4 Bro. C. C. 2 (overruling Attorney General *v.* Downing, Ambl. 573); Pigott *v.* Waller, 7 Ves. 98; Goodtitle *v.* Meredith, 2 M. & Sel. 5; Hulme *v.* Heygate, 1 Mer. 285; Rowley *v.* Eyton, 2 Mer. 128; Duffield *v.* Elwes, 3 B. & C. 705; Guest *v.* Willassey, 2 Bing. 429; 3 Bing. 614; In the Goods of Crosley, 2 Hagg. 80; 1 Saund. 278 *b et seq.* note to Duppa *v.* Mayo; Williams *v.* Goodtitle, 20 B. & C. 895; Doe *v.* Walker, 12 M. & W. 591; Skinner *v.* Ogle, 1 Robert. 363; S. C. 4 Notes of Cas. 74; Doe *v.* Marchant, 6 M. & Gr. 813, 825; Dickinson *v.* Stidolph, 11 C. B. N. S. 341; In re Earle's Trust, 4 Kay & J. 673; [Jones *v.* Shewmaker, 35 Geo. 151; Burton *v.* Newbery, L. R. 1 Ch. D. 234; Payne *v.* Payne, 18 Cal. 291; Murray *v.* Oliver, 6 Ired. Eq. 55; Rose *v.* Drayton, 4 Rich. Eq. 260; Stover *v.* Kendall, 1 Coldw. (Tenn.) 557.] So a will or codicil, containing a devise of real estates, but not duty attested, may be republished and made operative by a subsequent codicil having the requisite attestation, though the latter document be in no way annexed to the will or prior codicil. But it has been held that it must distinctly refer to it. See Doe *v.* Evans, 1 C. & M. 42; Utterton *v.* Robins, 1 Ad. & El. 423; Gordon *v.* Reay, 5 Sim. 274; Aaron *v.* Aaron, 3 De G. & Sm. 475; *ante*, 97, 98. [See the remarks of Jessel M. R. upon the above case of Gordon *v.* Reay, in Burton *v.* Newbery, L. R. 1 Ch. D. 237–241.] Though a codicil confirms a will, and for certain purposes brings down the will to the date of the codicil, it certainly does not make the will necessarily operate as if it had been originally made at the date of the codicil. Hopwood *v.* Hopwood, 7 H. L. Cas. 740, per Lord Campbell. [Nor does it republish any part of the will which is inconsistent with the codicil. Simmons *v.* Simmons, 26 Barb. 68.] See, as to a copy of a will in India being confirmed by a codicil made in England, In the Goods of Mercer, L. R. 2 P. & D. 91.

pendent on its being annexed to the will, yet if there are several wills of different dates, and there be a question to which of these the codicil is to be taken as a codicil, the circumstance of annexation is most powerful to show that was intended as a codicil to the will to which it is annexed and to no other. (*b*)

codicil referring inaccurately to a will may republish it:

A codicil referring inaccurately to a will may republish it. Thus, in the case of Jansen *v.* Jansen, cited by Sir John Nicholl in Rogers *v.* Pittis, (*c*) the deceased having executed two wills, the one dated the *twenty-first* of July, 1792, and * the other dated 18th of July, 1796, had made a codicil in 1820, referring in terms to his will, not of the *twenty-first* but of the *first* of July, 1792; and it was held, that as the other circumstances of the case showed that the codicil referred to the will of 1792, and not to that of 1796, the inaccuracy was immaterial, and the will of 1792 was therefore republished. (*d*) A codicil which is expressed to take effect only in an event which does not happen, republishes, it should seem, a will to which it refers by date, or makes the will valid, if it has not been duly executed, and it is, on that ground, entitled to probate. (*e*)

republication by contingent or conditional codicil:

But although the general rule as to the republishing operation

(*b*) Rogers *v.* Pittis, 1 Add. 41; Barnes *v.* Crowe, 1 Ves. jun. 490.

(*c*) 1 Add. 38.

(*d*) See accord. In the Goods of Houblon, 11 Jur. N. S. 549; In the Goods of Whatman, 33 L. J., P. M. & A. 17. See, also, the case of Lord St. Helens *v.* Lady Exeter, 3 Phillim. 461, in note to Fawcett *v.* Jones; and see, further, Thompson *v.* Hempenstall, 1 Rob. 783. A codicil will refer to the last in date of several wills, if no express date is mentioned; if there is, to that of the particular date expressed. Crosbie *v.* MacDonal, 4 Ves. 615. And the courts of law have determined that evidence cannot be admitted to prove that such reference was a mistake, and that the testator did not mean to refer to the will to which the codicil does expressly refer. Lord Walpole *v.* Lord Orford, 3 Ves. 402; S. C. by the name of Walpole *v.* Cholmondeley, 7 T. R. 138; Crosbie *v.* MacDnal, 4 Ves. 616. This decision has been applied in the spiritual courts to a will of personalty since the stat. 1 Vict. c. 26. In the Goods of Chapman, 1 Robert. 1. See, also, Payne *v.* Trappes, 1 Robert. 583; S. C. 5 Notes of Cas. 147, 478; Thompson *v.* Hempenstall, 1 Robert. 783, 793; S. C. 7 Notes of Cas. 141, 148; In the Goods of Goodenough, 2 Sw. & Tr. 141. When a testator refers in a codicil to a *last* will, and there is nothing in the contents of the codicil to point to any particular will, it must be construed to refer to the will in legal existence as the last will, and not to a revoked will. Hale *v.* Tokelove, 2 Robert. 326, by Dr. Lushington. See, also, In the Goods of Steele, L. R. 1 P. & D. 575. [See In the Goods of Gentry, L. R. 3 P. & D. 80.]

(*e*) In the Goods of Da Silva, 2 Sw. & Tr. 315; *ante*, 190; [Harvey *v.* Chouteau, 14 Misson. 587; Van Cortlandt *v.* Kip, 1 Hill (N. Y.), 590; 7 Hill (N. Y.), 346.]

of a codicil is as above stated, yet in all cases of this kind, the question to be considered is, whether the particular case is or is not within the general rule; (*f*) for, if it appear on the face of the codicil that it was not the * intention of the testator to republish, the ordinary presumption derived from the existence of the codicil will be counteracted. (*g*)

a codicil will not republish if a contrary intention appear on the face of it.

Secondly, it remains to consider the effect of the statute of Victoria on the mode of republication (*h*) or revival of wills.

2dly. The effect of the statute 1 Vict. c. 28.

The only mode in which a will, which has been revoked, can be revived, is that pointed out by the 22d section. There must be a reëxecution, (*i*) or a duly executed codicil. There are no other means of showing an intention to revive. Destruction of the revoking instrument is not sufficient. (*j*)

(*f*) By Lord Eldon C. in Bowes *v.* Bowes, 2 Bos. & Pull. 506. [A codicil which refers to a will of a particular date, and does not refer to a subsequent codicil, does not operate as a republication of that subsequent codicil. Burton *v.* Newbery, L. R. 1 Ch. D. 234. A testator made a will (dated before the *wills act*), by which he directed his residuary real estate to be sold and the proceeds to be divided (in events which happened) among twelve persons, of whom A. and B. were two. He made a first codicil (dated after the *wills act*), by which he directed certain real estate, acquired subsequently to the date of the will, to be sold, and the proceeds divided in the same way as the proceeds of his other real estate. This codicil was attested by A. and B. He then made another codicil, described as a codicil to his will of a certain date, but not referring to a prior codicil. It was held, that the second codicil did not operate as a republication of the first codicil; that the gifts to A. and B. of two twelfth shares of the proceeds of the property comprised in the first codicil failed; and that these shares fell into the residue, and were divisible between A. and B. and the other ten residuary legates. Burton *v.* Newbery, *supra*.]

(*g*) Strathmore *v.* Bowes, 7 Term. Rep. 482; S. C. under the name of Bowes *v.* Bowes, in Dom. Proc. 2 Bos. & Pull. 500. [Haven *v.* Foster, 14 Pick. 541; York *v.* Waller, 12 M. & W. 591.] See, also, Lord Mansfield's judgment in Heylin *v.* Heylin, Cowp. 132; Parker *v.* Biscoe, 3 B. Moore, 24; Smith *v.* Dearmer, 3 Y. & Jerv. 278; Ashley *v.* Waugh, *coram* Lord Cottenham, cited in Doe *v.* Walker, 12 M. & W. 598, 601; Moneypenny *v.* Bristow, 2 Russ. & M. 117; Hughes *v.* Turner, 3 My. & K. 666; Doe *v.* Hole, 15 Q. B. 848; Hughes *v.* Hosking, 11 Moore P. C. 1; [Kendall *v.* Kendall, 5 Munf. 541.]

(*h*) The real property commissioners (4th report, pp. 33, 34) intimate that since publication is no longer necessary for a will (see sect. 13 of the stat. 1 Vict. c. 26), it will be improper to continue the expression "republication." But it may be observed that this expression has always been in use, as a convenient term, with respect to wills of personal estate, although no publication was ever necessary for their validity. And the 34th section (see *post*, 222) of the new act itself (as was observed by Sir H. Jenner Fust in Skinner *v.* Ogle, 4 Notes of Cas. 78) distinguishes between a republication and revival.

(*i*) As to what amounts to a reëxecution, see Dunn *v.* Dunn, L. R. 1 P. & D. 277.

(*j*) Major *v.* Williams, 3 Curt. 432;

* But it must be observed that the 22d section, the terms of which have been stated at the beginning of this chapter, is confined to wills, &c. "*which shall be in any manner revoked.*" It is obvious, however, that, inasmuch as the old doctrine of the republication of wills by parol acts or declarations depends on the principle that the will so recognized becomes a new will of the date of the recognition, no such republication can take place, in respect of any will whatever, since the new statute came into operation, because no new will can be made, unless with the prescribed formalities. Again, it is clear that no republication can now, in any case, be effected by a codicil, unless the codicil be executed according to the exigencies of the new statute; because such republication depends on the codicil becoming a part of the will; and it cannot become a part unless it be so executed. But if it be so executed, it will still amount to a republication of the will, according to the old law, as above stated, unless it appears, on the face of it, that it was not the intention of the testator to republish; (*k*) or unless the will has been in some manner revoked, in which case the new statute further requires that the codicil should show an intention to revive the will. (*l*)

ante, 181. The above section was much considered by Lord Penzance in the case of In the Goods of Steele, L. R. 1 P. & D. 575, where it was laid down by his lordship that a codicil may, by referring in adequate terms to a revoked will, revive that will if it be in existence, but the codicil must "show an intention to revive the same," according to the words of the section; and in order to satisfy those words the intention must appear on the face of the codicil, either by express words referring to a will as revoked, and importing an intention to revive the same, or by disposition of the testator's property inconsistent with any other intention, or by some other expression conveying to the mind of the court, with reasonable certainty, the existence of the intention; and that since the passing of the statute, a will cannot be revived by mere implication. It was also laid down in the above case that references in codicils to revoked wills by their dates were insufficient to revive them, there being no evidence on the faces of such codicils of an intention to revive the will so referred to.

(*k*) Doe *v.* Walker, 12 M. & W. 591, *post*, 222; Skinner *v.* Ogle, 4 Notes of Cas. 74; S. C. 1 Robert. 363.

(*l*) A will and codicil revoked, under the new statute, by the marriage of the testator, were held to be revived by a codicil made after the marriage and duly attested, though it did not expressly confirm or revive any particular will, but referred merely to "the last will of me," and "my said will" (it not appearing that more than one will of the testator was in existence). Neate *v.* Pickard, Prerog. T. T. 1843; 2 Notes of Cas. 406. See, also, accord. In the Goods of Terrible, 1 Sw. & Tr. 140. Again, where one part of a will in duplicate remained undestroyed in the possession of the testator, but the other part in the possession of his solicitor had been destroyed by the testator on the execution of a subsequent will, made in 1838, in terms revoking the prior will, it was held that such prior will was revived by a

* By section 34, "This act shall not extend to any will made before the first day of January, 1838."

The result appears to be this: that a republication or revival by parol acts or declarations, or by an unattested codicil or other writing, according to the old law, shall be valid, if it took place before the 1st of January, 1838; but that, after the expiration of the year 1837, no republication shall be effectual unless by re-execution, according to the solemnities required by the statute of Victoria for an original will, or by a codicil executed in the same manner, notwithstanding the will itself may have been executed before the 1st of January, 1838. (*m*)

SECTION II.

Of the Consequences of Republication.

It has long been settled law that the republication of a will is tantamount to the making of that will *de novo*; (m^1) it brings down the will to the date of the republishing, and makes it *speak*, as it were, *at that time*. (m^2) In short, the will so republished is a new will. (*n*)

The will republished is a new will of the date of the republication:

codicil, made subsequently to the second will, though referring to the prior will *merely by date*; for that such reference sufficiently showed "an intention to revive." Payne *v.* Trappes, 1 Robert. 583. See, also, Hale *v.* Tokelove, 2 Robert. 318, *post*, 224. But the physical annexation (by a piece of tape, *e. g.*) of a duly executed codicil of a later date to testamentary papers duly executed but revoked, is no ground for infering the "intention to revive," required by the statute. And it should seem that such intention can only be shown by the contents of the codicil itself. Marsh *v.* Marsh, 1 Sw. & Tr. 528.

(*m*) Hobbs *v.* Knight, 1 Curt. 768, 774; De Zichy Ferraris *v.* Lord Hertford, 3 Curt. 468, 512. So, conversely, a will of lands made before January 1, 1838, and revoked, may be republished after that day by a codicil attested by two witnesses only. Andrews *v.* Turner, 3 Q. B. 177.

(m^1) [In Alabama the republication of a will is the making of a new will, and such republication must be made with all the formalities required by law. Barker *v.* Bell, 46 Ala. 216.]

(m^2) [Murray *v.* Oliver, 6 Ired. Eq. 55; Miles *v.* Boyden, 3 Pick. 213; Brownell *v.* De Wolf, 3 Mason, 486; Haven *v.* Foster, 14 Pick. 543; Richardson *v.* Richardson, C. W. Dud. Eq. 184; Dunlap *v.* Dunlap, 4 Desaus. 305; Luce *v.* Dimock, 1 Root, 82; Kip *v.* Van Cortland, 7 Hill, 346; Van Kleek *v.* The Dutch Church, 20 Wend. 457; Snowhill *v.* Snowhill, 3 Zabr. (N. J.) 447.]

(*n*) [Barker *v.* Bell, 46 Ala. 216; Brimmer *v.* Sohier, 1 Cush. 118; Murray *v.* Oliver, 6 Ired. Eq. 55; Jack *v.* Shoenberger, 22 Penn. St. 416.] So far has this principle been carried, that where a testator had made his will in December, 1734, before the statute of mortmain, 9 Geo. 2, c. 36, and devised all the residue of his personal estate to be laid out in land, and settled to certain charitable uses, and had confirmed that will by a codicil

it revokes any other will, of a date prior to that of republication:

* Consequently, upon the ordinary and universal principle that, of any number of wills, the last and newest is that in force, it revokes any will of a date prior to that of the republication. (*o*)

distinction between wills and codicils.

But there is a great distinction between wills and codicils in this respect; for as every codicil is, in construction of law, a part of the will, a testator by expressly referring to, and confirming the will, will not be considered as intending to set it up against a codicil or codicils, revoking it in part. And, therefore, in a case where a testator made his will, and afterwards executed several codicils thereto, containing partial alterations of, and additions to the will; and by a further codicil, referring to the will by date, he changed one of the trustees and executors, and in all other respects expressly confirmed the will; this confirmation of the will was held not to revive the parts of it which were altered or revoked by the former codicils; Lord Alvanley M. R. observing, that if a man ratifies and confirms his last will he ratifies and confirms it with every codicil that has been added to it. (*p*)

made in July, 1739, after the statute, the codicil, by making the will a new will, was held to bring the devise within the statute; and so much of the will as related to the residue of the testator's personal estate was, consequently, held to be void. *Vide* Attorney General *v.* Heartwell, Amb. 451; 1 Add. 38, note. But the contrary has been held of real estate. See Willett *v.* Sandford, 1 Ves. sen. 178, 186.

(*o*) Scrocold *v.* Hemming, 2 Cas. temp. Lee, 490; Rogers *v.* Pittis, 1 Add. 38; Jansen *v.* Jansen, 1b. 39; Walpole *v.* Orford, 3 Ves. 402; Walpole *v.* Cholmondeley, 7 T. R. 138.

(*p*) Crosbie *v.* McDoual, 4 Ves. 610; 1 Powell on Devises, p. 624, Jarman's edition. See Grand *v.* Reeve, 11 Sim. 66; Bunny *v.* Bunny, 3 Beav. 109; Cartwright *v.* Shepheard, 17 Beav. 301. [Where a testator copies and republishes his will, and the several codicils, and in the attestation styles them codicils, they do not thereby become parts of the will, but remain codicils, and constitute distinct instruments, and a bequest of the residue of the estate by the will "to the legatees" will be confined to such legatees as are therein named, and to such legatees as are substituted by codicil for some of them; and will not extend to others to whom legacies are left by the codicils. Alsop's Appeal, 9 Penn. St. 374; Riley's Appeal, 9 Penn. St. 374. Nor will such republication have the effect to revive legacies which have been adeemed or satisfied. Langdon *v.* Astor, 16 N. N. 9; Paine *v.* Parsons, 14 Pick. 318. But a will discharging all debts is a release of a new debt incurred between the date of the will and last codicil, though there be no reference to such debts in the codicil, and no express words of republication. Coale *v.* Smith, 4 Penn. St. 376.] Where there are several codicils of different dates, it will always be a question to be determined from the contents of the codicils, and (at all events, in a court of probate) from all other circumstances of the case, whether the later are cumulative to, or substituted for, and revocatory of the former. Methuen *v.* Methuen, 1 Phillim. 510; Greenough *v.* Martin, 2 Add. 239; *ante*, 167. See,

* In Upfill *v.* Marshall, (*q*) a will (dated February, 1837) disposed of real and personal estate. A codicil (dated June, 1837) partly revoked the disposition of the personalty. A memorandum (dated July, 1838) formally republished the will. And it was held that parol evidence was admissible to show *quo animo* the memorandum was made; and upon that evidence, that the codicil was not revoked by the republication of the will. (*r*)

And now, by stat. 1 Vict. c. 26, s. 22, "when any will or codicil, which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown."

In a case where a will and codicil, which had been revoked, under the new statute, by the testator's marriage, was revived by a codicil referring to the will, several alterations appeared on the face of the will; and it was held by Sir H. Jenner Fust, that the codicil revived the will as it stood at the time of republication, being of opinion that it was the intention of the deceased in the alterations to revoke the altered legacies, and that therefore he could not have intended to revive that part of the will which he had revoked before. (*s*)

Republication extends the operation of the will to property, &c. acquired after its date:

Another consequence of a republished will being considered as a new will of the date of the republication is, that its operation is extended to subjects which have arisen between its date and republication. (*s*[1]) As if one give to Sarah his wife a piece of plate, or other thing, and hath no such wife at the time, but after marrieth one of that name, and then publisheth the will again; now this shall be a good bequest. (*t*) So if one devise goods which he hath not, if he * after do purchase the same, and then say that his will before made shall stand or be his will, it shall be a good will and bequest; for this in effect is a new making. (*u*) So where a man had de-

also, *infra*, pt. 1. bk. IV. ch. III. § V. But see Thorne *v.* Rooke, 2 Curt. 799; *ante*, 167. [An omission to mention a particular codicil in a clause of republication, in which prior and subsequent codicils are specified, may be an implied revocation of such codicil; but this implication may be rebutted by other circumstances. Wikoff's Appeal, 15 Penn. St. 281.]

(*q*) 3 Curt. 636.

(*r*) See, also, Wade *v.* Nazer, 1 Robert. 627; S. C. 6 Notes of Cas. 46.

(*s*) Neate *v.* Pickard, 2 Notes of Cas. 406.

(*s*[1]) [See Haven *v.* Foster, 14 Pick. 541; Mooers *v.* White, 6 John. Ch. 375.]

(*t*) 1 Wentw. Off. Ex. c. 1, p. 62, 14th ed.

(*u*) 1 Wentw. Off. Ex. c. 1, p. 62, 14th ed.

vised a lease to his daughter, and afterwards renewed the lease, which was held to amount to a revocation by ademption of the lease originally bequeathed; it was holden that the renewed lease passed by means of a codicil made after the renewal, which, although it took no notice of the lease, operated as a republication of the will. (*x*) And so far has the doctrine that a republication gives words, used in the original will, the same force and effect as they would have had if first written at the time of the republication, (*x*[1]) been extended, that it has been considered that a bequest may extend to *any person* to whom the description is applicable at the period of republication, though not originally intended. (*y*)

Secus, as to a will in the exercise of a power, *semble:*

But it has been held that in the case of a married woman, whose will is only the exercise of a power, her republication of it by a codicil made after her husband's death has not necessarily the effect of extending the operation of the will so as to make it include that which was not included in the power given to her to make the will. Thus, where a married woman, by her will dated in 1824, and made in exercise of a power, duly appointed and devised certain hereditaments therein specified, and also all other the hereditaments, if any such there were, which she had any power to appoint and devise, and afterwards, when a widow, in the year 1829, made a codicil, whereby she gave some legacies, but did not dispose of the residue of her estate, and she confirmed all wills and codicils which she had theretofore made, it was held by Sir J. Romilly, that the will, as confirmed, passed only such hereditaments as were subject to * her power, and not certain other hereditaments to which she had become entitled at the date of the codicil; for that the codicil did not extend or enlarge the appointment, so as to make it a devise of that which was not contained in the power. (*z*)

distinction between wills of realty and personalty in this respect.

This consequence of republication was not so important with respect to personalty as it was with regard to realty, before the passing of the new statute of wills (1 Vict. c. 26); because a will of personalty, if it contained prospective words sufficiently comprehensive, would operate

(*x*) Alford *v.* Earle, 2 Vern. 208; S. C. cited under the name of Alford *v.* Alford, 3 P. Wms. 168. See, also, Coppin *v.* Fernyhough, 2 Bro. C. C. 291; Porter *v.* Smith, 16 Sim. 251.

(*x*[1]) [Haven *v.* Foster, 14 Pick. 541.]

(*y*) Perkins *v.* Micklethwaite, 1 P. Wms. 275.

(*z*) Du Hourmelin *v.* Sheldon, 19 Beav. 389.

on the personal estate of the testator, to which those words applied, although acquired since the making of the will, without any republication of it; (*a*) whereas no real estate which the testator had not at the date of the will would pass by it, however express, comprehensive, and general the words, or however manifest the intention of the testator might be. (*b*) Consequently, no after purchased lands could pass, nor any lands which did not remain in the same condition from the date of the will to the death of the testator, unless there were a republication, according to the solemnities required by the statute of frauds; for any the least alteration, or new modelling of the estate after the will, was an actual revocation. (*c*)

1 Vict. c. 26, s. 3:

But now, by stat. 1 Vict. c. 26, s. 3, the power of disposing by will executed as required by that act is extended to all such real estate as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

s. 24: a will shall be construed to speak from the death of the testator, unless a contrary intention

It should further be observed that, by the 24th section of the same statute, it is enacted, "that every will shall be * construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." (*d*)

(*a*) [Canfield *v.* Bostwick, 21 Conn. 553; Garrett *v.* Garrett, 2 Strobh. Eq. 283; Dennis *v.* Dennis, 5 Rich. (S. Car.) 468; Warner *v.* Swearingen, 6 Dana, 196.] See, as to the ademption of legacies, and the revival of adeemed legacies by republication, the subsequent part of this treatise, pt. III. bk. III. ch. III.

(*b*) 1 Saund. 277 *e*, note to Duppa *v.* Mayo; [*ante*, 6, and note (*c*) and cases cited; Mooers *v.* White, 6 John. Ch. 375; Brownell *v.* De Wolf, 3 Mason, 486; Miles *v.* Boyden, 3 Pick. 216.]

(*c*) 1 Saund. 278 *e*, note to Duppa *v.* Mayo; [*ante*, 204, note (c[1]).]

(*d*) [By Genl. Sts. Mass. c. 92, § 4, it is provided that real estate, acquired by the testator after the making of his will, shall pass thereby, in like manner as if possessed at the time of making the will, if such shall clearly and manifestly appear by the will to have been the intention of the testator. For the construction given to this provision, see Cushing *v.* Aylwin, 12 Met. 169; Pray *v.* Waterston, 12 Met. 262; Brimmer *v.* Sohier, 1 Cush. 118; Blaney *v.* Blancy, 1 Cush. 107, 116; Winchester *v.* Foster, 3 Cush. 366; Prescott *v.* Prescott, 7 Met. 141, 146; Wait *v.* Belding, 24 Pick. 136. In New York, by 2 Rev. Sts. 57, § 5, "every will made by a testator in express terms of all his real estate, or in any other terms, denoting his intent to devise all his real property, shall be construed to pass all the real estate which he was entitled to devise at the time of his death." 4 Kent, 512; Youngs *v.* Youngs, 45 N. Y. 254. The same rule seems to exist in Alabama and Indiana. But where the unlimited words of the

shall appear by the will:

The latter of these two enactments in effect puts the case of real property on the same footing as that on

statute are not used, there must be words in the will which will enable the court to see that the testator intended that his will should operate upon real estate which he should afterwards acquire. Lynes *v.* Townsend, 33 N. Y. 558, 569; Gray C. in Quinn *v.* Hardenbrook, 54 N. Y. 85. In this last case (54 N. Y. 89), Reynolds C. referring to the difference between the English and the New York statutes on this point, said: "Although the *onus* of construction appears to be inverted, the principle of the two statutes is substantially the same." See Wetmore *v.* Parker, 52 N. Y. 450; Pond *v.* Bergh, 10 Paige, 149; Bowen *v.* Johnson, 6 Ind. 111; Brown *v.* Brown, 16 Barb. 569; Youngs *v.* Younga, 45 N. Y. 254. In Connecticut, it is said to be the general rule, that a will speaks from the death of the testator, and not from its date, unless its language, by a fair construction, indicates the contrary intention. Canfield *v.* Bostwick, 21 Conn. 550; Gold *v.* Judson, 21 Conn. 616; Brewster *v.* M'Call, 15 Conn. 274. In other states, as in Massachusetts, *supra*, the statutes declare that after acquired real estate shall pass by a devise when such appears to have been the intention of the testator; and in some states the statutes merely confer the power to dispose of such estate. As to acts and language indicating the mode of showing the intention to dispose of after acquired real estate, or the contrary, see Brimmer *v.* Sohier, 1 Cush. 133; Wynne *v.* Wynne, 2 Swan (Tenn.), 407; Loveren *v.* Lamprey, 22 N. H. 444; Cushing *v.* Aylwin, 12 Met. 174; Pruden *v.* Pruden, 14 Ohio St. 253; Henderson *v.* Ryan, 27 Texas, 674; Willis *v.* Watson, 4 Scam. 67; Allen *v.* Harrison, 3 Call, 304; Warner *v.* Swearingen, 6 Dana, 199; Marshall *v.* Potter, 10 B. Mon. 2. Upon the question whether these statutes affect wills made before their passage and taking effect after, or only those made after their passage, see Parker *v.* Bogardus, 1 Selden, 311; Gable *v.* Daub, 40 Penn. St. 223; Loveren *v.* Lamprey, 22 N. H. 447; Cushing *v.* Aylwin, 12 Met. 174; Brewster *v.* M'Call, 15 Conn. 290; De Peyster *v.* Glendenning, 8 Paige, 295; Bishop *v.* Bishop, 4 Hill, 138; Pray *v.* Waterston, 12 Met. 262. For other cases, showing the rule as to the effect of wills upon after acquired estate, see Smith *v.* Edrington, 8 Cranch, 66; Carroll *v.* Carroll, 16 How. (U. S.) 275; De Peyster *v.* Clendenning, 8 Paige, 295; Pugh *v.* Bergh, 10 Paige, 140; Bishop *v.* Bishop, 4 Hill, 138; Whittemore *v.* Bean, 6 N. H. 47; Wakefield *v.* Phelps, 37 N. H. 295, 306; Carter *v.* Thomas, 4 Greenl. 341; Dennis *v.* Dennis, 5 Rich. (S. Car.) 468; Landrum *v.* Hatcher, 11 Rich. (S. Car.) 154; Watson *v.* Child, 9 Rich. Eq. (S. Car.) 129; Foster *v.* Craige, 3 Ired. 536; Battle *v.* Speight, 9 Ired. 288; Turpin *v.* Turpin, 1 Wash. 75; Hyer *v.* Shobe, 2 Munf. 200; Allen *v.* Harrison, 3 Call, 289; Walton *v.* Walton, 7 J. J. Marsh. 58; Dennis *v.* Warder, 3 B. Mon. 173; Ross *v.* Ross, 12 B. Mon. 437; Smith *v.* Jones, 4 Ohio, 115; Girard *v.* Philadelphia, 2 Wallace jr. C. C. 305; Willis *v.* Watson, 4 Scam. 64; McCulloch *v.* Souder, 5 Watts & S. 198; Legget *v.* Hart, 23 Missou. 127; 4 Kent, 512, and notes.] It is not at all necessary to find this "contrary intention" expressed in so many words, or in some way quite free from doubt. It is enough if it be found, on the fair construction of the will, adopting those rules of construction which are usually adopted in construing wills, that the contrary intention does appear. Accordingly, where in a will of real and personal estate *bearing a date*, the testator gave "all the estates of which I am now seised and possessed," and used the word "now" in other parts of his will, clearly alluding to the period at which he was making his will, Lord Cottenham held that the testator had thereby indicated a contrary intention, so as to take the case out of the general rule that the

which personal property already stood; for the general rule, as to wills of mere personalty, established before the wills act passed,

will shall be construed to speak and to take effect from the testator's death, and that real estate acquired after the date of the will did not pass by it. In the course of the argument, his lordship said he admitted the word "now" would, under the act, be the time of the death, if there was no date to the will. Cole *v.* Scott, 1 Mac. & G. 518; 16 Sim. 259. (See the observations on this case, 3 Sm. & G. 253, 254; 8 De G., M. & G. 437.) See, further, as to the construction of this section, Douglas *v.* Douglas, Kay, 400; Bullock *v.* Bennett, 1 Kay & J. 315; 7 De G., M. & G. 283; Goodlad *v.* Burnett, 1 Kay & J. 341; Jepson *v.* Key, 2 H. & C. 873; [In re Gibson, L. R. 2 Eq. 672; Hepburn *v.* Skirving, 4 Jur. N. S. 651; Lord Lilford *v.* Powys Keck, 30 Beav. 300;] Langdale *v.* Briggs, 3 Sm. & G. 246; 8 De G., M. & G. 391, 437; Re Otley Railway, 34 L. J. Ch. 596; S. C. 11 Jur. N. S. 818; Wagstaff *v.* Wagstaff, L. R. 8 Eq. Ca. 229; [Hutchinson *v.* Barrow, 6 H. & N. 583; 30 L. J. Ex. 280; 1 Jarman Wills (3d Eng. ed.), 298 *et seq.*, 311, 312; Goodfellow *v.* Goodfellow, 18 Beav. 361; Emuss *v.* Smith, 2 De G. & S. 722;] *post*, pt. III. bk. III. ch. IV. § VIII. To prevent the application of the section, an intention must be shown excluding the effect given to the will by the statute, namely, the effect of a continuing operation during the subsequent life of the testator. By Lord Westbury, in Thomas *v.* Jones, 1 De G., J. & Sm. 83. As to whether the section is to be applied to an excepting clause, see Hughes *v.* Jones, 1 Hemm. & M. 765, 770. [In Gold *v.* Judson, 21 Conn. 616, 622, 623, Ellsworth J. said: "Whenever a testator refers to an actually existing state of things, his language should be held as referring to the date of the will, and not to his death, as this is then a prospective event. Such, it is clear, is the construction of the word *now*. Thus, to the descendants *now living* of a person, means those living at the date of the will, exclusive of such as came into being between that period and the death of the testator. And the same is true, where the word *now* is combined with a term which could not have full effect according to its technical import, unless used prospectively, as in the case of a devise to the *heir male* of the body of A. *now living*; under which the heir apparent of A., living at the date of the will, has been held to be entitled. So in the description of the thing given, and the person or persons to whom given, it may be such as to embrace only the specific thing or persons described; as thus: the stock I *now* hold in the Hartford Bank, or the children of my brother *already* born." To the same effect is the language of Church C. J. in Wetmore *v.* Parker, 52 N. Y. 450, 463, 464, and of the judges in Quinn *v.* Hardenbrook, 54 N. Y. 83. See Everett *v.* Carr, 59 Maine, 325. Referring to the case of Cole *v.* Scott, *supra*, Mr. Jarman in his work on wills (3d Eng. ed. vol. 1, p. 312), says, "Lord Cottenham's observations, however, upon the word 'now' in that case, have not met with unqualified approval; and it has been repeatedly held, that unless it clearly appears on the face of the will that words importing the present time are used with the intention of limiting the operation of the will to property then in the testator's possession, they will not have that effect; but that a devise of all messuages, lands, &c. of which the testator is seised, or a bequest of stock of which he is possessed, includes after acquired real or personal estate." In Castle *v.* Fox, L. R. 11 Eq. 553, Malins V. C. dissenting from the decision in Cole *v.* Scott, *supra*, said: "The word 'now' does not occur here, and, therefore, it is not necessary for me to decide in opposition to that case; but I have no hesitation in saying that if the word 'now' had occurred here, I should have come to the same conclusion that I now do, and decided in opposition to Cole *v.* Scott." But in Wagstaff *v.* Wagstaff, L. R. 8 Eq. 229, it appeared that the tes-

was, that they speak from the day of the testator's death, and are not referable to the state of the property at the time of making the will, unless there are expressions in the will showing it was intended to describe property with * reference to the day of the date of the will, and not to the day of the death. (*e*)

It has been decided that the effect of this section is not to make a will valid, which was invalid in its inception (*e. g.* a will of a married woman unauthorized by a power), but to give a rule for the construction of a valid testamentary instrument. (*f*) But the will of a married woman is not excluded by the 8th section from the operation of this section. (*g*)

tator made a gift of "all my ready money, bank, and other shares, freehold property, . . . and any other property that I may now possess," and it was held that personal estate acquired subsequently to the date of the will passed by the bequest. Lord Romilly M. R. having noticed the language used by the testator in Cole *v.* Scott, said he thereby showed "that he had clearly in his mind the distinction between the property he was then possessed of and that which he should afterwards acquire. There is no doubt a testator may make his will in this way." Then referring to the case before him, he says: "If the testator had said, 'I give all my real and personal estate,' there can be no doubt that after acquired property would have passed. So again, if he had said, 'I give all the real and personal estate I possess.' Does it make any differeoce when he puts in the word 'now?' The words 'I possess' mean the same thing as 'I now possess.' In all these cases the law says that you must read the will as if it had been written on the day of the testator's death, and you must have distinct words, as there were in Cole *v.* Scott, in order to show that the property acquired subsequently to the date of the will is not intended to pass." See, also, Garrison *v.* Garrison, 5 Dutcher, 153; Roney *v.* Stiltz, 5 Whart. 381, 385.]

(*e*) Cole *v.* Scott, 1 Mac. & G. 529; *post*, pt. III. bk. III. ch. IV. § VIII. See Douglas *v.* Douglas, Kay, 400, 404, and Goodlad *v.* Burnett, 1 Kay & J. 341, 347, 348, as to the cases where the testator bequeathed the whole of some one *genus* of his property, as "all debts due to me on bond," or all "*my* stock." The effect of the wills act on cases of this kind will be considered hereafter. See pt. III. bk. III. ch. IV. § VIII. [See *ante*, 221, note (*d*). If the language is general, not specific, and not limited, the will speaks from the testator's death, and of course disposes of whatever property the testator had at that time, or to such persons as answer the description. So a general bequest of any particular species of personal property, as "my furniture and effects," has been held to embrace property of this description belonging to the testator at his death. A will also is held to speak from the death of the testator in reference to gifts to classes, or fluctuating bodies of persons, as to children, descendants, or next of kin, which apply to the persons answering the description, at the death of the testator, irrespective of those to whom the description was applicable at the date of the will, but who died in the testator's lifetime. Ellsworth J. in Gold *v.* Judson, 21 Conn. 616, 623; Bowers *v.* Porter, 4 Pick. 198; Stimpson *v.* Batterman, 5 Cush. 153.]

(*f*) Price *v.* Parker, 16 Sim. 198, 202; *ante*, 62; Noble *v.* Phelps, L. R. 2 P. & D. 276, accord.

(*g*) Thomas *v.* Jones, 1 De G., J. & S. 63; Noble *v.* Phelps, L. R. 2 P. & D. 276, accord. See *ante*, 53.

Upon this enactment it may be further remarked, that even in the case of wills within its operation, it has not rendered wholly inapplicable the doctrines which have just been stated with respect to the consequences of the republication of wills; because the statute does not enact absolutely that the will shall speak as if it had been made just before the death of the testator, but only that it shall do so in respect of the property comprised in it. Therefore, with respect to the description of persons in the will, the law remains as before the passing of the act. (*h*)

S. 34: a will republished, &c. shall be deemed to have been made when republished:

It is further enacted by the 34th section, that "every will reëxecuted, or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so reëxecuted, republished, or revived."

a will made before the new act, and republished afterwards, may pass lands acquired after the date of the republication:

An illustration of the effect of these enactments has occurred in the case of Doe *v.* Walker, (*i*) where a will, made in February, 1837, was held to be republished by a codicil * dated in February, 1838 (appointing an additional trustee, and "in all other respects ratifying and confirming the will"), and to pass real estates, purchased by the testator *after the date of the codicil*, under a bequest of "all the estates of which I am seised in the parish of B.;" inasmuch as the will, so republished, constituted, together with the codicil, a new will of the date of the codicil, and such new will having been so executed since the new act came into operation, must be construed, by sect. 24, to speak as if it had been executed immediately before the testator's death. (*k*)

so it will be brought within the 33d section, and a legacy to a child who leaves issue living at testator's death will not lapse.

Another illustration has been afforded by the cases which have arisen as to the application of the 33d section (by which it is enacted that a bequest from a testator to a child, who dies in his lifetime, but leaves children living at his decease, shall not lapse) to wills made before, and republished after, the act came into operation. But it will be more convenient to consider these cases hereafter, together with the general subject of lapsed legacies. (*l*)

(*h*) Bullock *v.* Bennett, 7 De G., M. & G. 283.

(*i*) 12 M. & W. 591.

(*k*) See accord. Douglas *v.* Douglas, Kay, 404. But see, also, Cole *v.* Scott, *ante*, 221, note (*d*); Langdale *v.* Briggs, 3 Sm. & G. 253.

(*l*) *Post*, pt. III. bk. III. ch. II. § V.

A codicil may give effect to unattested alterations or additions to the will:

A codicil duly executed will give effect and operation to a will altered after the passing of the act, though the alteration was not duly attested, and though the will itself was executed before 1838; (*m*) or to unexecuted papers, which have been written between the periods of the execution of the will and codicil, although the latter does not refer to the former; as where a testator by his will bequeathed articles of plate "specified in schedules A. and B. *to be* annexed to this document" [his will], and after his death two such schedules, marked A. and B., were found, which, it was sworn, were not written when the will was executed, but were in existence prior to the execution of a subsequent codicil, in which no mention was made of the schedules; *Sir John Dodson admitted the two schedules to probate, together with the will and codicil. (*n*)

or may render valid a previous unexecuted will, &c.:

The general question whether, and in what cases, an unexecuted will or other paper may be rendered valid as a testamentary disposition by a subsequent duly executed codicil, has been already considered in an earlier part of this work. (*o*)

Effect of codicil showing intention to revive a destroyed will.

A question of no little difficulty has lately arisen in the consistory court of London. (*p*) A testator having, after the new statute came into operation, duly executed two wholly inconsistent wills, destroyed the earlier one *animo revocandi*, and then duly executed a codicil, showing an intention to revive it. Dr. Lushington held that this codicil necessarily revoked the later will, thought it might be inoperative to revive the earlier one by reason of its having been so destroyed. The learned judge further expressed the inclination of his opinion (though it was not necessary to decide that question) that probate could not be decreed of the draft of the destroyed will; for that it was an unexecuted paper, not specifi-

(*m*) Per Sir H. Jenner Fust, in Skinner *v.* Ogle, Prerog. E. T. 1845; 4 Notes of Cas. 79. [And in Mooers *v.* White, 6 John Ch. 360, 375, Chancellor Kent said, "This codidil was indorsed and written on the back of the original will, and I see no reason why the codicil, executed with all the solemnities required by the statute, was not a republication of the will, so as to give effect to the devise to the parties to this suit, as if they had been expressly mentioned in the codicil."]

(*n*) In the Goods of Hunt, 2 Robert. 622. See, further, In the Goods of Baldwin, 5 Notes of Cas. 293; [Beall *v.* Cunningham, 3 B. Mon. 390.] But see, also, In the Goods of Lancaster, 29 L. J., P. M. & A. 155.

(*o*) *Ante*, bk. II. ch. II. § II. p. 97.

(*p*) Hale *v.* Tokelove, 2 Robert. 318.

cally adverted to or recognized by the codicil. But he gave no opinion on the point (which indeed does not appear to have been raised), whether, as in the case of a lost will, or a will destroyed unduly or *sine animo revocandi*, (*q*) probate might have been granted of the will itself, as contained in the draft and the depositions of the witnesses.

This decision was approved and acted on by Sir C. Cresswell as establishing the principle that where a will had been destroyed by the testator, or with his approval, it cannot be revived by any intention of his manifested in a subsequent codicil. (*r*)

* It has been already observed, that although a will made by a widow before or during coverture, will not revive by the mere circumstance of her husband's death, yet if she republish it, it will become valid. (*s*) So if, at any time before the statute of Victoria came into operation, an infant having attained the age of fourteen, if male, or twelve, if a female, by approval or recognition, or any other means, republished a will, which he or she made before arriving at those ages, it was thereby made effectual to all intents and purposes. (*t*) Likewise, although if the testator make his will while *non compos*, and afterwards recover his understanding, the will does not thereby obtain any force or strength; (*u*) yet if he should, after having regained a sound state of mind, republish the will made during his former insanity, it would doubtless become a valid will. (*u*[1])

Effect of republication by a widow:

by an infant after attaining majority:

by a person formerly of non-sane memory, who has recovered his understanding.

(*q*) See *post*, pt. 1. bk. IV. ch. III. § VII.

(*r*) Rogers *v.* Goodenough, 2 Sw. & Tr. 342. The learned judge, moreover, held that the codicil did not revoke an intermediate will, not being inconsistent therewith and not showing any intention to revoke it. See *ante*, 186.

(*s*) *Ante*, 55, 63. [See Fransen's Will, 26 Penn. St. 202.] But see Du Hourmelin *v.* Sheldon, cited *ante*, 220.

(*t*) Swinb. pt. 11, s. 2, pl. 8; Herbert *v.* Torball, 1 Sid. 162.

(*u*) Swinb. pt. 2, s. 3, pl. 2; Godolph. pt. 1, c. 8, pl. 2.

(*u*[1]) [A will executed under undue influence may be republished and confirmed by a codicil executed afterwards, when the testator is free from such influence. O'Neall *v.* Farr, 1 Rich. (S. Car.) 80.]

*BOOK THE THIRD.

OF THE APPOINTMENT OF EXECUTORS, AND THE ACCEPTANCE OR REFUSAL OF THE OFFICE.

THE word executor, taken in its largest sense, has three acceptations: for there is, 1. *Executor a lege constitutus*, and that was the ordinary of the diocese. 2. *Executor ab Episcopo constitutus*, or *Executor dativus*, and that is he who is called an administrator to an intestate. 3. *Executor a testatore constitutus*, or *Executor testamentarius*, and that is he who is usually meant when the term "executor" is used. (*a*)

The proper term in the civil law, as to goods, is *hæres testamentarius*; (*b*) and executor, said Lord Hardwicke, is a barbarous term unknown to that law. (*c*)

An executor, as the term is at present accepted, may be defined to be, the person to whom the execution of a last will and testament of personal estate is, by the testator's appointment, confided. (*d*) "To appoint an executor," says Swinburne, (*e*) "is to place one in the stead of the testator, who may enter to the testator's goods and chattels, and who hath action against the testator's debtors, and who may dispose of the same goods and chattels, towards the payment of the testator's debts, and performance of his will." (*e*[1])

(*a*) Godolph. pt. 2, c. 1, s. 1; Swinb. pt. 6, s. 1; Wentw. Off. Ex. c. 1.

(*b*) Godolph. pt. 2, c. 1. s. 1; Swinb. pt. 6, s. 1, pl. 4.

(*c*) Androvin *v.* Poilblanc, 30 Atk. 304; In the Goods of Oliphant, 1 Sw. & Tr. 525; *post*, 249.

(*d*) 2 Bl. Com. 503; Farrington *v.* Knightly, 1 P. Wms. 548, 549; Toller, 30.

(*e*) Swinb. pt. 4, s. 2, pl. 2

(*e*[1]) [A testator may appoint different executors in different countries in which his effects may lie, or different executors as to different parts of his estate in the same country. Hunter *v.* Bryson, 5 Gill & J. 483; Despard *v.* Churchill, 53 N. Y. 192; Allen J. in Hartnett *v.* Wandell, 60 N. Y. 351; Hill *v.* Tucker, 13 How. (U. S.) 466. Executors may be appointed with separate functions, or to succeed each other in the event that those first named shall die, be-

* The bare nomination of an executor, without giving any legacy, or appointing anything to be done by him, is sufficient to make it a will, and as a will it is to be proved. (*f*)

come incapacitated, or unwilling longer to serve, or two persons may be appointed to act for a definite period or during the minority, or during the absence from the country of one appointed executor. Hartnett *v.* Wandell, 60 N. Y. 346, 351. In Hill *v.* Tucker, 13 How. (U. S.) 466, Mr. Justice Wayne says: "The executor's interest in the testator's estate is what the testator gives him. That of an administrator is only that which the law of his appointment enjoins. The testator may make the trust absolute or qualified in respect to his estate. It may be qualified as to the subject-matter, the place where the trust shall be discharged, and the time when the executor shall begin and continue to act as such. He may be executor for one or several purposes, — for the part of the effects in possession of the testator at the time of his death, or for such as may be in action, if it be only for a debt due. But though the executor's trust or appointment may be limited, or though there are several executors in different jurisdictions, and some of them limited executors, they are, as to the creditors of the testators, executors in privity, bearing to the creditors the same responsibilities as if there was only one executor. The privity arises from their obligations to pay the testator's debts, wherever his effects may be, just as his obligation was to pay them. The executor's interest in the testator's estate, is derived from the will, and vests from the latter's death, whatever may be the form which the law requires to be observed before an executor enters upon the discharge of his functions. When within the same political jurisdiction, however many executors the testator may appoint, all of them may be sued as one executor for the debts of the testator, and they may unite in a suit to recover debts due to their testator, or to recover property out of possession. All of them, then, having the same privity with each other, and the same relation to the testator, and the same responsibility to creditors, though they may have been qualified as executors, in different sovereignties, an action for a debt due by the testator, against any one of them in that sovereignty where he undertook to act as executor, places all of them in one relation concerning it, and as to the remedies for its recovery, what one may plead to bar a recovery, another may plead; and that which will not bar a recovery against any of them, applies to all of them. Between administrators deriving their commissions to act from different political jurisdictions there is no such privity."]

(*f*) Godolph. pt. 2, c. 5, s. 1; In the Goods of Lancaster, 1 Sw. & Tr. 464. See, also, O'Dwyer *v.* Geare, 1 Sw. & Tr. 465; In the Goods of Jordan, L. R. 1 P. & D. 555. See, also, *ante*, 204.

*CHAPTER THE FIRST.

WHO IS CAPABLE OF BEING AN EXECUTOR.

Who may be an executor.

GENERALLY speaking, all persons, who are capable of making wills, and some others besides, are capable of being made executors. (*a*) From the earliest time it has been a rule, that every person may be an executor, saving such as are expressly forbidden. (*b*)

The king.

It seems to be admitted that the king may be constituted executor; in which case he appoints such persons as he shall think proper to officiate the execution of the will, against whom such as have cause of action may bring their suits: also the king may appoint others to take the accounts of such executors. (*c*) Thus, Catherine, queen dowager of England, mother of Henry the Sixth, made her last will and testament, and thereof constituted King Henry the Sixth her sole executor; whereupon the king appointed Robert Rolleston, keeper of the great wardrobe, John Merston, and Richard Alreed, esquires, to execute the said will, by the oversight of the cardinal, the duke of Gloucester, and the bishop of Lincoln, or two of them, to whom they should account. (*d*)

Corporations.

Doubts have been entertained whether a corporation aggregate can be executor, (*d*[1]) principally because they cannot prove a will, or at least cannot take the oath for the due execution of the office. (*e*) But there are authorities in * favor of the capability; (*f*) and it is said to be now settled, that on their

(*a*) 2 Bl. Com. 503.

(*b*) Swinb. pt. 5, s. 1, pl. 1. [See *post*, 232, note (*c*), 235, note (*q*), 238, note (*g*).]

(*c*) Godolph. pt. 2, c. 1, s. 2.

(*d*) 4 Inst. 335.

(*d*[1]) [A corporation cannot be an administrator. Thompson's Estate, 33 Barb. 334; Georgetown College *v.* Brown, 34 Md. 450.]

(*e*) 1 Bl. Com. 477; Com. Dig. Admon. B. 2; Wentw. Off. Ex. c. 1, p. 39, 14th ed. The other grounds of the last author's doubt are stated to be: 1st, because they cannot be feoffees in trust, to others' use; 2d, they are a body framed for a special purpose.

(*f*) Swinb. pt. 5, s. 9; Godolph. pt. 2, c. 1, s. 1; 1 Roll. Abr. tit. Executors, T. 7, citing 12 E. 4, 9 *b*.

being so named, they may appoint persons styled syndics, to receive administration with the will annexed, who are sworn like other administrators. (*g*) No doubt appears ever to have been entertained, but that a corporation sole may be executor. (*h*) Where a testator in India nominated his brother, and "Messrs. Cockerell & Co., East India agents, London," and one A. B., to be his executors, and before his death the firm of Cockerell & Co., which consisted of four members, had been dissolved, Sir H. Jenner Fust held that the appointment was not of the firm collectively, but of the persons composing it individually, and that each of the members was entitled to be joined in the probate with the other executors. (*i*)

A partnership firm.

It seems agreed that by our law an alien, or one born out of the king's allegiance, may be an executor; (*k*) though by the civil law he cannot, unless so appointed in a military testament. (*l*) With respect to alien enemies, "it has long been doubted," says Lord C. B. Gilbert, in his history of the C. P., (*m*) "whether an alien enemy should maintain an action as executor; for, on the one hand, it is said, that, by the policy of the law, alien enemies shall not be admitted to actions to recover effects, which may be carried out of the kingdom to weaken ourselves and

Aliens.

(*g*) 3 Bac. Abr. by Gwillim, p. 5, tit. Executors, A. 2; Toller, 30, 31; In the Goods of Darke, 1 Sw. & Tr. 516. But the grant will not be made until the appointment of syndics is before the court. 1 Sw. & Tr. 516.

(*h*) Godolph. pt. 2, c. 6; Wentw. Off. Ex. p. 39, 14th ed. See In the Goods of Haynes, 3 Curt. 75.

(*i*) In the Goods of Feruie, 6 Notes of Cas. 657.

(*k*) Caroon's case, Cro. Car. 8; Godolph. pt. 2, c. 6, s. 1. [The statute of New York, which provides that an executor shall not be an alien non-resident of the state, excludes only those who are both, not citizens of the United States, and non-residents of New York. A citizen of any state of the Union may take letters testamentary under the laws of New York, although he may reside in another state. McGregor *v.* McGregor, 3 Abb. (N. Y.) App. Dec. 86; S. C. 1 Keyes, 133; 33 How. Pr. 456. Non-residence does not necessarily disqualify an executor in Wisconsin. Cutler *v.* Howard, 9 Wisc. 309. So, there is no legal objection, in some states, to granting letters of administration to one who is a resident and citizen of another state. Ex parte Barker, 2 Leigh, 719; Jones *v.* Jones, 12 Rich. (S. Car.) 623. In others, a non-resident cannot be appointed administrator. Child *v.* Gratiot, 41 Ill. 357; Radford *v.* Radford, 5 Dana, 156. Where two persons are of the same relation to the deceased, and one resides in New Hampshire and the other does not, ordinarily, the one resident there is entitled to administration as of right; but if he makes a claim against the estate which is resisted by the heirs, it is properly within the discretion of the court in New Hampshire to appoint the one residing out of the state. Pickering *v.* Pendexter, 46 N. H. 69.]

(*l*) Godolph. pt. 2, c. 6, s. 2.

(*m*) P. 166; 3 Bac. Abr. 6, tit. Executors, A. 4.

enrich the enemy, and therefore, public utility must be preferred to private convenience; but, on the other hand, it is said that those effects of the testator are not forfeited to the king by way of reprisal, because they are not the alien enemy's, for he is to *recover them for others; and if the law allows such alien enemies to possess the effects, as well as an alien friend, it must allow them power to recover, since in that there is no difference, and, by consequence, he must not be disabled to sue for them; if it were otherwise it would be a prejudice to the king's subjects, who could not recover their debts from the alien executor, by his not being able to get in the assets of the testator. (*n*)

*But now, on declaring war, the king usually, in the proclamation of war, qualifies it, by permitting the subjects of the enemy resident here to continue, so long as they peaceably demean them-

(*n*) It is said in Toller, pp. 33, 34, that although the cases are not uniform, yet it seems clear, on the whole, that alienage, with a relation to a hostile country, accompanied with residence abroad, or residence here without the king's permission, express or implied, clearly works a disability. It may, however, be remarked, without presuming to controvert this position, that the weight of authorities does not appear to be in favor of it. The earliest case on the subject is an anonymous one (probably it was Pascatia de Fountain's case, mentioned in Wentworth, p. 35, 14th ed.) decided in 31 Eliz. and reported in Cro. Eliz. 142, and Owen, 45. The action was debt by an executor; and the plea, that the plaintiff was an alien, born at Ghent under the allegiance of the king of Spain, the queen's enemy; and it was held a good plea. This is certainly a direct authority upon the point, but it seems the only one in favor of the disability; all the succeeding decisions are uniformly in favor of the executor's capacity. Thus, in Watford *v.* Masham (38 Eliz.), Moore, 431, and Brocks *v.* Phillips (41 Eliz.), Cro. Eliz. 684 (also cited by the court as adjudged in Caroon's case, Cro. Car. 9), the same plea, under the same circumstances, was held had on demurrer. The next case is Richfield *v.* Udall (19 Car. 2), Carter, 48, 191, where the court agreed that an action by an alien enemy, as executor, lies; and Bridgman C. J. said he remembered Sir Stephen Le Sure's case, 11 Jac. 1, that any alien whatsoever may be executor. The last case on the subject is Villa *v.* Dimock (5 W. & M.), Skinner, 370, which was an action brought by an executor for work and labor, and the plea was, that both the testator and executor were alien enemies, born at such a place, under the obedience of the French king: to this the plaintiff demurred and had judgment, on the ground that it was not shown that the testator did not die before the war; and that the plaintiff might be executor, and the action attach in him before the war, and then, being dead before he became an alien enemy, the testator might have an executor; and the action being in *auter droit*, it should be maintained. The other cases cited by Sir S. Toller, it is submitted, with deference, do not apply; inasmuch as they merely decide the general question as to suits by alien enemies; whereas, the present inquiry is, whether, assuming an alien enemy to be generally incapable of suing, *proprio jure*, he may not still sue in *auter droit*, as executor, just as persons attainted or outlawed may.

selves; and without doubt, such persons are to be deemed alien friends in effect. (*o*) And though an alien should come here after the war commenced, yet if he has been commorant here by the license of the king ever since, he may clearly maintain an action, (*p*) and consequently there seems no objection to his acting as executor.

Infants.

An infant may be appointed executor, how young so ever he be, (*q*) and even a child *in ventre sa mere*, (*r*) (who is considered in law, to all intents and purposes, as actually born), (*s*) inasmuch that when such is so appointed, if the mother bring forth two or three children at one birth, they are all to be admitted executors. (*t*) But if an infant be appointed *sole* executor, by statute 38 Geo. 3, c. 87, s. 6, he is altogether disqualified from exercising his office during his minority, and administration, *cum testamento annexo*, shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the age of twenty-one years. (*u*) This act only applies in case of an infant being sole executor; for if there are several executors, and one of them is of full age, no administration *durante minore ætate* ought to be granted; for he who is of full age may execute the will. (*x*)

38 Geo. 3, c. 87: sole executor cannot act till 21 years old:

*It has been said, that if it be a woman infant who is made executrix, and if her husband be of age and assent, it is as if she were of age, and her husband shall have execution of the will: (*y*) and in Prince's case, (*z*) it was resolved by the justices of the common pleas, that if administration be committed during the minority of the

whether if an infant executrix take husband of full age, he shall have the execution.

(*o*) Co. Lit. 129 *b*, note by Hargrave.

(*p*) Wells *v.* Williams, 1 Ld. Raym. 283; S. C. 1 Salk. 46; S. C. 1 Lutw. 34.

(*q*) Wentw. Off. Ex. c. 18, p. 390, 14th ed.; Swinb. pt. 5, s. 1, pl. 6.

(*r*) Godolph. pt. 2, c. 9, s. 1.

(*s*) 2 Saund. 387, note to Purefoy *v.* Rogers; [Duncan J. in Swift *v.* Duffield, 5 Serg. & R. 40; Thompson *v.* Garwood, 3 Whart. 304; M'Knight *v.* Read, 1 Whart. 220.]

(*t*) Godolph. pt. 2, c. 9, s. 1.

(*u*) *Post*, pt. 1. bk. v. ch. III. § III. [p. 479, and note (e[1]).] Before the passing of this act the law considered him capable of acting as executor at the age of seventeen. Godolph. pt. 2, c. 9, s. 2; Swinb. pt. 5, s. 1, pl. 6; Piggot's case, 5 Co. 29 *a*.

(*x*) Pigot & Gascoigne's case, cited Brownl. 46; Foxwist *v.* Tremain, 1 Mod. 47, by Twysden J. See, further, *post*, pt. 1. bk. v. ch. III. § III. as to infant executors and administration *durante minoritate*, [p. 479, and note (*f*).] See, also, 2 Williams's Notes to Saunders, 637.

(*y*) Wentw. Off. Ex. c. 18, p. 392; Toller, 31.

(*z*) 5 Co. 29 *b*.

executrix, and she take husband of full age, then the administration shall cease. But this has since been doubted. (*a*)

Feme covert:

A married woman may be appointed an executrix, and according to the canon law (in which there is no distinction between woman married and unmarried, but the wife may sue and be sued alone), she may take upon her the probate without the assent of her husband. (*b*) But by the law of England, husband and wife are considered but as one person, and as having one mind, which is placed in the husband, as most capable to rule and govern the affairs of the family; and therefore the wife can do no act which may prejudice the husband without his consent; consequently, the wife cannot, by our law, take upon her the office of executrix, without the consent of the husband. (*c*) Therefore, it seems, that where a wife, who is made executrix, is cited in the spiritual court to take upon her the executorship, and the husband appears and refuses his consent thereto, if afterwards they proceed to compel her, a prohibition will be *granted. (*d*) It appears, however, to have been the practice in the registry of the prerogative court to allow a married woman to take probate without requiring the consent of her husband. But on a late occasion, (*e*) Sir H. Jenner Fust said he thought it would be

cannot accept the executorship without her husband's consent.

(*a*) See *post*, pt. 1. bk. v. ch. III. § III.

(*b*) Godolph. pt. 2, c. 10, s. 3; Wentw. Off. Ex. 375 *et seq.* 14th ed.

(*c*) Godolph. pt. 2, c. 10, s. 2, 3; Wentw. Off. Ex. 377, 14th ed.; Thrustout *v.* Coppin, 2 Black. 801. Another reason is, that in all actions by or against the wife, the husband, by our law, must be joined. Upon this ground, where the husband was abroad, and not amenable to process, Lord Hardwicke granted an injunction to restrain an executrix from getting in the assets of the testator, and appointed a receiver for that purpose. Taylor *v.* Allen, 2 Atk. 212. [But a married woman may, with the consent of her husband, be appointed executrix, and take upon herself and execute such trust. Stewart's Appeal, 56 Maine, 300. See English *v.* McNair, 34 Ala. 40. By Laws of 1867, c. 782, § 2, married women in New York are capable of receiving letters, whether testamentary, or of administration, or of guardianship, and of giving bonds therein, as if they were sole. See *post*, 450, and note (*k*[1]). So in Massachusetts by St. 1874, c. 184, § 4. So under the laws of Maryland, a married woman may act as administratrix or executrix. Binnerman *v.* Weaver, 8 Md. 517.]

(*d*) 3 Bac. Abr. 9 (edition by Gwillim), tit. Executors, A.; 8 Wentw. Off. Ex. 377, 14th ed. But see Mr. Fonblanque's note (*h*) to Treat. on Eq. bk. 1, c. 2, s. 6. Administration taken by the wife during coverture must be presumed to have been with the consent of the husband. Adair *v.* Shaw, 1 Sch. & Lef. 266.

(*e*) In the Goods of Dye, 2 Robert. 342. In that case a testator had appointed a married woman, to whom he bequeathed certain property to her separate use, and one A. B., executors. They took probate; but in consequence of the Bank of

well to reconsider the practice, as a husband is liable for the acts of his wife.

But if the wife administer, though without the husband's privity and assent, and then an action be brought against them, they are estopped, it is said, from pleading that she was not executrix. (*f*) "Yet, perhaps," adds the author of the Office of Executor, "this administration of the wife against her husband's mind, will (as against him) be a void act; else I cannot see how the opinion before cited, viz, that the wife shall not be executrix without or against her husband's mind, can be law." (*g*)

If she administer without her husband's consent, whether he is bound.

In the great case of Pemberton *v.* Chapman, (*h*) it was held that a payment *bonâ fide* made to a married woman, executrix, by a person who knew she was married, but not of * any other disability, the husband not having authorized her to receive such payment, and having subsequently dissented from her taking on herself the office of executrix, and probate having been subsequently granted to a co-executor and refused to her, was held to operate to discharge the debtor as against such co-executor. (*i*)

Payment made to a *feme covert* executrix, when it discharges the debtor.

On the other hand, if the husband of a woman named executrix, would have his wife to take upon her the execution of the will, and to prove the same, but she will not assent thereto, in this case the spiritual court will not fasten the executorship upon the wife, against her will. (*j*) But if the husband, though the will be not proved, ad-

The husband cannot compel the wife to accept the executorship:

England refusing to allow a transfer of stock in the absence of her husband, who was in foreign parts, the court was moved to revoke it, and to decree it to A. B. alone; and Sir H. Jenner Fust granted this motion; but he said, if it were not for the expense, he would send the executors to the court of chancery, where he thought they would find redress.

(*f*) Godolph. pt. 2, c. 10, s. 4; Wentw. Off. Ex. 377, 378, 14th ed.; 3 Bac. Abr. 9 (edition by Gwillim), tit. Executors, A. 8; Note (B) by Mr. Fraser to Russel's case, 5 Co. 27 *b*. The same estoppel, it is surmised by Godolphin and Wentworth, would occur, if once the will should be proved, and execution thereof given to the wife though against her husband's consent. Godolph. pt. 2, c. 10, s. 4; Off. Ex. 377, 378, 14th ed.

(*g*) Wentw. Off. Ex. 378, 14th ed. [See English *v.* McNair, 34 Ala. 40.]

(*h*) 7 El. & Bl. 210; S. C. in Cam. Scacc. El., Bl. & El. 1056.

(*i*) This question will be considered more fully hereafter. *Post*, pt. III. bk. I. ch. IV.

(*j*) Godolph. pt. 2, c. 10, s. 1; Wentw. Off. Ex. 376, 14th ed. See Da Rosa *v.* Da Pinna, cited 2 Cas. temp. Lee, 390, and *post*, pt. I. bk. V. ch. II. § II. as to letters of administration to a *feme covert*, being next of kin.

ministers as in the wife's right, though against her consent, she will thereby be so far bound and concluded, as that during his life she cannot decline or avoid the executorship; (*k*) but after his death she may refuse, if she has never intermeddled with the administration. (*l*) A distinction is taken between the case of a woman made executrix during her coverture, and the case of a *feme sole* made executrix, who takes a husband after the testator's death, before either proving, or refusing to prove the will, (*l*[1]) for in the latter case, she, marrying before her determination, does upon the matter deliver it into her husband's hands; (*m*) and if he administers, this is such an acceptance as will bind her, and she can never afterwards refuse. (*n*)

how far she is bound, if he administer against her consent.

* The general law respecting the powers, duties, and responsibilities of the husband and wife respectively, when the wife is appointed executrix, will be found in a subsequent part of this treatise.

There are few or none, who, by our law, are disabled, on account of their crimes, from being executors; and therefore it has always been holden, that persons attainted or outlawed may sue as executors, because they sue *in auter droit*, and for the benefit of the parties deceased. (*o*) And it has been lately decided that a person appointed executor, and after the tes-

Persons attaint and outlaws.

(*k*) Godolph. pt. 2, c. 10, s. 1; Wentw. Off. Ex. 378, 14th ed. See, also, 1 Salk. 306, in Ld. Holt's judgment in Wankford *v.* Wankford; Thrustout *v.* Coppin, 2 W. Bl. 802.

(*l*) Stokes *v.* Porter, Dyer, 166; Godolph. pt. 2, c. 10, s. 1; Wentw. Off. Ex. 378, 14th ed.; Beynon *v.* Gollins, 2 Bro C. C. 323; and see the note (*b*) by the learned reporters to Adair *v.* Shaw, 10 Sch. & Lef. 258, and the remarks of Lord Redesdale, on the report of Beynon *v.* Gollins, Ib. 259.

(*l*[1]) [Lindsay *v.* Lindsay, 1 Desaus. 150.]

(*m*) Wentw. Off. Ex. 379, 14th ed.

(*n*) Wentw. Off. Ex. 379, 14th ed.; Godolph. pt. 2, c. 10, s. 4; Bro. Abr. tit. Exor. 147.

(*o*) Hix & Uxor *v.* Harrison, 3 Bulst. 210; Co. Lit. 128 *a*; Caroon's case, Cro. Car. 9; Killigrew *v.* Killigrew, 1 Vern. 184; Swan & Ux. *v.* Porter, Hard. 60; Wentw. Off. Ex. 36, 14th ed.; Godolph. pt. 2, c. 6, s. 1; Vin. Abr. tit. Utlawry, n. a. pl. 2. So a villein was capable of being an executor. Swinb. pt. 5, s. 1, pl. 3; Off. Ex. 36, 14th ed.; and the lord could not seize those goods which he had to the use of the deceased; and he might sue his lord for a debt due to the testator. Lit. B. 2, c. 11, s. 192. But it was held that an outlaw could not move to have an attorney's bill taxed, where he (the outlaw) was administrator, with the will annexed, by which all the personal estate was bequeathed to him, subject to payment of the debts, &c. and one of the bills which he sought to tax related to business done for himself and the testatrix jointly, and the other to business done for the testatrix alone. Re Mander, 6 Q. B. 867. See stat. 32 & 33 Vict. c. 23.

tator's death convicted of felony, is not thereby disentitled to maintain a suit in a court of probate with a view of establishing the validity of the will by which he is appointed executor; for that his office being *in auter droit* was not forfeited by the conviction. (*p*) By the civil and canon law indeed, not only traitors and felons, but heretics, apostates, usurers, famous libellers, incestuous bastards, and many others, are incapable of being executors. (*q*)

Persons in mean or insolvent circumstances:

The spiritual court cannot refuse to grant the probate of a will to a person appointed executor, on account of his poverty or insolvency. (*q*[1]) Therefore, where, to a *mandamus* to * the judge of the prerogative court, to grant the probate of a will to a person named executor therein, the ordinary returned that he was an absconding person, and insolvent, and that he refused to give caution to pay legacies bequeathed to some of the testator's infant relations; a peremptory *mandamus* was granted; for the ordinary has no authority to interpose and demand caution of the executor when the testator himself required none. (*r*)

bankrupt:

So where, after probate of the will, the executor became bankrupt, and a suit was commenced in the ecclesiastical court to revoke the probate, and grant administration to another; the court of queen's bench granted a prohibition. (*s*)

when the court of chancery

The consequence of these decisions was, that the court of chancery was forced to assume a new jurisdiction: (*t*)

(*p*) Smethurst *v.* Tomlin, 2 Sw. & Tr. 143.

(*q*) Swinb. pt. 5, s. 2, 3, 4, 7, 9, 10; Godolph. pt. 2, p. 6. [A person found by inquisition to be an habitual drunkard is not thereby, in Pennsylvania, deprived of his power to perform the office of executor or administrator. Sill *v.* M'Knight, 7 Watts & S. 244. But the orphan's court has power to vacate the letters testamentary or of administration, where the executor or administrator has been duly declared a lunatic or an habitual drunkard. Sill *v.* M'Knight, 7 Watts & S. 244, 245; Act of Penn. March 29, 1832; Purd. Dig. p. 216 (ed. 1853). For other grounds of vacating letters testamentary of an executor in Pennsylvania, Webb *v.* Dietrich, 7 Watts & S. 402; Cohen's Appeal, 2 Watts, 175; Taggart's Petition, 1 Ashmead, 321. As to the law in reference to capacity to hold the office of executor or administrator, see, further, *post*, 238, note (*f*), 449, and notes (*b*) and (*e*).]

(*q*[1]) [*Post*, 237, note (*z*).]

(*r*) Rex *v.* Sir Richard Raines, 1 Ld. Raym. 361; S. C. 1 Salk. 299; 3 Salk. 162; 1 Stra. 672; Carth. 457; Holt, 310; Hathornthwaite *v.* Russell, 2 Atk. 127; S. C. Barnard. Chanc. C. 334. See, also, 3 P. Wms. 336, note to Slanning *v.* Style

(*s*) Hill *v.* Mills, 1 Show. 293; S. C. 1 Salk. 36; S. C. Skin. 299.

(*t*) By Lord Mansfield, in Rex *v.* Simpson, 1 W. Bl. 458.

will control insolvent executors by the appointment of receivers:

and that court will now restrain an insolvent or bankrupt executor, and appoint a receiver: (t^1) and if it is necessary to bring actions at law to recover part of the effects, since that must be in the name of the executor, the court will compel him to allow his name to be used. (u)

But if a person, *known* by the testator to be a bankrupt or insolvent, be appointed an executor by him, such person cannot, on the ground of insolvency alone, be controlled by the appointment of a receiver. (v) It is not, however, to be * inferred from the circumstance of the will having been made some time before the commission, and not altered afterwards, that the testator had a deliberate intention to intrust the management of his estate to an insolvent executor. (w) It must be observed, finally, that the court will certainly not grant a receiver upon the single ground, that the executor is in mean circumstances. (x)

The general principle upon which the court will restrain executors and administrators by the appointment of receivers will be pointed out hereafter. (y)

Likewise, as an executor is considered but as a bare trustee in equity, if he be insolvent, the court of chancery will oblige him, as it will any other trustee, to give security before he enters upon the trust. (z)

by requiring security.

(t^1) [Elmendorf *v.* Lansing, 4 John. Ch. 562. Where an executrix, widow of the testator, married a man in necessitous circumstances, and incapable of properly managing the estate, the court appointed a receiver. Stairley *v.* Rabe, 1 McMullan Ch. 22.]

(u) Utterson *v.* Mair, 2 Ves. jun. 95; S. C. 4 Bro. C. C. 269; Scott *v.* Becher, 4 Price, 346. In like manner it will restrain the assignees of a bankrupt executor from paying over the fund to him, and this upon petition in the bankruptcy, from the peculiar authority it has over them. Ib. See, also, Ex parte Ellis, 1 Atk. 101; Fonbl. Eq. bk. 4, pt. 2, c. 1, s. 3.

(v) Gladdon *v.* Stoneman, 21st March, 1808, *coram* Lord Eldon C. reported in a note to 1 Madd. 143; Langley *v.* Hawke, 5 Madd. 46; Stainton *v.* The Carron Company, 18 Beav. 146, 161.

(w) 5 Madd. 46.

(x) Hathornthwaite *v.* Russell, 2 Atk. 126; S. C. Barnard. Chanc. Cas. 334; Anon. 12 Ves. 4; Howard *v.* Papera, 1 Madd. 142. [In New York, security may be required of an executor whose circumstances are such as not to afford adequate security for the faithful discharge of his trust. It will not, however, be required merely because the executor does not own property to the full value of the estate. Mandeville *v.* Mandeville, 8 Paige, 475; Holmes *v.* Cock, 2 Barb. Ch. 426; Colgrove *v.* Horton, 11 Paige, 261.]

(y) *Infra*, pt. v. bk. ii. ch. ii.

(z) Rex *v.* Raines, Carth. 456, *ad finem*, S. P.; S. C. Holt, 310; Duncumban *v.* Stint, 1 Ch. Cas. 121; S. C. 1 Eq. Cas. Abr. 238, pl. 21; Rous *v.* Noble, 2 Vern. 249; S. C. 1 Eq. Cas. Abr. 238, pl. 22; Bac. Abr. tit. Exors. A. 6. See, also, Batten *v.* Earnley, 2 P. Wms. 163; Slanning *v.* Style, 3 P. Wms. 336. [See

A person excommunicated may be appointed executor; "yet so long as he standeth in the sentence of excommunication, he is not to be admitted by the ordinary, nor can commence any suit for his legacy." (*a*) But now, by statute 53 Geo. 3, c. 127, excommunication is not to be pronounced except in certain cases; and by section 3, in those cases, parties excommunicated shall incur no civil incapacity whatever. Persons excommunicated.

By statute 3 Jac. 1, c. 5, s. 22, a Popish recusant convicted at the time of the testator's death, is made altogether incompetent; (*b*) and so, by statute 3 Car. 1, c. 2, s. 1, is any person sending or contributing to send another abroad, to be ecucated in the Popish religion. But now by statute 31 * Geo. 3, c. 32, Roman Catholics are exempt from these disabilities, upon Roman Catholics.

Cooper *v.* Cooper, 2 Halst. Ch. 9; In re Wadsworth, 2 Barb. Ch. 381. But the mere poverty of an executor, which existed at the testator's death, will not authorize the court to require that he furnish security, or give up the office. Fairbarn *v.* Fisher, 4 Jones (N. Car.) Eq. 390; Wilson *v.* Whitefield, 38 Geo. 269; Wilkins *v.* Harris, 1 Wins. (N. Car.) 41; Bowman *v.* Wootton, 8 B. Mon. 67; Shields *v.* Shields, 60 Barb. 56. In most the American States, executors are required to give bonds for the faithful performance of their trusts, before entering upon the duties thereof. See Genl. Sts. Mass. c. 93, § 2; Cowling *v.* Nansemond Justices, 6 Rand. 349; Webb *v.* Dietrich, 7 Watts & S. 401; Cohen's Appeal, 2 Watts, 175; *post*, 529 *et seq.* and notes; Bankhead *v.* Hubbard, 14 Ark. 298; Holbrook *v.* Bentley, 32 Conn. 502. In other states, bonds are required only when it appears to be necessary for the security of the estate; see Mandeville *v.* Mandeville, 8 Paige, 475; Wood *v.* Wood, 4 Paige, 299; Colegrove *v.* Horton, 11 Paige, 261; Holmes *v.* Cock, 2 Barb. 426; McKennan's Appeal, 27 Penn. St. 237; Powel *v.* Thompson, 4 Desans. 162; as in New York, where the surrogate finds that the circumstances of the executor are "precarious," or that he has removed or is about to remove from the state. Redfield L. & P. of Surrogates' Courts, 145. As to the force of the word "precarious" in this connection, see Shields *v.* Shields, 60 Barb. 56; Cotterell *v.* Brock, 1 Bradf. Sur. 148; and Mandeville *v.* Mandeville, Wood *v.* Wood, and Holmes *v.* Cock, *supra*. The "due administration of the estate" for which the executor gives security, consists in paying its obligations, and distributing the balance among the persons entitled. Cunningham *v.* Souza, 1 Redf. Sur. 462. If an executor gives bonds that are insufficient, the probate court will upon proper application, generally, require additional security of him. See Killcrease *v.* Killcrease, 7 How. (Miss.) 311; Ellis *v.* McBride, 27 Miss. 155. This additional security can be required only by the court originally granting administration. See Atkinson *v.* Christian, 3 Grattan, 448. The liability of the sureties on an executor's bond is limited to the assets which rightfully come, or by right ought to have come, to the executor's hands, in the state where he was appointed. Fletcher *v.* Weir, 7 Dana, 345; The Governor *v.* Williams, 3 Ired. (Law) 152; Normand *v.* Grognard, 17 N. J. Eq. 425.]

(*a*) Swinb. pt. 5, s. 6; Wentw. Off. Ex. 38, 14th ed.

(*b*) Richardson *v.* Seise, 12 Mod. 306; Hill *v.* Mills, Show. 293; Ride *v.* Ride, 6 Mod. 239.

subscribing the declaration and oath of allegiance, &c. as appointed by that act. (*c*)

Persons denying the Trinity, &c.

By statute 9 & 10 W. 3, c. 32, persons denying the Trinity, or asserting that there are more Gods than one, or denying the Christian religion to be true, or the Holy Scriptures, shall be for the second offence disabled to be executors. But this statute is repealed, as far as denying the Trinity, by statute 53 Geo. 3, c. 160, s. 1.

Persons not qualifying for office.

Also by the statutes prescribing the qualifications for offices (*d*) persons not having taken the oaths, and complied with the other requisities for qualifying, who shall execute their respective offices after the time limited for the performance of those acts, shall incur the same incapacity. (*e*)

Non compotes.

By our law, as well as by the civil law, idiots and lunatics are incapable of being executors or administrators; for these disabilities render them not only incapable of executing the trust reposed in them, but also by their insanity and want of understanding they are incapable of determining whether they will take upon them the execution of the trust or not. (*f*)

Therefore it has been agreed, that if an executor become *non*

(*c*) See note to Co. Lit. 391 *a*.

(*d*) 25 Car. 2, c. 2; 1 Geo. 1, st. 2, c. 13; 13 W. 3, c. 6, s. 6. But see 9 Geo. 4, c. 17.

(*e*) Toller, 33, 34; 4 Burn E. L. 123. But it is usual to pass in every session an act to idemnify those who have omitted to qualify, &c.

(*f*) Godolph. pt. 2, c. 6, s. 2; Bac. Abr. Exors. A. 5; 2 Robert. 133, 134; [Hubbard J. in Thayer *v.* Homer, 11 Met. 104, 110. The necessary qualifications of an executor in New York are that he shall be of the age of twenty-one years and capable of making a contract; that he shall not be an alien non-resident of the state, nor one convicted of an infamous crime, nor one whom the surrogate, on proof, shall adjudge incompetent to execute the duties of the trust by reason of drunkenness, dishonesty, improvidence, or want of understanding, and the surrogate may, in his discretion, refuse to grant letters testamentary or letters of administration to a person unable to read and write the English language. 2 R. S. (N. Y.) 69, § 3, as amended, Laws, 1830, c. 230, § 17; Laws, 1867, c. 782, § 5; Laws, 1873, c. 79. See *ante*, 235, note (*q*). What will justify the rejection of one as an executor or administrator, see Coope *v.* Lowerre, 1 Barb. Ch. 45; Shilton's Estate, 1 Tuck. Sur. 73; Elmer *v.* Kechele, 5 N. Y. Sur. 472; McMahon *v.* Harrison, 6 N. Y. 443; 10 Barb. 659; Smith *v.* Young, 5 Gill, 197; McGregor *v.* McGregor, 33 How. Pr. 456; S. C. 3 Abb. App. Dec. 92; Perry *v.* De Wolf, 2 R. I. 103. As to the significance of "improvidence" in the above statute, see McMahon *v.* Harrison, 6 N. Y. 443; Coope *v.* Lowerre, 1 Barb. Ch. 45; Emerson *v.* Bowers, 14 N. Y. 449. Of "want of understanding," see Shilton's Estate, 1 Tuck. Sur. 73; McGregor *v.* McGregor, 1 Keyes, 133; 33 How. Pr. 456; 3 Abb. App. Dec. 96. The immoral character of the executor is not of itself sufficient ground for refusing to qualify him. Berry *v.* Hamilton, 12 B. Mon. 191.]

compos, the spiritual court may, on account of this natural disability, commit administration to another. (*g*)

(*g*) Hill *v.* Mills, 1 Salk. 36; Evans *v.* Tyler, 2 Robert. 128, 134; S. C. 7 Notes of Cas. 296. See *post*, pt. I. bk. V. c. III. § VI. [In Massachusetts the probate court may remove an executor or administrator who becomes insane or otherwise incapable of discharging the trust, or evidently unsuitable therefor. Genl. Sts. Mass. c. 101, s. 2; Hubbard J. in Thayer *v.* Homer, 11 Met. 110; Hussey *v.* Coffin, 1 Allen, 354; Winship *v.* Bass, 12 Mass. 199; Drake *v.* Green, 10 Allen, 124.]

*CHAPTER THE SECOND.

OF THE APPOINTMENT OF EXECUTORS. — BY WHAT WORDS EXECUTORS MAY BE APPOINTED.

AN executor can derive his office from a testamentary appointment only. (*a*)

His appointment may either be express or constructive; in which case he is usually called executor *according to the tenor;* for, although no executor be expressly nominated in the will by the word executor, yet, if by any word or circumlocution the testator recommend, or commit to one or more the charge and office, or the rights which appertain to an executor, it amounts to as much as the ordaining or constituting him or them to be executors. (*b*)

Executor according to the tenor:

As if he declare by his will that A. B. shall have his goods after his death to "pay his debts, and otherwise to dispose at his pleasure, or to that effect, by this A. B. is made executor. (*c*) So if the testator say, "I commit

by words pointing at the office or rights of an executor:

(*a*) [Allen J. in Hartnett *v.* Wandell, 60 N. Y. 350.] A will (says the author of the Office of Executor, p. 3, 14th ed.) is the only bed where an executor can be begotten or conceived. According to the old doctrine, an executor could not be primarily appointed in a codicil. See *ante*, 8, note (*p*); [Whetmore *v.* Parker, 7 Lansing, 121, 129.]

(*b*) Swinb. pt. 5, s. 4, pl. 3; Godolph. pt. 2, c. 5, s. 2; Wentw. Off. Ex. 20, 14th ed.; In the Goods of Manley, 3 Sw. & Tr. 56; In the Goods of Fraser, L. R. 2 P. & D. 183; [Grant *v.* Spann, 34 Miss. 294; Nunn *v.* Owens, 2 Strobh. (S. Car.) 101; Carpenter *v.* Cameron, 7 Watts, 51; Myers *v.* Daviess, 10 B. Mon. 394; State *v.* Rogers, 1 Houst. (Del.) 569; State *v.* Watson, 2 Spears (S. Car.), 97; Carter *v.* Carter, 10 B. Mon. 327; Wood *v.* Nelson, 9 B. Mon. 600; Ex parte M'Donnell, 2 Bradf. Sur. 32; Watson *v.* Mayrant, 1 Rich. Eq. 449; Allen J. in Hartnett *v.* Wandell, 60 N. Y. 350. The testator may by his will delegate the power of naming an executor to another; as, where the testator, by his will, appointed his wife executrix, and requested "that such male friend as she may desire shall be appointed with her as executor," it was held (Grover and Folger JJ. dissenting), that an appointment of an executor in pursuance of this request was valid; and that letters testamentary were properly issued to him as such. Hartnett *v.* Wandell, 60 N. Y. 346; State *v.* Rogers, 1 Houst. (Del.) 569. But see Bronson's Will, 1 Tuck. Sur. 464.]

(*c*) Ib.; Henfrey *v.* Henfrey, 4 Moore

all my goods to the administration of A. B.," (*d*) or to "the disposition of A. B.;" (*e*) in this case he is made executor. *And where certain persons were directed by the will to pay debts, funeral charges, and the expenses of proving the will, they were held to be clearly executors according to the tenor. (*f*). So where the testator in a codicil said, "I appoint my nephew my residuary legatee, to discharge all lawful demands against my will," the nephew was admitted executor. (*g*) So if the testator say, "I make A. B. lord of all my goods," (*h*) or "I make my wife lady of all my goods," (*i*) or "I leave all my goods to A. B.," (*k*) or "I leave A. B. legatary of all my goods," (*l*) or "I leave the residue of all my goods to A. B.," (*m*) it will amount to the appointment of such persons respectively as executors according to the tenor. (*n*) But it appears that the practice of the prerogative court has been to grant administration with the will annexed to the universal legatee of a testamentary paper, but not to decree probate to him as executor according to the tenor. And Sir C. Cresswell, on a late occasion, adhered to this practice. (*o*)

Where the testator gave divers legacies, and then appointed that, his debts and legacies being paid, his wife should have the residue of his goods, so that she put in security for the performance of his will, this was held by three common law judges to make her executrix. (*p*) Again, where the will *said nothing of the

P. C. C. 33. So where one said on his deathbed to his wife that she *should pay all and take all*, by this she was executrix. Brightman *v.* Keighley, Cro. Eliz. 43.

(*d*) Godolph. pt. 2, c. 5, s. 3; Bro. Executors, pl. 73.

(*e*) Pemberton *v.* Cony, Cro. Eliz. 164; Godolph. pt. 2, c. 5, s. 3. So, if he says, "I will that A. B. shall dispose of my goods which are in his custody," he is thereby made executor of those parcels or goods. Ib.

(*f*) In the Goods of Fry, 1 Hagg. 80; In the Goods of Montgomery, 5 Notes of Cas. 92, 101. See, also, In the Goods of Almosnino, 2 Sw. & Tr. 508; In the Goods of Collett, Dea. & Sw. 274.

(*g*) Grant *v.* Leslie, 3 Phillim. 116.

(*h*) Godolph. pt. 2, c. 5, s. 3; Swinb. pt. 4, s. 4, pl. 3.

(*i*) Swinb. pt. 4, s. 4, pl. 3.

(*k*) Godolph. pt. 2, c. 5, s. 3; Swinb. pt. 4, c. 4, pl. 3.

(*l*) Ib.

(*m*) Ib. "I devise all my personal goods to my two daughters and my wife, whom I make executrix;" this was holden to appoint them all three executrices. Foxwith *v.* Tremaine, Ventr. 102.

(*n*) [In the Goods of Adamson, L. R. 3 P. & D. 253.] In Androvin *v.* Poilblanc, 3 Atk. 301, Lord Hardwicke said a person named "universal heir," in a will, would have a right to go to the ecclesiastical court for the probate. But it has lately been held otherwise as to a person named universal legatee. In the Goods of Oliphant, 1 Sw. & Tr. 525.

(*o*) In the Goods of Oliphant, 1 Sw. & Tr. 525.

(*p*) Wentw. Off. Ex. p. 20, 14th ed. But if the testator bequeath the residue of

testator's debts, but contained only devises of real and personal legacies, to be paid within two months after his death, and concluded, without any bequest of the residue or express appointment of executors, in these words, "I appoint A. B., C. D., and E. F., to receive and pay the contents above mentioned;" Sir G. Lee held that the persons so named were executors according to the tenor; for they could not receive and pay the lagacies without collecting in the effects; and no one can assent to a legacy but he that has the management of the estate, because legacies cannot be paid till after the debts, and he only who has the management of the estate knows whether the assets are sufficient. (*q*)

But where a testator, being entitled to many shares in the Sun Fire Office, and in the mines of Scotland, and a lease for years of a coal-meter's place, gave the same, by a will containing no appointment of an executor, to trustees in trust for his daughter, and after several contingencies gave the remainder thereof to his son, and if he should die in his minority without issue, gave the remainder thereof to the trustees for their own use, and gave all the residue of his estate to the said trustees, to pay one moiety to his daughter, and the other moiety to his son; Sir G. Lee held that there were no words in this will that made the trustees executors; inasmuch as they had only power to pay what was vested in them as trustees to the particular persons for whose use they held it, but had not a general power to receive and pay what was due to and from the estate, which is the office of *an executor. (*r*) So where the whole personal estate was left to a trustee on trust for a specific purpose, and no executor was named in the will, it

his goods *the debts discharged*, in this case, according to Swinburne, the universal legatary doth still remain legatary, and is to receive his legacy at the hands of the executor or administrator. Swinb. pt. 4, s. 4, pl. 7. See Friswell *v.* Moore, 3 Phillim. 138; Hillam *v.* Walker, 1 Hagg. 71. In the Goods of Davis, 3 Curt. 748, 749, and In the Goods of Toomy, 3 Sw. & Tr. 562, for instances where a party was held not to be executor according to the tenor.

(*q*) Pickering *v.* Towers, 2 Cas. temp. Lee, 401; S. C. Ambl. 364.

(*r*) Boddicott *v.* Dslzeel, 2 Cas. temp. Lee, 294. See, also, Fawkener *v.* Jordan, Ib. 327; and Moss *v.* Bardwell, 3 Sw. & Tr. 187, as to the distinction between the offices of trustee and executor. [See Knight *v.* Loomis, 30 Maine, 204; Wheatley *v.* Badger, 7 Penn. St. 459; Hunter *v.* Bryson, 5 Gill & J. 483. Although the testator does not, in his will, nominate an executor in express terms, hut confides the execution of it to persons whom he denominated trustees, conferring on them the rights belonging to executors, it amounts to a constructive appointment of them to the office; and although called trustees by him, they are also, according to the tenor of the will, his executors. Myers *v.* Daviess, 10 B. Mon. 394.]

was held by Sir C. Cresswell that such trustee was not entitled to probate as executor according to the tenor. (*s*)

by necessary implication.

An executor may be appointed by necessary implication; as where the testator says, "I will that A. B. be my executor, if C. D. will not;" in this case C. D. may be admitted, if he please, to the executorship. (*t*) So where the testator gave a legacy to A. B., and several legacies to other persons, among the rest, to his daughter-in-law, C. D.; immediately after which legacies followed these words: "but should the within named C. D. be not living, I do constitute and appoint A. B. my whole and sole executrix of this my last will and testament, and give her the residue;" probate was decreed to C. D., as executrix by implication, according to the tenor of the will. (*u*) Or if the testator supposing his child, his brother, or his kinsman to be dead, say in his will, "Forasmuch as my child, my brother, &c. is dead, I make A. B. my executor," in this case, if the person whom the testator thought dead be alive, he shall be executor. (*v*) So where a man made his last will, and did will thereby, that none should have any dealings with his goods until his son came to the age of eighteen years, except J. S., by *this J. S. was held to be made executor during the minority of his son. (*w*)

(*s*) In the Goods of Jones, 2 Sw. & Tr. 155. Unless the court can gather from the words of the will that a person named trustee therein is required to pay the debts of the deceased, and generally to administer his estate, it will not grant probate to him as executor according to the tenor thereof. In the Goods of Punchard, L. R. 2 P. & D. 369; [Ex parte M'Donnell, 2 Bradf. Sur. 32. Where a will, in which no executor was appointed, directed certain trustees named in it to convert the personal estate into money as soon as might be deemed convenient, and out of the proceeds to pay debts and funeral expenses, and an administrator with the will annexed was appointed, it was held that the direction to the trustees was inconsistent with the duty imposed by law upon the administrator, and was, therefore, inoperative and void. Drury *v.* Natick, 10 Allen, 174. In Newcomb *v.* Williams, 9 Met. 533, 534, Shaw C. J. said: "If a testator were to appoint no executor, or direct that the estate should go immediately into the hands of legatees, or of one or more trustees, for particular purposes, such direction would be nugatory and void; and it being a will in which no executor is appointed, it would be the duty of the judge of probate to appoint an administrator with the will annexed, who would have all the powers of an executor, and in whom all the personal property would vest."]

(*t*) Godolph. pt, 2, c. 5, s. 3; Swinb. pt. 4, s. 4, pl. 6. If the testator makes A. B. or C. D. his executors, in this case they shall both be executors, for "or" shall be construed "and." Godolph. pt. 2, c. 5, s. 3; c. 3, s. 1.

(*u*) Naylor *v.* Stainsby, 2 Cas. temp. Lee, 54.

(*v*) Godolph. pt. 2, c. 5, s. 3; Swinb. pt. 4, s. 4, pl. 6.

(*w*) Brightman *v.* Keighley, Cro. Eliz. 43. However, in Godolphin, pt. 3, c. 3, s. 5, it is laid down that if the testator say

What words appoint a coadjutor or overseer: distinction between his office and that of executor.

There is a great distinction between the office of coadjutor, or overseer, and that of executor. The coadjutor, or overseer, has no power to administer or intermeddle otherwise than to counsel, persuade, and advise; and if that fail to remedy negligence or miscarrying in the executors, he may complain to the spiritual court, and his charges in so doing ought to be allowed out of the testator's estate. (*x*) It is therefore material to inquire what words in a will amount only to an appointment as coadjutor, or overseer. If A. be made an executor, and B. a coadjutor, without more, he is not by this made a joint executor with A. (*y*) But if A. be made executor, and the testator after in his will expresseth that B. shall administer also with him, and in aid of him, here B. is an executor as well as A., and may prove the will alone as executor, if A. refuse. (*z*) Where an infant was made *an executor, and A. and B. *overseers*, with this condition, that they should have the rule and disposition of his goods, and payment and receipt of debts unto the full age of the infant, by this they were held to be executors in the mean time. (*a*) Where the testator named his wife his executrix, and A. B. to assist her, it was held that A. B. might be executor according to the tenor. (*b*)

"If my son, A. B., marry with C. D., let him not be my executor," or "one of my 'executors,'" this would not hold; because an "executor may not be instituted, nor the office of executor inferred, only by conjecturals." Where a testatrix executed a will containing these words: "I leave the sum of one sovereign each to the executor and witness of my will for their trouble to see that everything is justly divided," but not naming any executor, and beneath the signature of the testatrix, and opposite the names of the attesting witnesses were the words "executors and witnesses," the court held that there was no appointment of executors. In the Goods of Woods, L. R. 1 P. & D. 556.

(*x*) Wentw. Off. Ex. 2, 14th ed. Sir Thomas Ridley takes occasion to wish that overseers might be made of more use; although, he says, they be looked upon only as candle-holders; having no power to do anything but hold the candle, while the executors tell the deceased's money. Ridley, pt. 4, c. 2; 4 Burn E. L. 126, 8th ed.

(*y*) Bro. Executors, pl. 73; Wentw. Off. Ex. 21, 14th ed.; Godolph. pt. 2, c. 2, s. 4. The words in the Year Book, 21 H. 6, 6, are, "I will that A. and B. shall be my executors, and also that I. and K. be coadjutors of the same A. and B. to distribute my goods."

(*z*) Bro. Executors, pl. 73; Wentw. Off. Ex. 21, 14th ed. Where a testator willed that A. and B. should be his executors, and that I. and K. should be the executors of A. and B. to dispose of his goods, they are all executors. Dyer, 4 pl. 10, in marg.

(*a*) Wentw. Off. Ex. 21, 14th ed.

(*b*) Powell *v.* Stratford, cited 3 Phillim. 118.

Although when there is an express appointment of an executor, it is less probable that there should be an indirect appointment to the same office, yet there is no objection, either in principle or practice, to admit an executor according to the tenor to probate, jointly with an executor expressly nominated. Thus in Powell *v.* Stratford, (*c*) the testator's wife was expressly named as executrix; and Lord H. was to assist her, but he was not called executor; the court said he might be so according to the tenor. So in a modern case (*d*) the deceased left a will and four codicils; and in the will named certain persons executors, and his nephew residuary legatee. In the last codicil, dated at a time when his nephew was on the point of attaining twenty-one years, the words were, "I appoint my nephew my residuary legatee to discharge all lawful demands against my will and codicils signed of different dates." It was held that the nephew should be joined in the probate. (*e*) And in a subsequent case, where an executor was expressly nominated for general purposes, another person was held to be executor, according to the tenor, for limited purposes. (*f*)

An executor by the tenor may be admitted to probate jointly with an executor expressly nominated.

*Again, in a case where a person had been expressly appointed executor for a limited purpose in a will, it was held that he was appointed general executor by a codicil, by implication merely, without express words. (*g*)

A general appointment by implication after an express limited one.

In another case, where a person by his will directed that the legatees should appoint two persons to execute his testamentary bequests, probate was granted in the prerogative court to the nominees as executors; and on that occasion the deputy registrar informed the court that, in practice, instances had frequently occurred of granting probates to persons nominated by those authorized by the testator so to nominate. (*h*)

Appointee of legatees.

(*c*) Prerog. 1803, 3 Phillim. 118. See, also, Collard *v.* Smith, Prerog. 1799, Ib. 117.

(*d*) Grant *v.* Leslie, 3 Phillim. 116.

(*e*) If a man makes J. N. his executor, and devises goods to him, and to W. S. to devise for his soul, W. S. is executor of these goods by these words as well as J. N. is. Bro. Executors, pl. 98.

(*f*) Lynch *v.* Bellew, 3 Phillim. 424.

(*g*) In the Goods of Aird, 1 Hagg. 336.

(*h*) In the Goods of Cringan, 1 Hagg. 548. The testator in this case died in Scotland; and Sir John Nicholl said he was informed that such a provision, as to the appointment of executors, is not very unusual in that country. See In the Goods of Ryder, 2 Sw. & Tr. 127, where the person authorized to nominate had nominated himself, and probate was granted to him. [Allen J. in Hartnett *v.* Wandell, 60 N. Y. 346, 351, 352.]

And it has been held that the new wills act does not preclude this practice. (*i*)

Several executors.

An executor may be appointed solely, or in conjunction with others; but in the latter case they are all considered in law in the light of an individual person. (*k*) Likewise a testator may appoint several persons as executors in several degrees; as where he makes his wife executrix, but if she will not or cannot be executrix, then he makes his son executor; and if his son will not or cannot be executor, then he makes his brother, and so on. (*l*) In which case the wife is said to be *instituted* executor in the first degree, B. is said * to be *substituted* in the second degree, C. to be *substituted* in the third degree, and so on. (*m*)

Substituted executors.

It must be observed, that if an instituted executor once accepts the office, and afterwards dies intestate, the substitutes, in what degree soever, are all excluded; because the condition of law (if he will not or cannot be executor) was once accomplished by such acceptance of the instituted executor. (*n*) But where a testator appoints an executor, and provides that *in case of his death* another should be substituted; on the death of the original executor, although he has proved the will, the execu-

(*i*) *Infra*, 247, note (*r*).

(*k*) Toller, 37. See *post*, pt. 111. bk. 1. ch. 11.; [Ames J. in Ames *v.* Armstrong, 106 Mass. 18.]

(*l*) Swinb. pt. 4, s. 19, pl. 1; Godolph. pt. 2, c. 4. s. 1. So where a testator appointed his son sole executor, but in the event of his going abroad, or being or remaining abroad for upwards of two calendar months, then he appointed B. his executor, and the son after the death of the testator went abroad without taking probate and there remained, Sir J. P. Wilde granted probate to B., but reserved power to the son to prove the will. In the Goods of Lane, 33 L. J., P. M. & A. 185.

(*m*) The substituted executor cannot propound the will, till the person first named executor has been cited to accept or refuse the office. Smith *v.* Crofts, 2 Cas. temp. Lee, 557. But where a testatrix appointed her nephew Charles her executor, "but in case he shall happen at the time of my decease to be abroad, or from any other cause incapable of acting as such executor, then and in such case I appoint my nephew Eardley executor, to act only during such time as the said Charles shall be resident abroad, or otherwise incapable of acting," and the nephew Charles died in lifetime of the testatrix, probate was granted by Sir John Dodson to the nephew Eardley, as executor. In the Goods of Wilmot, 2 Robert. 579; In the Goods of Langford, L. R. 1 P. & D. 458. In that case an appointment of A. as executor, and "in case of his absence on foreign duty," of B. as executrix, was held to be an appointment of B. as substituted executrix in the event of A.'s absence from the country when the necessity for proving the will arose. A. was in England at the time of the testator's death, but was absent on foreign service in her majesty's navy when the application for probate was made, and was likely to be absent for some years; probate was granted to B.

(*n*) Swinb. pt. 4, s. 19, pl. 10; Godolph. pt. 2, c. 4, s. 2.

tor so substituted may be admitted to the office, if it appear to have been the testator's intention that the substitution should take place on the death of the original executor, whether happening in the testator's lifetime or afterwards. (*o*)

*A man may by his will substitute another legatee or executor, if the first should by treason forfeit during the life of the testator; but if he means to extend this beyond the term of his own life, it will not take effect; for if it should, it would be a plain evasion of the statute of Hen. 8, and other acts made concerning treason. (*p*)

Several executors with power to survivor to appoint a fresh one.

In a late case, (*q*) a testatrix appointed A. and B. executors of her last will, and "in case of the death of either of them," empowered the survivor to appoint another, "so that there should continue to be two executors." Upon the death of A., B. appointed C. executor to act with him; C. did not take probate during the lifetime of B., and it was held by Sir H. Jenner Fust, that probate might pass to C., and that he might appoint another executor to act with him. So where a testator bequeathed his estate in trust to F. and G., who were nominated executors, with directions conjointly with the testator's wife to appoint a third person as trustee and executor, it was held by Sir H. Jenner Fust that, though there was no probability of agreement between F. and G. and the testator's wife in the choice of such third person, the appointment of executors was not thereby void, but that F. and G. were entitled to probate, with a power reserved for the third person when appointed. (*r*)

(*o*) In the Goods of Lighton, 1 Hagg. 235; In the Goods of Johnson, 1 Sw. & Tr. 17. So he may be admitted if the intention is that the substituted executor shall be executor, if the original executor cannot or will not act, and the latter dies in the testator's lifetime. In the Goods of Betts, 30 L. J., P. M. & A. 167. See, further, as to substituted executors, In the Goods of Foster, L. R. 2 P. & D. 304.

(*p*) By Lord Hardwicke, in Carte *v.* Carte, 3 Atk. 180.

(*q*) In the Goods of Deichman, 3 Curt. 123.

(*r*) Jackson *v.* Paulet, 2 Robert. 344. It was objected that, under the wills act, probate could be decreed only to a person named in a duly executed testamentary paper. But the court said the case was not like one where a testator, in his will, reserves to himself a power to deal hereafter with his will by writings not duly executed. See *ante*, 100. [The validity of an appointment of an executor, under a delegation of power, has been affirmed by the courts in Delaware. By a will made in the state of Delaware, by a citizen of that state, the testator, in the event of the executor named by him relinquishing the trust, authorized the orphan's court of the city and county of Philadelphia to name a suitable person

Appointment of executors, in a will revoked by codicil naming a "sole executor:" appointment bad for uncertainty.

Where the testator in his will appointed two persons his executors, and in a codicil named his wife "sole executrix of this my will," the court held that the appointment of executors in the will was revoked. (*s*)

*An appointment of "A. as my executor with any two of my sons," was held bad, as to the sons, for uncertainty. (*t*)

as executor. Upon the relinquishment of the trust by the executor appointed by the will, the orphan's court of Philadelphia named a person for the office; and letters testamentary were issued to the nominee by the register of New Castle county. The court held that he was the executor of the will, and that letters testamentary were properly issued to him, instead of letters of administration with the will annexed. State *v.* Rogers, 1 Houst. Del. 569; Allen J. in Hartnett *v.* Wandell, 60 N. Y. 346, 352.]

(*s*) In the Goods of Lowe, 3 Sw. & Tr. 478; In the Goods of Baily, L. R. 1 P. & D. 628. But a reappointment in a subsequent will of one of the executors named in a former will with a new co-executor is no revocation of the appointment of executors in the first will. In the Goods of Leese, 31 L. J., P. M. & A. 169.

(*t*) In the Goods of Baylis, 2 Sw. & Tr. 613.

* CHAPTER THE THIRD.

IN WHAT WAYS THE APPOINTMENT OF EXECUTOR MAY BE QUALIFIED.

THE appointment of an executor may be either absolute or qualified. It may be absolute when he is constituted certainly, immediately, and without any restriction in regard to the testator's effects, or limitation in point of time. (*a*) It may be qualified, by limitations as to the time or place wherein, or the subject-matter whereon, the office is to be exercised; or the creation of the office may be conditional.

It may be qualified by limitations in point of time, inasmuch as the time may be limited when the person appointed shall begin, or when he shall cease, to be executor. Thus if one appoint a man to be his executor at a certain time, as at the expiration of five years after his death, (*b*) or at an uncertain time, as upon the death or marriage of his son, (*c*) this is a good appointment. Where the deceased appointed two executors, and, in case of the death of either of them, appointed two others to be executors in their stead; on the death of the original executor who had alone proved the will, the substituted executors were admitted to the office. (*d*) So if a man appoints his son to be executor when he shall come to full age, (*e*) such qualified appointment is good; and in the mean time he has no executor. Again, the testator may appoint the executor of A. to be his executor; and * then if he die before A. he has no executor till A. die. (*f*) So a man may make A. and B. his executors, and appoint that A. shall not intermeddle during

1. Limitations in point of time:

as to when the executor shall begin to execute his office:

(*a*) Toller, 36.

(*b*) Swinb. pt. 4, s. 17, pl. 1; Wentw. Off. Ex. 22, 14th ed.

(*c*) Swinb. pt. 4, s. 17, pl. 4.

(*d*) In the Goods of Lighton, 1 Hagg. 235. A proxy of consent was exhibited from the original executor who had not proved. See, also, accord. In the Goods of Johnson, 1 Sw. & Tr. 17.

(*e*) Wentw. Off. Ex. 22, 23, 14th ed.

(*f*) Wentw. Off. Ex. 22, 23, 14th ed.; Godolph. pt. 2, c. 2, s. 4; Graysbrook *v.* Fox, Plowd. 281.

the life of B., and by this they shall be executors successively, and not jointly. (*g*) Likewise the testator may appoint a person to be his executor for a particular period of time only, as during five years next after his decease, (*h*) or during the minority of his son, or the widowhood of his wife, (*i*) or until the death or marriage of his son. (*k*) In a case (*l*) where a widow was appointed executrix and residuary legatee for life, with remainder, as to the residue, to the nieces of the testator, and by a codicil it was provided, that in case she thought proper to marry again she and the nieces should agree on proper persons to be trustees, to whom she was directed to assign all the real and personal estate, in trust for the uses of the will, but so as not to be liable to the debts, or subject to the power, of her second husband, it was held that her executorship expired on her second marriage.

as to when he shall cease:

in these cases an administrator may be appointed till there be an executor, or after the executorship is ended.

In these cases, if the testator does not appoint a person to act before the period limited for the commencement of the office on the one hand, or after the period limited for its expiration on the other, the court of probate may commit *administration to another person, until there be an executor, or after the executorship is ended. (*m*)

2. Limitations in point of place.

In like manner, the appointment may be limited in point of place; as thus, the testator may make A. his executor for his goods in Cornwall, B. for those in Devon, and C. for those in Somerset; (*n*) or he may make different

(*g*) Wentw. Off. Ex. 31, 14th ed.; Bro. Executors, 155. But where two were made executors with a proviso or clause, that one of them should not administer the goods, this was held void for repugnancy by Brudenel and Englefield JJ.; but Fitzherbert J. was of mind that it was not void, nor utterly repugnant, for the other might join in suits, though not administer; and Shelley J. was of a third opinion, different from all the rest, viz, that there was a repugnancy, but the last clause should control the premises, and so this one only should be executor. Anon. Dyer, 3 *b*; Wentw. Off. Ex. *ubi supra*. See, also, Bro. Executors, 9, citing 3 Hen. 6, 6, 7, where Martin J. gives an opinion similar to that of Shelley J. above.

(*h*) Swinb. pt. 4, s. 17, pl. 1.

(*i*) Wentw. Off. Ex. 29, 14th ed.; Godolph. pt. 2, c. 2, s. 3; Carte *v.* Carte, 3 Atk. 180; Pemberton *v.* Cony, Cro. Eliz. 164.

(*k*) Swinb. pt. 4, s. 17, pl. 4.

(*l*) Bond *v.* Faikney, 2 Cas. t. Lee, 371.

(*m*) Swinb. pt. 4, s. 17, pl. 2; Plowd. 279, 281. This will be an administration *cum testamento annexo*, and the person entitled to it will be discovered by referring to the rules respecting that species of administration. See *post*, pt. I. bk. V. ch. III. § I.

(*n*) Swinb. pt. 4, s. 18, pl. 1; Godolph.

executors for his goods in different dioceses, or different provinces; (*o*) or, which seems more rational and expedient, he may so divide the duty when his property is in various countries. (*p*)

Again, the power of an executor may be limited as to the subject-matter upon which it is to be exercised. Thus, the testator may make A. his executor for his plate and household stuff, B. for his sheep and cattle, C. for his leases and estates by extent, and D. for his debts due to him. (*q*) So a * person may be made executor for one particular thing only, as touching such a statute or bond, and no more. (*r*) And the same will may contain the appointment of one executor for general, and another for limited purposes. (*s*) But although a testator may thus appoint separate executors of distinct parts of his property, and may divide their authority, yet *quoad* creditors they are all executors, and as one executor, and may be sued as one executor. (*t*)

3. Limitations as to the subject-matter.

pt. 2, c. 2, s. 3; Wentw. Off. Ex. 29, 14th ed.; Bro. Executors, 2, 155; Anon. 2 Sid. 114, *per tot cur.*; Spratt *v.* Harris, 4 Hagg. 408, 409.

(*o*) Swinb. pt. 4, s. 18, pl. 4.

(*p*) Toller, 36; 4 Hagg. 408, 489. Where a testator appointed a man who was resident in Portugal, to be his executor "in Portugal," it was held that the words "in Portugal" were equivalent to "for Portugal," and that such executor was not entitled to probate in this country. Velho *v.* Leite, 3 Sw. & Tr. 456. See, also, In the Goods of Pulman, 3 Sw. & Tr. 269. Again, where W. made a will in England in 1861, and appointed B. and C. executors thereof, and in May, 1863, being in India, he made a codicil, and on the 9th of June executed a paper, whereby he appointed E. and F. "my executors in this country;" the court held that the context of the paper, giving the testator's reasons for the appointment of E. and F., showed that he did not mean them to have any power over his property in England, and granted probate to B. and C. without reserving power to E. and F. In the Goods of Wallich, 3 Sw. & Tr. 423. If power had been reserved of making a similar grant to them, this, it should seem, would not affect the validity of the probate. 3 Sw. & Tr. 269.

(*q*) Dyer, 4 *a*; Wentw. Off. Ex. 29, 14th ed.; Godolph. pt. 2, c. 3, pl. 2, 3; Bro. Executors, 155; Austre *v.* Andley, 1 Roll. Abr. 914, S. pl. 4. See, however, the judgment of Lord Hardwicke in Owen *v.* Owen, 1 Atk. 495; *contra, post*, pt. III. bk. I. ch. II.

(*r*) Wentw. Off. Ex. 29, 14th ed.; Davies *v.* Queen's Proctor, 2 Robert. 413. But when the testator said, 'I make my wife my full and whole executrix of all my cattle, corn, and movable goods," and said nothing of what should be done with the residue of his estate, as leases and debts, Jones and Croke JJ. held that she was sole and absolute executrix for the whole estate, as well leases and debts as other things; but Berkeley J. thought that she was a special executrix for the things named, and not a general executrix. Rose *v.* Bartlett, Cro. Car. 293.

(*s*) Lynch *v.* Bellew, 3 Phillim. 424. [See Hunter *v.* Bryson, 5 Gill & J. 483.]

(*t*) Rose *v.* Bartlett, Cro. Car. 293.

4. The appointment may be conditional.

Lastly, the appointment may be conditional; and the condition may be either precedent or subsequent. (*u*) Thus it may be, that he give security to pay the legacies, and in general to perform the will, before he acts as executor. (*x*) In Alice Frances' case, (*y*) the testator willed that if his wife suffered J. S. to enjoy Blackacre for three years, then she should be his executor; but if she disturbed J. S., then he made his son executor. It was held in C. B. by all the *justices (the Lord Anderson at first *dissentiente*) that she was executrix presently; for this should not be construed a condition precedent, but as a condition to abridge her power to be executrix, if she perform it not.

In a case where an executor was appointed, provided he proved the will within three calendar months next after the death of the deceased, it was held, that in computing the time, the day of the death was to be excluded. (*z*) But if he fails to prove the will within three months, his appointment is void (at all events if there be substituted executors), though the failure were through the inadvertence of his solicitor, and though he has acted in the execution of the trusts of the will. (*a*)

It is not thought expedient to go farther into the law of conditional appointments of executors, which the reader will find fully discussed in Swinburne (*b*) and Godolphin. (*c*) The parts of the subject which seem necessary to be introduced into this treatise will be found subsequently, when conditional legacies are considered. (*d*)

(*u*) Wentw. Off. Ex. 23, 14th ed.; Godolph. pt. 2, c. 2, s. 1. Should the executorship be determined by a breach of the condition, yet all acts done by the executor in pursuance of his office, before such condition broken, are good. Godolph. pt. 2, c. 2, s. 1. See *post*, pt. 1. bk. VI. ch. III.

(*x*) Godolph. pt. 2, c. 2, s. 1; Wentw. Off. Ex. 28, 14th ed. Where A. made B. and C. executors, and added, "I will that C. shall pay my other executor all such debts as he owes me, before he meddle with anything of this my will, or take any advantage of this my will for the discharge of the same debts, for that I have made him one of my executors," it was held that C. could not administer, or be executor, before he paid the debts. Stapleton *v.* Truelock, 3 Leon. 2, pl. 6.

(*y*) Dyer, 4, pl. 8, in margin; Wentw. Off. Ex. 28, 14th ed.; S. C. *semble*, by the name of Jennings *v.* Gower, Cro. Eliz. 219; S. C. 1 Leon. 229.

(*z*) In the Goods of Wilmot, 1 Curt. 1.

(*a*) In the Goods of Day, 7 Notes of Cas. 553. See, also, In the Goods of Lane, 33 L. J., P. M. & A. 185; *ante*, 245, note (*l*).

(*b*) Pt. 4, s. 5–16.

(*c*) Pt. 1, c. 13, 14; pt. 2, c. 2.

(*d*) *Post*, pt. III. bk. III. ch. II. § VI.

* CHAPTER THE FOURTH.

IN WHAT CASES THE APPOINTED EXECUTOR MAY TRANSMIT HIS APPOINTMENT.

ALTHOUGH the executor cannot assign the executorship, (*a*) yet the interest vested in him by the will of the deceased may, generally speaking, be continued and kept alive by the will of the executor; so that if there be a *sole* executor of A., the executor of such executor is, to all intents and purposes, the executor and representative of the first testator. (*b*) But if the first executor dies intestate, then his administrator is not such a representative, but an administrator *de bonis non* of the original testator must be appointed by the court of probate; (*c*) for the power of an executor is founded

1. Where there is a sole executor, his executor represents the first testator:

(*a*) Bedell *v.* Constable, Vaugh. 182. [As to assigning the right to administer, see 417, note (o).]

(*b*) Com. Dig. tit. Administration, G., tit. Administration, B. 6; Touchst. 464; Wankford *v.* Wankford, 1 Salk. 308; stat. 25 Edw. 3, st. 5, c. 5; Wentw. Off. Executor, 461, 14th ed.; Bro. Administrator, pl. 7; 2 Bl. Com. 506; [Carroll *v.* Connet, 2 J. J. Marsh. 195; Navigation Company *v.* Green, 3 Dev. (N. Car.) Law, 434; *post*, 959; O'Driscoll *v.* Fishburne, 1 Nott & McC. 77. An action for a legacy under the will of the first testator cannot, in Pennsylvania, be maintained against the executor of an executor. Gilliland *v.* Bredin, 63 Penn. St. 393.] The rule is the same, though the original probate was a limited one. In the Goods of Beer, 2 Robert. 349. [An executor of an executor may prove the will, and accept the office of executor of his testator, and renounce the executorship of the will of the first testator. Worth *v.* M'Arden, 1 Dev. & Bat. (N. Car.) Eq. 199.] See *post*, pt. III. bk. I. ch. III. as to whether a power given to an executor is transmissible to his executor. [*Post*, 959. It is provided by statute in Pennsylvania that the executor of a deceased executor shall in no case be deemed executor of the first testator. Act of 15th March, 1832, Purd. Dig. (ed. 1847), 1002; (ed. 1853), p. 189. So it is provided by statute in Massachusetts that the executor of an executor shall not, as such, administer the estate of the first testator. Genl. Sts. c. 93, § 9. See Waters *v.* Stickney, 12 Allen, 9, per Gray J.; Farwell *v.* Jacobs, 4 Mass. 634. In Maine, the duties and liabilities of an executor at his decease devolve upon the administrator with the will annexed of the estate of his testator, and not upon the executor of the executor. Prescott *v.* Morse, 64 Maine, 422; S. C. 62 Maine, 447. As to Maryland, see Scott *v.* Fox, 14 Md. 388.]

(*c*) Bro. Abr. Administrator, pl. 7; Com.

upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence; and so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator.

but his administrator does not:

But the administrator of the executor * is merely the officer of the court of probate, and has no privity or relation to the original testator, being only commissioned to administer the effects of the intestate executor, and not of the original testator. (*d*)

the executor of the executor does not represent the first testator, unless the first executor proves the will.

If the first executor should die, without having proved the will, (*e*) the executorship is not transmissible to his executor, but is wholly determined, and an administrator *cum testamento annexo* must be appointed. (*f*)

A married woman, being executrix, may continue the chain of representation, by making her own executor. (*g*)

Transmission of executorship by a *feme*

In Barr *v.* Carter, (*h*) Elizabeth Chapman, a married woman, made a will, merely executing a power given her by the marriage settlement, but she also went on to

Dig. Administrator, B. 6.; 2 Bl. Com. 506. Thus, it was held that the administratrix of an executrix could not sue for the double value of lands held over, after notice to quit under a demise from the testator, contrary to stat. 4 Geo. 2, c. 28, without taking out administration *de bonis non*, even though the tenant had attorned to her. Tingrey *v.* Brown, 1 Bos. & Pull. 310.

(*d*) 2 Bl. Com. 506. However, the administrator *durante minore ætate* of the executor of an executor is the representative of the first testator; for such an administrator is *loco executoris*. Anon. 1 Freem. 287; *contra*, Limmer *v.* Every, Cro. Eliz. 211, as cited by C. B. Gilbert, in Bac. Abr. Executors, B. 8. But see Mr. Smirke's note, in his valuable edition of Freeman. [When the administrator of an executor takes out, jointly with another, letters of administration *de bonis non*, on the estate of the testator, he does not exclusively represent both estates; and, consequently, there can be no transfer, by operation of law, of the property in his hands, as administrator, to him as administrator *de bonis non*. Thomas *v.* Wood, 1 Md. Ch. Dec. 296.]

(*e*) But if administration *cum testamento annexo* has been granted under his letter of attorney for his use or benefit to another, it is the same thing as if he had proved the will himself. In the Goods of Bayard, 1 Robert. 769; S. C. 7 Notes of Cas. 117.

(*f*) Isted *v.* Stanley, Dyer, 372 *a*; Hayron *v.* Wolfe, Cro. Jac. 614; S. C. Palm. 156; Hutton, 30; Wentw. Off. Ex. 81, 14th ed.; Day *v.* Chatfield, 1 Vern. 200; Wankford *v.* Wankford, 1 Salk. 308; S. C. 1 Freem. 520; Anon. 3 Salk. 21; [In re Drayton, 4 McCord, 46.] Hence it follows, that if the person appointed executor *dies before the testator*, here must be administration *cum testamento annexo*. See Brown *v.* Poyns, Sty. 147; Pullen *v.* Sergeant, 2 Chan. Rep. 300.

(*g*) Birkett *v.* Vandercom, 3 Hagg. 750; *ante*, 53, 54.

(*h*) 2 Cox, 429.

appoint Elizabeth Carter sole executrix of that her will. She died in the lifetime of her husband; and the ecclesiastical court granted probate of this will in the general form. The testatrix was herself the executrix of a former husband, Thomas Hawley; and it was held that the general probate of her will transmitted the representation to Elizabeth Carter, so as to make her the personal representative of the first testator Thomas Hawley. (*i*)

covert executrix.

* If there are several executors appointed, and one of them dies, leaving one or more of his co-executors living, no interest in the executorship is transmissible to his own executor, but the whole representation survives, and will be transmitted ultimately to the executor of the surviving executor, unless he dies intestate. Thus, if A. makes B. and C. executors, then B. makes J. S. executor, and dies, and afterwards C. dies intestate, the executor of B. shall not be executor of A., because the executorship wholly and solely vested in C. by the survivorship; and so administration *de bonis non* shall be committed. (*j*)

If there are several executors, no interest is transmissible, except to the executor of the survivor.

The law was formerly the same where there were several executors, and one alone proved the will, and the rest renounced before the ordinary; there, upon the death of him who proved, no interest was transmitted to his executor, if any of those who refused were surviving. (*k*) But the law is altered in this respect by the court of probate act, 1857, s. 79. (*l*)

(*i*) But a limited probate will not continue the chain of representation. In the Goods of Bayne, 1 Sw. & Tr. 132.

(*j*) Wentw. Off. Ex. 215, 14th ed.; In the Goods of Smith, 3 Curt. 31. [See Crafton *v.* Beal, 1 Geo. 322.]

(*k*) Arnold *v.* Blencowe, 1 Cox, 426.

(*l*) See *post*, 286.

* CHAPTER THE FIFTH.

OF AN EXECUTOR DE SON TORT.

HAVING thus considered the appointment of executors by legal means, it remains to treat of a class who are in some sort regarded as executors, but who assume the office by their own intrusion and interference.

If one, who is neither executor nor administrator, intermeddles with the goods of the deceased, or does any other act characteristic of the office of executor, he thereby makes himself what is called in the law an executor of his own wrong, or more usually, an executor *de son tort*. (*a*)

(*a*) [Crunkleton *v.* Wilson, 1 Browne, 361; Bacon *v.* Parker, 12 Conn. 213; Bennett *v.* Ives, 30 Conn. 329; Wilson *v.* Hudson, 4 Harring. 168; Wiley *v.* Truett, 12 Geo. 588; Barron *v.* Barney, 38 Geo. 264; White *v.* Mann, 26 Maine, 361; Appleton C. J. in Lee *v.* Chase, 58 Maine, 432, 435; Emery *v.* Berry, 28 N. H. 473; Brown *v.* Durbin, 5 J. J. Marsh. 170; Gentry *v.* Jones, 6 J. J. Marsh. 148; Howell *v.* Smith, 2 McCord (S. Car.), 516; Givens *v.* Higgins, 4 McCord, 286; Hubble *v.* Fogartie, 3 Rich. (S. Car.) 413; Johnson *v.* Duncan, 3 Litt. (Ky.) 163; Bailey *v.* Miller, 5 Ired. 444; M'Morine *v.* Storey, 4 Dev. & Bat. 189; Sturdivant *v.* Davis, 9 Ired. 365; Wilson *v.* Davis, 37 Ind. 141; Wilbourn *v.* Wilbourn, 48 Miss. 38; Rayner *v.* Kochler, L. R. 14 Eq. 262. The office of executor *de son tort* is not recognized by the probate laws of Texas. Ansley *v.* Baker, 14 Texas, 607. The law of New York does not recognize such an executor. Redfield L. & P. of Surrogates' Courts, 220. So in Arkansas, Rust *v.* Witherington, 17 Ark. 129; Barasien *v.* Odum, 17 Ark. 122. So in Kansas, Fox *v.* Van Norman, 11 Kansas, 214.] The definition of an executor *de son tort*, by Swinburne, Godolphin, and Wentworth, is in the same words, viz, "He who takes upon himself the office of executor by intrusion, not being so constituted by the deceased, nor, for want of such constitution, substituted by the [ecclesiastical] court to administer." Swinb. pt. 4, s. 23, pl. 1; Godolph. pt. 2, c. 8, s. 1; Wentw. Off. Ex. c. 14, p. 320, 14th ed. But the term is, in the older books, sometimes applied to a lawful executor, who mal-administers; as by the Lord Dyer, in Stokes *v.* Porter, Dyer, 167 *a*. [It is only in case of intermeddling with the goods or personal estate of one deceased that a person becomes executor *de son tort;* no intermeddling by a person with the lands or real estate of the deceased will charge him as executor. King *v.* Lyman, 1 Root, 104; Mitchel *v.* Lunt, 4 Mass. 654; Nass *v.* Van Swearingen, 7 Serg. & R. 192, 196. Such interference with the real estate of the deceased is a wrong done to the heir or devisee. Parsons C. J. in Mitchel *v.* Lunt, 4 Mass. 659. Neither are the lands of the deceased liable

A very slight circumstance of intermeddling with the goods of the deceased will make a person executor *de son tort*. (*a*[1]) Thus it is said in Dyer, *in margine*, (*b*) that milking the cows, even by the widow of the deceased, or taking a dog, will constitute an executorship *de son tort*. So in one case the taking a bible, and in another a bedstead, (*c*) were held sufficient, inasmuch as they were the *indicia* of the person so interfering being the representative of the deceased. (*d*) So if a man kills the cattle, (*e*) or uses or gives away, or sells any of the goods, (*f*) or if he takes the *goods to satisfy his own debt or legacy; (*g*) or if the wife of the deceased take more apparel than she is entitled to, she will become executrix *de son tort*. (*h*) So there may be a *tort* executor of a term for years: as where a man enters upon the land leased to the deceased, and takes possession, claiming the particular estate; (*i*) though with respect to a term

What acts constitute an executor *de son tort*.

to be taken to satisfy a judgment recovered against an executor *de son tort*. Mitchel *v.* Lunt, 4 Mass. 654, 659.]

(*a*[1]) [Emery *v.* Berry, 28 N. H. 473, 482, 483. In this case Eastman J. said: "The best rule that occurs to us, that can be laid down upon the subject, is this: that all acts which assume any particular control over the property, without legal right shown, will make a person executor in his own wrong as against creditors. Any act which evinces a legal control, by possession, direction, or otherwise, will, unexplained, make him liable." Campbell *v.* Tousey, 7 Cowen, 64; Lee *v.* Chase, 58 Maine, 435; White *v.* Mann, 26 Maine, 361; Hubble *v.* Fogartie, 3 Rich. (S. Car.) Law, 413; Givens *v.* Higgins, 4 McCord, 286; Wilson *v.* Hudson, 4 Harring. 168; Church J. in Bacon *v.* Parker, 12 Conn. 212; Leach *v.* Prebster, 35 Ind. 415.]

(*b*) P. 166 *b*.

(*c*) Robin's case, Noy, 69.

(*d*) Toller, 38.

(*e*) Godolph. pt. 2, c. 8, s. 4.

(*f*) Read's case, 5 Co. 33 *b*; Padget *v.* Priest, 2 T. R. 97; Godolph. pt. 2 c. 1, s. 1; Swinb. pt. 4, s. 23; [Gilchrist J. in Leach *v.* Pillsbury, 15 N. H. 139.] So if he gives them away to the poor. Dyer, 166 *b*, in marg.

(*g*) Godolph. pt. 2, c. 8, s. 1; Swinb. pt. 4, s. 23. [See Stephens *v.* Barnett, 7 Dana, 257.]

(*h*) Stokes *v.* Porter, Dyer, 166 *b*; 1 Roll. Abr. 918, Executors, C. 2, pl. 2; Wentw. Off. Ex. c. 14, p. 325, 14th ed.; Godolph. pt. 2, c. 8, s. 1; Swinb. pt. 4, s. 23. [So if a widow continues in the possession of her deceased husband's goods, and uses them as her own, she is liable as an executrix *de son tort*. Hawkins *v.* Johnson, 4 Blackf. 21. See Chandler *v.* Davidson, 6 Blackf. 367. But it would be otherwise, where, being left in possession of her husband's goods, she uses them to support herself and family, though after his death if unknown to her. Brown *v.* Benight, 3 Blackf. 39.]

(*i*) Godolph. pt. 2, c. 8, s. 5; Mayor of Norwich *v.* Johnson, 3 Lev. 35; S. C. 3 Mod. 90; 2 Show. 457; Comberb. 7; Garth *v.* Taylor, 1 Freem. 261, and see 2 Prest. on Convey. p. 319 *et seq.* [In Haskins *v.* Hawkes, 108 Mass. 379, it was held that where the heirs of a mortgagee, after the decease of their ancestor, who had not taken possession in his lifetime, entered the mortgaged premises to foreclose, and took the rents and profits, they became, by such intermeddling with the property, executors in their own wrong in respect to the rents and profits received, and liable

of years in reversion there can be no executorship of this nature, because it is incapable of entry. (*k*) And if he that has from the ordinary letters *ad colligendum*, sell or dispose of any goods, though otherwise subject to perishing, it makes him executor of his own wrong; even though, by the letters *ad colligendum*, he be warranted thereunto; for the judge himself may not do so. (*l*)

Again, if a man demands the debts of the deceased, or makes acquittances for them, or receives them, (*m*) he will * become executor *de son tort*. (*m*[1]) In a modern case, it was held, that if a man's servant sells the goods of the deceased, as well after his death as before, by the directions of the deceased given in his lifetime, and pays the money, arising therefrom, into the hands of his master, this makes the master, as well as the servant, executor *de son tort*. (*n*) And it seems to be established that the agent of an executor *de son tort* collecting the assets, with a knowledge that they belong to the testator's estate, and that his principal is not the legal personal representative, may himself be treated as an executor *de son tort*. (*o*)

to be treated as such by the mortgagor in a bill to redeem, even after the time for redemption would have expired, had they been lawfully entitled to foreclose the mortgage.] Where the entry of the wrong-doer is general, he is a disseisor of the fee-simple, and not an executor *de son tort*. Ib. See, also, Bac. Abr. Executors, B. 3, 1.

(*k*) Kenrick *v.* Burgess, Moore, 126.

(*l*) Anon. Dyer, 256 *a*; Wentw. Off. Ex. c. 14, p. 324, 14th ed.; Godolph. pt. 2, c. 8, s. 1; Swinb. pt. 4, s. 23. In what cases the mere taking possession of the goods of the deceased will or will not create an executorship *de son tort*, see Read's case, 5 Co. 33 *b*; 1 Roll. Abr. 918, pl. 5; Wentw. Off. Ex. 327, 14th ed.; Swinb. pt. 6, s. 22, pl. 2; Fleier *v.* Southcot, Dyer, 105 *b*; Ib. 106 *b*; Garter *v.* Dee, 1 Freem. 13; Parsons *v.* Mayesden, Ib. 151; Serle *v.* Waterworth, 4 M. & W. 9; *post*, 262. Some possession is colorable, and still none in law to charge, &c. as in the case of an overseer or supervisor (see *ante*, 243, 244), or one who is made executor by a will, which is afterwards disproved by the proving of one later; Dyer, 166 *b*; in which case he may plead the special matter, *sans ceo* that he administered in any other manner. Ib.

(*m*) Godolph. pt. 2, c. 8, s. 1; Swinb. pt. 4, s. 23.

(*m*[1]) [But payments made to such executor do not protect the person paying against a suit by the rightful executor or administrator. Hunter *v.* Wallace, 13 Upper Can. Q. B. 385; Lee *v.* Chase, 58 Maine, 434, 435.]

(*n*) Padget *v.* Priest, 2 T. R. 97.

(*o*) Sharland *v.* Mildon, 5 Hare, 468; [Ambler *v.* Lindsay, L. R. 3 Ch. D. 198, 206. In Brown *v.* Sullivan, 22 Ind. 359, it was held that taking possession of property at the request of the widow of the deceased, for the purpose of taking care of it, did not make one liable as executor *de son tort*. In Givens *v.* Higgins, 4 McCord, 286, it was decided that one acting as agent for the widow in regard to the funds of the estate, and not knowing what relation she held to them, would be considered as her agent merely, and not as exercising such control over the funds as to make himself liable. In this case last stated, the defendant had, by direction of the widow,

So if a man *pays* the debts of the deceased, or the fees about proving his will, this will constitute him executor *de son tort;* (*p*) but it is otherwise if he pays the debts or fees with his own money. (*q*)

Living in the house, and carrying on the trade of the deceased, (a victualler), was held a sufficient intermeddling to make the defendant executor *de son tort*, notwithstanding his wife (the daughter of the deceased) proved the will after the action was commenced, and she and her husband were acting together, and were in the house before the death of the testator. (*r*)

Likewise, if a man sue as executor, or if an action be brought against him as executor, and he pleads in that character, this will make him executor *de son tort.* (*s*)

With respect to fraud, by the statute 43 Eliz. c. 8, after reciting that "forasmuch as it is often put in ure to the defrauding of creditors, that such persons as are to have the administration of the goods of others dying intestate committed unto them, if they require it, will not accept the same, but suffer or procure the administration to be granted * to some stranger of mean estate, and not of kin to the intestate, from whom themselves or others by their means do take deeds of gifts and authorities by letter of at-

transferred certain property of the deceased in payment of one of his debts. In Magner *v.* Ryan, 19 Missou. 196, it was also decided that a person, who had, by direction of the widow, sold certain goods and paid over to her the proceeds, was not liable as executor *de son tort*, and that no one was liable as such for acts in reference to the administration of an estate, which he had done merely as the servant of another. In the somewhat similar case of Perkins *v.* Ladd, 114 Mass. 420, 423, 424, Devens J., referring to the last two above cited and stated cases, said: "Both these last cases go much farther than the present case, and perhaps farther than we should be willing to go. The rules against intermeddling with the estates of deceased persons are important, as the interval of time between the decease and the appointment of an administrator affords opportunities of which evil disposed, or even intrusive and officious persons, should not be allowed to take advantage, by interfering with the administration of the person who may thereafter be appointed. When, however, one can show that he has acted in good faith, at the request of the party entitled to administration, in doing an act in disposing of perishable property apparently necessary for the purpose of having its proceeds reach those entitled to them and has paid over the proceeds to the party at whose request he has thus acted, he is not responsible for a wrongful conversion of the property."]

(*p*) Godolph. pt. 2, c. 8, s. 1; Swinb. pt. 4, s. 23.

(*q*) Ib.; Went. Off. Ex. 326, 14th ed.; [Carter *v.* Robbins, 8 Rich. (S. Car.) 29.]

(*r*) Hooper *v.* Summersett, Wightw. 16.

(*s*) Godolph. pt. 2, c. 8, s. 1; Com. Dig. Administrator, C. 1; [Davis *v.* Connelly, 4 B. Mon. 136; Brown *v.* Leavitt, 26 N. H. 495; Brown *v.* Durbin, 5 J. J. Marsh. 170; Pleasants *v.* Glasscock, 1 Sm. & M. Ch. 17; Hill *v.* Henderson, 13 Sm. & M. 688.]

torney, whereby they obtain the estate of the intestate into their hands, and yet stand not subject to pay any debts owing by the same intestate, and so the creditors for lack of knowledge of the place of habitation of the administrator, cannot arrest him nor sue him; and if they fortune to find him out, yet for lack of ability in him to satisfy of his own goods the value of that he hath conveyed away of the intestate's goods, or released of his debts by way of wasting, the creditors cannot have or recover their just and due debts," it is enacted "that every person and persons that hereafter shall obtain, receive, and have any goods or debts of any person dying intestate, or a release or other discharge of any debt or duty that belonged to the intestate upon any fraud as is aforesaid, or without such valuable consideration as shall amount to the value of the same goods or debts, or near thereabouts (except it be in or towards satisfaction of some just and principal debt of the value of the same goods or debts to him owing by the intestate, at the time of his decease), shall be charged and chargeable as executor of his own wrong; (*t*) and so far only as such goods and debts coming to his hands, or whereof he is released or discharged by such administrator will satisfy, deducting nevertheless to and for himself allowance of all just, due, and principal debts upon good consideration, without fraud, owing to him by the intestate at the time of his decease, and of all other payments made by him which lawful executors or administrators may and ought to have and pay by the laws and statutes of this realm."

So, if in his lifetime the deceased made a deed of gift, or bill of sale, of all his goods and chattels to another, in fraud of his creditors, and the donee after the death of the donor * disposes of these goods and chattels, by these means he shall be executor in his own wrong. (*u*)

(*t*) See Godolph. pt. 2, c. 8, s. 2; Swinb. pt. 4, s. 23; Kitchen *v.* Dixon, Goldsb. 116, pl. 12; 2 H. Bl. 26, note (*b*).

(*u*) Godolph. pt. 2, c. 8, s. 1; 1 Sid. 31, pl. 9; 1 Roll. Abr. 549, C. 1, pl. 3; Stamford's case, 2 Leon. 223; Hawes *v.* Leader, Cro. Jac. 271; S. C. Yelv. 197; Edwards *v.* Harben, 2 T. R. 587; [Hopkins *v.* Towns, 4 B. Mon. 124; Norfleet *v.* Riddick, 3 Dev. 221; Bayner *v.* Robertson, 3 Dev. 439; Bailey *v.* Miller, 5 Ired. (Law) 444; Tucker *v.* Williams, Dudley (S. C.), 329; M'Morine *v.* Storey, 4 Dev. & Bat. (Law) 189; Morrison *v.* Smith, Busbee (N. Car.) Law, 399; Garner *v.* Lyles, 35 Miss. 176; Gleaton *v.* Lewis, 24 Geo. 209; Howland *v.* Dews, R. M. Charlt. 383; Dorsey *v.* Smithson, 6 Har. & J. 61; Sturdivant *v.* Davis, 9 Ired. 365; Allen *v.* Kimball, 15 Maine, 116; Crunkleton *v.* Wilson, 1 Browne, 360; Clayton *v.* Tucker, 20 Geo. 452; Warren *v.* Hall, 6 Dana, 450; Densler *v.* Edwards, 5 Ala. 31; Simonton *v.* M'Lain, 25 Ala. 353. But it

When the will is proved, or administration granted, and another person then intermeddles with the goods, this shall not make him executor *de son tort*, by construction of law, because there is another personal representative of right against whom the creditors can bring their actions; and such a wrongful intermeddler is liable to be sued as a trespasser. (*x*) But, though there be a lawful executor or administrator, yet if any other take the goods *claiming them as executor*, or pays debts or legacies, or intermeddles *as executor*, in this case, because of such express claiming to be executor, he may be charged as executor of his own wrong, although there were another executor of right. (*y*)

has been held that the donee will not be treated as such executor, where he has sold the goods and chattels in the lifetime of the donor, although he may have retained the proceeds after his decease. Morrill *v.* Morrill, 13 Maine, 415. An administrator who holds property of his intestate under a fraudulent conveyance, is liable as an executor *de son tort*. Norfleet *v.* Riddick, 3 Dev. 221. But it is otherwise where one merely sets up a claim to the goods of the intestate, under a fraudulent conveyance, and thereby injures the sale of them. Barnard *v.* Gregory, 3 Dev. 223. But it is not necessary in such cases to charge the fraudulent grantee or donee, as executor *de son tort;* the creditor has a remedy in the due course of administration. In Bowdoin *v.* Holland, 10 Cush. 17, it was held that if a judge of probate is satisfied that a creditor of a deceased non-resident has reasonable grounds for an averment that the debtor has fraudulently conveyed his real estate in Massachusetts, he ought to grant administration upon the estate of such person in order that the question of fraud, may be fully tried in a court of common law. And such administration may be granted in Massachusetts although the deceased left a will which has not been proved and allowed in the state of his domicil. Bowdoin *v.* Holland, 10 Cush. 17; Stevens *v.* Gaylord, 11 Mass. 256, 263.]

(*x*) Anonymous, 1 Salk. 313; Godolph. pt. 2, c. 8, s. 3; [M'Morine *v.* Storey, 3 Dev. & Bat. (Law) 87.] But one who gets the goods of the testator into his hands may be sued as executor *de son tort*, although afterwards and before the writ brought, administration be legally granted to another. Ib.; Kellow *v.* Westcombe, 1 Freem. 122; S. C. 3 Keb. 202; [M'Morine *v.* Storey, 3 Dev. & Bat. (Law) 87.]

(*y*) Read's case, 5 Co. 34 *a;* Went. Off. Ex. 326, 14th ed.; Godolph. pt. 2, s. 1; Swinb. pt. 4, s. 23; Com. Dig. Administrator, C. 1; [Howland *v.* Dews, R. M. Charlt. 383; Mitchell *v.* Kirk, 3 Sneed, 319; Foster *v.* Nowlin, 4 Misson. 18; Carter *v.* Robbins, 8 Rich. (Law) 29; Ambler *v.* Lindsay, L. R. 3 Ch. D. 198.] However, this was denied at N. P. in Hall *v.* Elliott, Peake N. P. C. 87, by Lord Kenyon, who said it was impossible there should be a lawful executor and an executor *de son tort* at the same time. Observations to the same effect were also made by Sir T. Plumer M. R. in Tomlin *v.* Beck, 1 Turn. & R. 438, where his honor held, that a person who was permitted by an executor to possess himself of part of the assets of a testator, and who, after the executor's death, and when there was no legal representative, either of the testator or the executor, retained the assets, and acted in the execution of the trusts of the will, was not executor *de son tort* to the original testator. [That there may be both a rightful executor and an executor *de son tort* at the same time, see Dorsey *v.* Smithson, 6 Har. & J. 61; Foster *v.* Wallace, 2 Misson. 231; Chamberlayne *v.*

What acts do not make a man executor, *de son tort.*

But there are many acts which a stranger may perform without incurring the hazard of being involved in such an executorship; such as locking up the goods for preservation, (*z*) directing the funeral, in a manner suitable to the * estate which is left, and defraying the expenses of such funeral himself, or out of the deceased's effects, (*a*) making an inventory of his property, (*b*) feeding his cattle, (*c*) repairing his houses, or providing necessaries for his children; (*d*) for these are offices merely of kindness and charity. (*e*)

In a modern case, (*f*) the widow of a hairdresser, one Joseph Waterworth, who died in October, 1836, continued to reside in his house and keep open the shop (through which was the entrance to the house), but there was no proof of any articles being sold. In December, she received notice of a bond debt of 100*l.* due from him, and had his goods valued. On January 3d, 1837, on the application of a creditor, to whom Joseph Waterworth, at the time of his death, owed 24*l.* for goods, she gave a promissory note for that amount, payable to the creditor twelve months after date. In March, she took out administration. It was held, in an action against her on the promissory note, that this was not evidence to charge her as executrix *de son tort.* (*g*)

Temple, 2 Rand. 384; Hopkins *v.* Towns, 4 B. Mon. 124; Howland *v.* Dews, R. M. Charlt. 383; Simonton *v.* M'Lain, 25 Ala. 353; and that if the rightful executor is also a creditor of the estate, he may sue the executor *de son tort*, and recover his debt, and the fact that the plaintiff is rightful executor will not defeat the action. See Dorsey *v.* Smithson, 6 Har. & J. 61; Shields *v.* Anderson, 3 Leigh, 729; Osborne *v.* Moss, 7 John. 161.]

(*z*) Godolph. pt. 2, c. 8, s. 6. So if one do but take a horse of the deceased, and tie him in his own stable. Godolph. pt. 2, c. 8, s. 3; Wentw. Off. Ex. 325, 14th ed.

(*a*) Dyer, 166 *b*, in margin; Fitzh. Executors, pl. 24; 1 Roll. Abr. 918, Executors, C. 2, pl. 4; Wentw. Off. Ex. c. 14, p. 323, 14th ed.; Godolph. pt. 2, c. 8, s. 6; Harrison *v.* Rowley, 4 Ves. 216; [Wagner *v.* Ryan, 19 Missou. 196; Bacon *v.* Parker, 12 Conn. 212; Devens J. in Perkins *v.* Ladd, 114 Mass. 420, 422, 423.] So where a party receives a debt due to the estate of a person deceased, for the purpose of providing the funeral, he will not thereby become chargeable as executor *de son tort*; unless he receive a greater sum than is reasonable for that purpose, regard being had to the estate and condition of the deceased; which is a question for the jury. Camden *v.* Fletcher, 4 M. & W. 378.

(*b*) Godolph. pt. 2, c. 8, s. 6.

(*c*) Godolph. pt. 2, c. 8, s. 8.

(*d*) Godolph. pt. 2, c. 8, s. 6.

(*e*) Swinb. pt. 2, s. 23; Bac. Abr. tit. Executors, B. 3, 1; Toller, 40; [Brown *v.* Sullivan, 22 Ind. 264; Emery *v.* Berry, 28 N. H. 483.]

(*f*) Serle *v.* Waterworth, 4 M. & W. 9.

(*g*) [Chandler *v.* Davidson, 6 Blackf. 367.] The defendant had pleaded that one Joseph Waterworth, before and at the time of his death, was indebted to the plaintiff in 24*l.* for goods sold, which sum was due to the plaintiff at the time of the making of the note in the declaration mentioned; that the plaintiff, after the death

* If another man takes the goods of the deceased, and sells or gives them to me, this shall charge him as executor of his own wrong, but not me. (*h*) Accordingly, where a lessee died intestate during the term, and his widow entered, without taking administration, and paid rent, and afterwards her son-in-law took the premises, with her concurrence, and with the assent of the landlord, and paid rent and continued to occupy during the remainder of the term; it was held that he could not be considered as assignee in the law of the lease; for though the widow might have been chargeable as executrix *de son tort*, he had not made himself executor *de son tort* by taking the premises from her. (*i*)

Again, if a person sets up in himself a colorable title to the goods of the deceased, as where he claims a lien on them, though he may not be able to make out his title completely, he shall not be deemed an executor *de son tort*. (*k*) So if a man lodge in my

of Joseph, applied to the defendant for payment; whereupon, in compliance with his request, the defendant, after the death of Joseph, for and in respect of the debt so remaining due to the plaintiff as aforesaid and for no other consideration whatever, made and delivered the note to the plaintiff; and that Joseph died intestate, and that at the time of the making and delivery of the note, no administration had been granted of his effects, *nor was there any executor of his estate*, nor any person liable for the debt so remaining due to the plaintiff as aforesaid; and the plea then averred that there never was any consideration for the said note except as aforesaid. The barons of the exchequer held, after verdict for the defendant, that the plea was no answer to the declaration, inasmuch as it did not negative every consideration for the promissory note, for that it did not allege there were no assets; and the effect of giving the note was, at all events, to preclude the plaintiff, for a year, from suing the defendant, in case she should afterwards take out administration, which was a sufficient consideration for the giving of the note. But this decision was afterwards overruled in the exchequer chamber. Nelson *v.* Serle, 4 M. & W. 795.

(*h*) Godolph. pt. 2, c. 8, s. 1; Com. Dig. Administrator, C. 2; [Johnson *v.* Gaither, Harper (S. Car.), 6; Nesbit *v.* Taylor, 1 Rice (S. Car.), 296. A purchase from an executor *de son tort* will not charge the purchaser as an executor *de son tort*. Smith *v.* Porter, 35 Maine, 287.] It might be otherwise, if a case of collusion could be made out. See, also, stat. 43 Eliz. c. 8; *ante*, 259, 260. [Where creditors of an intestate demanded and received their debts from the widow, out of the estate, knowing that administration had not been taken out, and that the widow had no authority to pay them, they were held liable as executors in their own wrong, to the administrator subsequently appointed. Mitchell *v.* Kirk, 3 Sneed, 319.]

(*i*) Paull *v.* Simpson, 9 Q. B. 365.

(*k*) Flemings *v.* Jarrat, 1 Esp. N. P. C. 336; [Densler *v.* Edwards, 5 Ala. 31; Smith *v.* Porter, 35 Maine, 287; Claussen *v.* Lafrenz, 4 Green (Iowa), 224; Ward *v.* Bevill, 10 Ala. 197; Barnard *v.* Gregory, 3 Dev. 223. If, upon the death of a principal, his surety sells property conveyed to him as security, with power of sale, to indemnify himself for his liability, he will not for this cause be considered an executor *de son tort*. O'Reily *v.* Hendricks, 2 Sm. & M. 388. Nor is he liable as such, because a surplus

house, and die there, leaving goods therein behind him, I may keep them, until I can be lawfully discharged of them, without making myself chargeable as executor in my own wrong. (*l*) Or if I take * the goods of the deceased by mistake, supposing them to be my own, this will not make me executor of my own wrong. (*m*)

Likewise, a man who possesses himself of the effects of the deceased, under the authority of and as agent for the rightful executor, cannot be charged as executor *de son tort*. (*n*) But, although a person, cannot, therefore, be charged as such while he acts under a power of attorney, made by one of several executors who has proved the will, yet if he continues to act after the death of such executor, he may be charged as executor *de son tort*, though he act under the advice of another of the executors, who has not proved or administered. (*o*)

In Beavan *v.* Lord Hastings, (*p*) an Englishman having died intestate in Belgium, possessed of real and personal property there, his brother went over from England and obtained representation to him *pur et simple*, which by the Belgian law imposed upon him a personal obligation to pay all the debts of the intestate independently of the amount of the assets. The intestate's

remains in his hands after discharging his claim, if there be no lawful representative of the deceased to pay it to. O'Reily *v.* Hendricks, 2 Sm. & M. 388. See Hawkins *v.* Johnson, 4 Blackf. 21; Chandler *v.* Davidson, 6 Blackf. 267; Foster *v.* Nowlin, 4 Miss. 18.]

(*l*) Godolph. pt. 2, c. 8, s. 3; Swinb. pt. 4, s. 23; Com. Dig. Administrator, C. 2; [Graves *v.* Page, 17 Missou. 91.]

(*m*) Ib.

(*n*) Hall *v.* Elliot, Peake N. P. C. 87; [Turner *v.* Child, 1 Dev. 25.] A person who deals with the goods of a testator, as agent of executors who afterwards prove the will, cannot be treated as executor *de son tort*. Sykes *v.* Sykes, L. R. 5 C. P. 113. It has been held, however, to be no defence that the goods were taken by consent of a person to whom administration was afterwards granted. Parsons *v.* Mayesden, 1 Freem. 152. But in Hill *v.* Curtis, L. R. 1 Eq. 90, it was held by Wood V. C. that where A. took possession of goods as the agent of B. and by his order, and B. afterwards took out administration, the agency and order prevented the act of A. from being the act of an executor *de son tort;* for that the tort of B. was purged by his becoming administrator, and his order became rightful *ab initio*, so that the agent's act was also purged. But see *post*, 269, note (*r*).

(*o*) Cottle *v.* Aldrich, 4 M. & Scl. 175; S. C. 1 Stark. N. P. C. 37; [Turner *v.* Child, 1 Dev. (N. Car.) Law, 331; Ambler *v.* Lindsay, L. R. 3 Ch. D. 198, 206.] But see Tomlin *v.* Beck, *ante*, 261, note (*y*). [The administrator of a person chargeable as an executor *de son tort* does not himself become executor *de son tort*, by merely taking the property, the possession of which rendered his intestate so chargeable. Alfriend *v.* Daniel, 48 Geo. 154. As to an executor *de son tort* of an executor *de son tort*, Dawson *v.* Callaway, 19 Geo. 573.]

(*p*) 2 Kay & J. 724.

brother afterwards returned to this country, but did not take possession of any property in England belonging to the intestate. A creditor of the * intestate obtained letters of administration to him in England. And it was held by Wood V. C. that he could not sue the intestate's brother in equity in respect of the personal liability which he had so incurred, but that his remedy to recover his debt was at law. His honor held also that the intestate's brother, as he had not taken possession of any of the English property of the intestate, was not an executor *de son tort*. (p^1)

The question whether executor *de son tort*, or not, is a conclusion of law and not to be left to a jury: whether the party did certain acts is indeed a question for a jury; but when these facts are established, the result from them is a question of law. (q)

When a man has so acted, as to become in law an executor *de son tort*, he thereby renders himself liable, not only to an action by the rightful executor or administrator, but also to be sued as executor by a creditor of the deceased, (r) or by a legatee: (s) for an executor *de son tort* has all the liabilities,

Liability of executor *de son tort*;

(p^1) [See Eastman J. in Willard *v.* Hammond, 21 N. H. 382, 385. An inhabitant of one state, in whose house an inhabitant of another state dies, is not an executor *de son tort* for paying over money found upon the person of the deceased to a rightful administrator in the latter state. Nesbit *v.* Stewart, 2 Dev. & Bat. (Law) 24. See Graves *v.* Page, 17 Missou. 91. But where money was received by a father, residing in New Hampshire, as the avails of the estate of his son, who died in California, and nothing was disclosed showing the purpose for which the money was sent, or that any one in California or elsewhere had any right to its legal control, it was held that the possessor of the money in New Hampshire might be charged as executor *de son tort* by a creditor of the deceased. Emery *v.* Berry, 28 N. H. 473. To the same effect, see Foster *v.* Nowlin, 4 Missou. 18. So an executor appointed in a neighboring state may be sued in New York as executor *de son tort*, and will be liable for all assets which he has not applied in due course of administration, or in payment of the testator's debts, whether the assets were received in New York, or received abroad and arrived there. Campbell *v.* Tousey, 7 Cowen, 64. See Hopkins *v.* Towns, 4 B. Mon. 124; Evans *v.* Tatem, 9 Serg. & R. 258; Campbell *v.* Sheldon, 13 Pick. 8.]

(q) Padget *v.* Priest, 2 T. R. 99.

(r) Godolph. pt. 2, c. 8, s. 2; [Elder *v.* Littler, 15 Iowa, 65.] On this ground, in a case where the defendant acted as executor, but did not take out probate till sixteen years after the testator's death, the lord chancellor (Eldon) allowed a plea of the statute of limitations; because he might have been sued as executor *de son tort*. Webster *v.* Webster, 10 Ves. 93; [Ambler *v.* Lindsay, L. R. 3 Ch. D. 198, 207; Coote *v.* Whittington, L. R. 16 Eq. 534. But see Phaelon *v.* Houseal, 2 McCord Ch. 423.]

(s) 1 Roll. Abr. 910, Executors, F. pl. 1; Bac. Abr. Executors, B. 3, 3. [See Hansford *v.* Elliott, 9 Leigh, 79. But persons, chargeable as executors *de son tort*, are not liable to account to the next of kin, but to the duly appointed executor or administrator of the deceased. Muir

though none of the privileges, that belong to the character of executor. (*t*)

in an action or suit by a creditor of the deceased or a party beneficially interested in his estate.

In an action by a creditor he shall be named executor generally; (*u*) for the most obvious conclusion which strangers can form from his conduct is, that he has a will of the deceased, wherein he is appointed executor, but has not yet proved it. (*v*) And accordingly it has lately been *held, (*x*) that if a man be sued as the executor of an executor for a debt of the original testator, it is no

v. Leake & Watts Orphan House, 3 Barb. Ch. 477; Hazelden *v.* Whitesides, 2 Strobh 353. The executor *de son tort* cannot be cited to account before the probate court. Peeble's Appeal, 15 Serg. & R. 41; Stockton *v.* Wilson, 3 Penn. 129.]

(*t*) Carmichael *v.* Carmichael, 1 Phill. C. C. 103, per Lord Cottenham. [In a case where the defendant, sued as executor in his own wrong, pleaded the statute of limitations, Bell J. said the defendant "contends that as the plaintiff has declared against him as executor, and as the defendant, by pleading the statute of limitations, has admitted that he is executor, he is to be regarded and treated throughout as the rightful executor, and entitled to any defence that such rightful executor could have. But there is no pretence that we are aware of, that this was true at common law. The liability of an executor *de son tort* is in its nature essentially distinct from that of an executor duly appointed. It is governed by different rules and subject to different principles. The one is founded on consent and contract, while the other, whatever its form of action, is in substance founded on tort. By our statutes, the distinction between the two cases is kept up." Brown *v.* Leavitt, 26 N. H. 494, 495. So those rights which the law allows to an executor, on account of his office, can be claimed by a rightful executor only. M'Intire *v.* Carson, 2 Hawks (N. Car.), 544. And where a trust is imposed upon an executor in the settlement of the estate, by the will of the deceased, it cannot be enforced against an executor *de son tort*. In Campbell *v.* Sheldon, 13 Pick. 824, Wilde J. said: "An executor *de son tort* cannot settle the estate of the deceased, he cannot sue for and collect the debts due to the estate, nor make any valid disposition of the goods and effects, so that no trust can arise by any acts and doings of his in Massachusetts. The trust estate is not vested in him, nor does any trust devolve on him in consequence of his unauthorized intermeddling." See Marcy *v.* Marcy, 32 Conn. 308; Bennett *v.* Ives, 30 Conn. 329; Francis *v.* Welch, 11 Ired. (Law) 215. An executor *de son tort* is not entitled to an action. Francis *v.* Welch, 11 Ired. 215. Such an executor has no right to reduce assets, and is therefore not chargeable for not reducing and administering them. Kinard *v.* Young, 2 Rich. Eq. 247.]

(*u*) Coulter's case, 5 Co. 31 *a*; Prince *v.* Rowson, 1 Mod. 208; S. C. 2 Mod. 51; Godolph. pt. 2, c. 8, s. 2; 1 Saund. 265, note (2) to Osborne *v.* Rogers; [Brown *v.* Durbin, 5 J. J. Marsh. 170; Buckminster *v.* Ingham, Brayt. 116; Bell J. in Brown *v.* Leavitt, 26 N. H. 495; Pleasants *v.* Glasscock, 1 Sm. & M. Ch. 17; Stockton *v.* Wilson, 3 Penn. 129; Gregory *v.* Forrester, 1 McCord Ch. 318; Meyrick *v.* Anderson, 14 Q. B. 719; Lee *v.* Chase, 58 Maine, 435.]

(*v*) 2 Bl. Com. 507, 508. The possession and occupation, or meddling with the goods, is that which gives notice to creditors whom they are to sue as executor. By the Lord Dyer, Wentw. Off. Ex. c. 14, p. 322, 14th ed.

(*x*) Meyrick *v.* Anderson, 14 Q. B. 719.

answer to the action, that he is only executor *de son tort* to the original rightful executor. If there should be also a lawful executor, they may be joined in the suit, or sued severally; but it is otherwise if there be a lawful administrator, for he cannot be joined in a suit with the executor *de son tort.* (*y*)

And if the executor *de son tort*, being sued by a creditor, should plead *ne unques executor*, on which issue should be joined, this issue, on proof of acts by the defendant, such as constitute in law an executorship *de son tort*, would be found against him, and the judgment thereon would be, that the plaintiff do recover the debt and costs, to be levied out of the assets of the testator if the defendant have so much, but if not, then *out of the defendant's own goods.* (*z*)

(*y*) Wentw. Off. Ex. 328, 14th ed. Godolph. pt. 2, c. 8, s. 2; Com. Dig. Administrator, C. 3; [Howland *v.* Dews, R. M. Charlt. 383; Stephens *v.* Barnett, 7 Dana, 257.] There cannot be an administrator *de son tort;* the law knows no such appellation. Godolph. pt. 2, c. 8, s. 2. [See Eastman J. in Willard *v.* Hammond, 21 N. H. 385.]

(*z*) Robbin's case, Noy, 69; Wentw. Off. Ex. c. 14, pp. 331, 332, 14th ed.; Bull *v.* Wheeler, Cro. Jac. 648; 1 Saund. 336 *b*, note (10) to Hancock *v.* Prowd; Hooper *v.* Summersett, Wightw. 19, by Thompson B.; [Howland *v.* Dews, R. M. Charlt. 383; Stephens *v.* Barnett, 7 Dana, 257; Hubbell *v.* Fogartie, 1 Hill (S. Car.), 167; Campbell *v.* Tousey, 7 Cowen, 64; Parsons C. J. in Mitchel *v.* Lunt, 4 Mass. 654, 658; Peters *v.* Breckenridge, 2 Cranch C. C. 518. The creditor of an intestate who has recovered judgment against an executor *de son tort* cannot levy his execution issued on such judgment upon the real estate left by the intestate Mitchel *v.* Lunt, 4 Mass. 654.] As to whether in any cases of levy out the goods of the executor *de son tort* equity can afford relief, see Robinson *v.* Bell, 2 Vern. 147, where the Lord Commissioner Hutchins cited a case in the Lord Bacon's time, in which, upon an action of debt upon a bond of seven hundred pounds, brought against one as executor, he pleaded *ne unques executor*, and upon the evidence it appeared, that a chimney-back, or other matter of very small value, had come to his hands; and thereupon a verdict passed against him, and the judges came into court, and informed the lord keeper this was the fact; and the party was relieved in equity; and he also cited the case of Cryer *v.* Goodhand, in Lord Nottingham's time, where, in an action of debt brought against the widow of an ale-house keeper, who died intestate, she pleaded *ne unques executor*, and all the proof that was against her was, that she had taken money for some few pots of ale sold in the house after her husband's death; and upon hearing she was relieved. However, the general rule is, that a court of equity will not relieve either misplcading or where there is a neglect or want of plea. See Treat. on Eq. bk. 1, c. 3, s. 3. [In Mississippi, by statute, an executor *de son tort* is liable only to the extent of the assets in his hands, and judgment should be rendered against him in the ordinary form, although he may err in pleading. Hill *v.* Henderson, 13 Sm. & M. 688. By statute, in New Hampshire, an executor *de son tort* is held liable to the actions of creditors and others aggrieved to double the amount of the estate he intermeddles with. Bellows *v.* Goodall, 32 N. H. 97. Under the statutes of Iowa, an executor *de son tort* is liable to be sued by any creditor of the

However, though an executor *de son tort* cannot by his * own wrongful act acquire any benefit, yet he is protected in all acts not for his own benefit, which a rightful executor may do. And, accordingly, if he pleads properly, he is not liable beyond the extent of the goods which he has administered. (*a*) Therefore, in an action by a creditor of the deceased, under a plea of *plene administravit*, he shall not be charged beyond the assets which came to his hands; (*b*) and in support of this plea, he may give in evidence the payments by himself of just debts of the deceased, of equal or superior degree to that on which the action is brought, which have exhausted such assets. (*c*) So even after action brought, he may apply the assets, which are in his hands, to the payment of a debt of superior degree, and plead such payment in bar of the action. (*d*) So he may give in evidence, under the

estate, to the value of the property taken or received by him, and for all damages caused by his acts. Elder *v.* Littler, 15 Iowa, 65. By the statute of Massachusetts, regulating this subject, "every executor in his own wrong shall be liable to the rightful executor or administrator for the full value of the goods or effects of the deceased taken by him, and for all damages caused by his acts to the estate of the deceased." Genl. Sts. c. 94, § 15. See Root *v.* Geiger, 97 Mass. 178.

(*a*) Godolph. pt. 2, c. 8, s. 2; Wentw. Off. Ex. 331, 14th edition; [*ante*, 266, note (*z*); Sawyer J. in Bellows *v.* Goodall, 32 N. H. 99; Nass *v.* Van Swearingen, 7 Serg. & R. 196; Glenn *v.* Smith, 2 Gill & J. 493. He may make defence as the rightful executor. Stockton *v.* Wilson, 3 Penn. 129; Weeks *v.* Gibbs, 9 Mass. 77. "As an executor in his own wrong is subjected only to the actions of creditors, and others aggrieved, he has a right to raise the question, whether the plaintiff, at the time of bringing his action, was a creditor. If the plaintiff's right of action has become barred by the statute of limitations, he has ceased to be a creditor within the meaning of the statute. But if a claim still exists, and has not become finally barred by any statute, if it is capable of being enforced against the estate whenever an administrator is duly appointed to represent the estate, the claimant is a creditor, and may bring his action against any one who embezzles the estate." Thus an action may be brought against an executor in his own wrong, if a cause of action exist against the debtor at his decease, until the action is barred by the lapse of such time as may be allowed in such cases for bringing an action after a lawful grant of administration. Brown *v.* Leavitt, 26 N. H. 493.]

(*b*) Dyer, 156 *b*, in margin; 1 Saund. 265, note (2) to Osborne *v.* Rogers; Hooper *v.* Summersett, Wightw. 21, *per curiam*; Yardley *v.* Arnold, Carr. & M. 434; [Leach *v.* House, 1 Bailey (S. Car.), 42; Cook *v.* Sanders, 15 Rich. (S. Car.) 63; Kinard *v.* Young, 2 Rich. (S. Car.) Eq. 247; Hill *v.* Henderson, 13 Sm. & M. 688; McKenzie *v.* Pendleton, 1 Bush (Ky.), 164; Bellows *v.* Goodall, 32 N. H. 99; Glenn *v.* Smith, 2 Gill & J. 493.]

(*c*) Wentw. c. 14, pp. 333, 334, 14th ed.; Ayre *v.* Ayre, 1 Ch. Cas. 33; Whitehall *v.* Squire, Carth. 104, by Lord Holt; Mountford *v.* Gibson, 4 East, 453, in the judgment of Le Blanc J.; 2 Bl. Com. 508; Bac. Abr. Executors, B. 3, 2; [Dorsett *v.* Frith, 25 Geo. 537; Weeks *v.* Gibbs, 9 Mass. 74; Winn *v.* Slaughter, 5 Heisk. 191.]

(*d*) Oxenham *v.* Clapp, 2 B. & Ad. 309. See, further, *post*, pt. III. bk. II. ch. II. § III.

same plea, that he has delivered the assets to the rightful executor or administrator *before* action brought. (*e*) An executor *de son * tort* may well plead *ne unques executor* and also *plene administravit*, and, although on the former issue he should be unsuccessful, he may have a verdict on the latter. (*f*)

But it is no defence, either under a plea of *plene administravit* or a special plea, that *after* action brought, and before plea pleaded, the defendant delivered over the assets to the rightful executor or administrator; (*g*) not even, though, in fact, no administration was granted to any one till after the action was brought. (*h*) So payments made by an executor *de son tort*, pending a suit in equity for an account of an intestate's estate, to a person who took out administration after the institution of the suit, and was thereupon made a co-defendant, will not be allowed. (*i*)

And it has been said that a man who is sued in equity as executor *de son tort*, jointly with the rightful executor, cannot set up as a defence that he had, even *before* the bill was filed, accounted for his receipts and payments to his co-defendant, and paid over the balance; for that an executor *de son tort* cannot, by settling with the personal representative, discharge himself from liability to the parties beneficially interested in the testator's

(*e*) Anon. 1 Salk. 313; Padget *v.* Priest, 2 T. R. 97, in the judgments of Ashurst J. and Buller J.; Curtis *v.* Vernon, 3 T. R. 590, in Lord Kenyon's judgment; Hill *v.* Curtis, *post*, 268, note (*k*). In Samuel *v.* Morris, 6 C. & P. 620, which was an action of trover, the plaintiff had pledged the goods in question to a parish pauper for a debt. On the pauper's death, the defendants, who were the parish overseers, took the goods, together with those of the pauper, in order to pay the expenses of his funeral. When the bill for the coffin was brought in by one Joseph, who had made it by their order, they proposed that he should have all the goods, to make what he could of them, if he would pay the rent due to the landlord of the house in which the pauper had lived, and all the funeral expenses. To this proposal Joseph assented, and took the goods and sold them. And Parke B. held, that although the defendants, by taking the goods on the death of the pauper, had made themselves executors *de son tort*, yet as the jury found that the agreement with Joseph amounted to a transfer of the office, and not to a sale of the goods to him by the defendants, they were not liable to the plaintiff, because he being a pawnor of the goods, a mere seizure of them did not amount to conversion.

(*f*) Hooper *v.* Summersett, Wight. 20, by Wood B.

(*g*) Curtis *v.* Vernon, 3 T. R. 587; S. C. affirmed in error, 2 H. Bl. 18. The reason seems to be that the creditor would thereby be put into a worse situation; he would have to bring a second action against the rightful executor. 2 B. & Ad. 315.

(*h*) 3 T. R. 587; 2 H. Bl. 18.

(*i*) Layfield *v.* Layfield, 7 Sim. 172.

estate. (*k*) So the agent of an * executor *de son tort*, who has, by collecting the assets, made himself also liable as executor *de son tort*, cannot discharge himself by showing that he has duly accounted for his receipts to his principal; for the rule that the receipt of the agent is the receipt of the principal does not apply to the case of a wrong-doer. (*l*)

An executor *de son tort* cannot give in evidence, under *plene administravit*, or specially plead, a retainer for his own debt; (*l*[1]) for otherwise the creditors of the deceased would be running a race to take possession of his goods, without taking administration to him. (*m*) And it will make no difference though the debt due to the executor *de son tort* be of a superior degree to that of the creditor who brings the action against him. (*n*) Nor though the rightful executor or administrator has assented to such retainer. (*o*) If the executor *de son tort* should plead the retainer to satisfy his own debt, the plaintiff, though he had sued the defendant as executor generally, may reply, that he is executor *de son tort*. (*p*) If he attempts to give the retainer in evidence, under *plene administravit*, the plaintiff must show the will, and who are the rightful executors. (*q*)

Yet if an executor *de son tort* afterwards, *pendente lite*, obtains administration, he may retain; for it legalizes those acts which were tortious at the time. (*r*) And, therefore, * if subsequently to

(*k*) Carmichael *v.* Carmichael, 2 Phill. C. C. 101, per Lord Cottenham. But this *dictum* was doubted by Wood V. C. in Hill *v.* Curtis, L. R. 1 Eq. 90. Lord Cottenham appears to have been influenced by the reasoning that even the rightful executor cannot discharge himself by settling accounts with a co-executor. But Wood V. C. pointed out the reason for this, viz, that a rightful executor is bound to *administer* the assets which he receives, and it is not enough simply to hand them over to his co-executor. But an executor *de son tort* is not so bound; and may discharge himself by showing that he has delivered the assets to the rightful executor before action brought. *Ante*, 267.

(*l*) Sharland *v.* Mildon, 5 Hare, 469.

(*l*[1]) [Shields *v.* Anderson, 3 Leigh, 729; Chapman C. J. in Carey *v.* Guillow, 105 Mass. 18, 21; Turner *v.* Child, 1 Dev. 331; Glenn *v.* Smith, 5 Gill & J. 493; Brown *v.* Leavitt, 26 N. H. 493, 495; Kinard *v.* Young, 2 Rich. Eq. 247; Partee *v.* Caughran, 9 Yerger, 460.]

(*m*) Coulter's case, 5 Co. 30 *a*; S. C. Cro. Eliz. 630; Wentw. Off. Ex. c. 14, p. 333, 14th ed.

(*n*) Curtis *v.* Vernon, 2 T. R. 587; 2 H. Bl. 18.

(*o*) Ib.

(*p*) Alexander *v.* Lane, Yelv. 137.

(*q*) Arnold *v.* Arnold, Bull. N. P. 143.

(*r*) Pyne *v.* Woolland, 2 Ventr. 180; Williamson *v.* Norwitch, Sty. 337; 1 Saund. 265, note (2) to Osborne *v.* Rogers; [Colt J. in Hatch *v.* Proctor, 102 Mass. 351, 354; Alvord *v.* Marsh, 12 Allen, 603; Wagner *v.* Ryan, 19 Misson. 196; Priest *v.* Watkins, 2 Hill (N. Y.), 225; Rattoon *v.* Overacker, 8 John. 126; Andrew *v.* Gallison, 15 Mass. 325, note;

the replication that he is executor *de son tort*, he obtains administration, he may rejoin that fact by way of plea *puis darrein continuance;* for it is consistent with the retainer in the plea. (*s*)

His liability in an action by the rightful executor.

With respect to the liability of an executor *de son tort* at the suit of the lawful representative of the deceased, there are several authorities to show, that if the rightful executor or administrator bring an action of trover or trespass, the executor *de son tort* may give in evidence, under the general issue, and in mitigation of damages, payments made by him in the rightful course of administration: (*t*) upon this ground, that the payments which are thus, as it is termed, *recouped* in damages, were such as the lawful executor or administrator would have been bound to make; and therefore, it cannot be considered as any detriment to him, that they were made by an executor *de son tort*. (*u*) But the executor *de son tort* cannot *plead*, in bar, to an action by the rightful executor or administrator, payments of debts, &c. to the value of the assets, or that he has given the goods in satisfaction of the debts; (*x*) and,

Richardson C. J. in Clements *v.* Swain, 2 N. H. 476; Farrell's Estate, 1 Tuck. Sur. 110.] But if administration be granted to one after he hath intermeddled wrongfully with the deceased's goods, this will not purge the wrong done before; and, therefore, a creditor may sue him as executor *de son tort*, or as a lawful administrator, at his election. Laury *v.* Aldred, 2 Brownl. 185; Godolph. pt. 2, c. 8, s. 2; Com. Dig. Administrator, C. 1; [Green *v.* Dewit, 1 Root, 183; Partee *v.* Caughran, 9 Yerger, 460.] But see Hill *v.* Curtis, *ante*, 264, note (*n*).

(*s*) Vaughan *v.* Browne, 2 Stra. 1106; S. C. Andr. 328; 1 Saund. 265, note (2), to Osborne *v.* Rogers; [Shillaber *v.* Wyman, 15 Mass. 322; Andrew *v.* Gallison, 15 Mass. 325, note; Priest *v.* Watkins, 2 Hill, 225; Hoar J. in Alvord *v.* Marsh, 12 Allen, 604, 605; Emery *v.* Berry, 28 N. H. 473; Wagner *v.* Ryan, 19 Missou. 196; Richardson C. J. in Clements *v.* Swain, 2 N. H. 476;] but see Whitehead *v.* Sampson, 1 Freem. 265.

(*t*) Graysbrook *v.* Fox, Plowd. 282; Anon. 12 Mod. 441; Whitehall *v.* Squire, Carth. 104, by Holt C. J.; Padget *v.* Priest, 2 T. R. 100, by Buller J.; Mountford *v.* Gibson, 4 East, 454, by Le Blanc J.; 2 Bl. Com. 508; Bac. Abr. Exors. B. 3, 1; Fyson *v.* Chambers, 9 M. & W. 468, per Lord Abinger; [Chapman C. J. in Carey *v.* Guillow, 105 Mass. 18, 21; Saam *v.* Saam, 4 Watts, 432; Weeks *v.* Gibbs, 9 Mass. 74; Reagan *v.* Long, 21 Ind. 264; Tobey *v.* Miller, 54 Maine, 480; Glenn *v.* Smith, 2 Gill & J. 493; Olmsted *v.* Clark, 30 Conn. 108.] It is said in Bull. N. P. 48, that perhaps in trover he could not give in evidence payment of debts to the value of such goods as were still in his custody, but only for such as he had sold; *sed quære.* [See Hardy *v.* Thomas, 23 Miss. 544, in accordance with the above suggestion in Bull. N. P. 48.]

(*u*) By Lawrence J. in Mountford *v.* Gibson, 4 East, 451.

(*x*) Anon. 12 Mod. 441; Whitehall *v.* Squire, Carth. 104, by Holt C. J.; 2 Bl. Com. 508; Elworthy *v.* Sandford, 3 H. & C. 336; [Buchanan C. J. in Glenn *v.* Smith, 2 Gill & J. 493.]

although the payments proved, under the general issue, to have been made by the executor *de son tort* amount to the full value of the goods sought to be recovered in the action of trespass or trover, * the lawful executor or administrator shall not be nonsuited, but will still be entitled to a verdict for nominal damages. (*y*) And in the modern case of Woolley *v.* Clark, (*z*) a will was proved by the executor named in it, who, after probate, sold the goods of the testator. At the time of the sale he had notice of a subsequent will, which was afterwards proved, and the probate of the former will revoked on citation: whereupon the executor under the latter will, brought trover against the executor under the former, for the goods sold: and it was holden that the action was sustainable to recover the full value, *and that the defendant was not entitled, in mitigation of damages*, to show that he had administered assets to the amount. (*a*)

Again, this recouping in damages can only be allowed to the executor *de son tort* in cases where there are sufficient assets to satisfy all the debts of the deceased; for otherwise the rightful executor or administrator would be precluded, not only from giving preference to one creditor over others of equal degree, which is one of the privileges of his office, but also from satisfying his own debt, in priority to all those of equal degree, by way of retainer. (*b*)

What effect the acts of an

It remains to be considered, what effect the acts of an executor *de son tort* may have on the goods of the de-

(*y*) Anon. 12 Mod. 441; 2 Phillipps on Ev. 234, note (6), 7th ed. The contrary is lain down as to the action of trover, in Buller's Nisi Prius, 48; but the authority cited for this position does not support it, and it is, as it seems, incorrect. See Mountford *v.* Gibson, 4 East, 447, by Lord Ellenborough; Roscoe on Evidence, 617, 7th ed.; [Rattoon *v.* Overacker, 8 John. 126.]

(*z*) 5 B. & Ald. 744; S. C. 1 Dowl. & Ryl. 409.

(*a*) [See Bradley *v.* Commonwealth, 31 Penn. St. 522.] It must be observed, that the authorities in favor of the right of an executor *de son tort* to recoup, in damages, payments made in a due course of administration, were not cited in the argument of this case, nor was the point mentioned. *Ideo quære*, whether it must be understood as overruling them.

(*b*) Wentw. Off. Ex. c. 14, p. 335, 14th ed.; Mountford *v.* Gibson, 4 East, 453, in the judgment of Lawrence J.; 2 Bl. Com. 507, 508; Elworthy *v.* Sandford, 3 H. & C. 330; [Appleton C. J. in Tobey *v.* Miller, 54 Maine, 483; Neal *v.* Baker, 2 N. H. 477. Under the statute of Massachusetts, an executor *de son tort* is not "allowed to retain or deduct any part of the goods or effects, except for such funeral expenses or debts of the deceased or other charges actually paid by him as the rightful executor or administrator might have been compelled to pay." Genl. Sts. c. 94, § 15.]

executor *de son tort* shall have on goods aliened by him.

ceased, with relation to the rightful executor or administrator and the alienee of the executor *de son tort*. (b^1)

* It is laid down in Coulter's case (c) that "it is clear that all lawful acts, which an executor *de son tort* doth, are good." So it was said in Graysbrook *v.* Fox, (d) by Walsh, *quod alii duo justiciarii concesserunt*, that if an administrator under a grant which is void (by reason of there being a will and executor) alienes the goods of the deceased to pay the funeral, or debts, the sale is good and indefeasible. (d^1) And Lord Holt, in Parker *v.* Kett, (e) laid down that a legal act done by an executor *de son tort* shall bind the rightful executor, and shall alter the property; and that the reason is, because the creditors are not bound to seek farther than him who acts as executor; therefore, if an executor *de son tort* pays 100*l.* of the testator's in a bag to a creditor, the rightful executor shall not have trover against the creditor. (f)

But when it is thus generally laid down, that payments made in the due course of administration, by one who is executor *de son tort*, are good, that must be understood of cases where such payments are made by one who is proved to have been acting at the time in the character of executor, and not of a mere solitary act of wrong, in the very instance complained of, by one taking upon himself to hand over the goods of the deceased to a creditor. Thus in Mountford *v.* Gibson, (g) the goods in question had originally been sold by the defendant to the intestate in his lifetime; on his death, they not having been paid for, on application to the intestate's widow for that purpose, she delivered them back to the defendant, in satisfaction of his demand. No other acts appeared to have been done by the widow, to show that she had before taken upon herself to act as executrix. The administrator brought trover for the goods against the creditor; on whose behalf it was

(b^1) [See Carpenter *v.* Going, 20 Ala. 587; Woolfork *v.* Sullivan, 23 Ala. 548; Wylly *v.* King, Geo. Dec. pt. II. 7; Wilde J. in Campbell *v.* Sheldon, 13 Pick. 8, 24.]

(c) 5 Co. 30 *b*.

(d) Plowd. 282.

(d^1) [A person acting under void letters of administration may be treated as an executor in his own wrong. Bradley *v.* Commonwealth, 31 Penn. St. 622.]

(e) 1 Ld. Raym. 661; S. C. 12 Mod. 471.

(f) See, also, the judgment of Le Blanc J. in Mountford *v.* Gibson, 4 East, 454, and of Littledale J. in Oxenham *v.* Clapp, 1 B. & Ad. 313.

(g) 4 East, 441. [See Gilchrist J. in Leach *v.* Pillsbury, 15 N. H. 139; Giles *v.* Churchill, 5 N. H. 341; Hoar J. in Alvord *v.* Marsh, 12 Allen, 605.]

contended, that he had a right * to protect himself in the action under such payment by the widow as executrix *de son tort*. But the court of king's bench held, on the ground above stated, that this was no defence. (*g*[1]) Accordingly, in Thomson *v.* Harding, (*h*) it was laid down in the judgment of the same court that the law is not that as against the true representative every payment from the assets of the deceased shall be valid, if made by a person who has so intermeddled with the property of the deceased as to render himself liable to be sued as executor *de son tort*. But that where the executor *de son tort* is really acting as executor, and the party with whom he deals has fair reason for supposing that he has authority to act as such, his acts shall bind the rightful executor and shall alter the property.

It must further be observed that the act of an executor *de son tort* is good against the true representative of the deceased only where it is lawful, and such an act as the true representative was bound to perform in the due course of administration. (*i*)

How far an administrator is bound by his own acts as executor *de son tort*.

Where a man has acted as executor *de son tort*, and afterwards obtains letters of administration, a question may arise, how far he is bound, in his character of rightful administrator, by his own acts done while executor *de son tort*. (*i*[1]) This subject will be considered hereafter, to-

(*g*[1]) [See Pickering *v.* Coleman, 12 N. H. 148; Alvord *v.* Marsh, 12 Allen, 605; Wilson *v.* Hudson, 4 Harring. 169; Mitchell *v.* Kirk, 3 Suced, 319.]

(*h*) 2 El. & Bl. 630.

(*i*) Buckley *v.* Barber, 6 Exch. 164; [Gilchrist J. in Pickering *v.* Coleman, 12 N. H. 148, 151, 152; Giles *v.* Churchill, 5 N. H. 341; Gay *v.* Lemle, 32 Miss. 309; *ante*, 271, note (*b*).]

(*i*[1]) [Although this may be a question, it is still said to be "certain that he can ratify and make valid, by relation, all those acts which would have been valid, had he been the rightful administrator." Outlaw *v.* Farmer, 71 N. Car. 35; Alvord *v.* Marsh, 12 Allen, 603. In Walker *v.* May, 2 Hill Ch. 22, it was held that where a judgment is recovered against one as executor *de son tort*, and he afterwards takes out letters of administration on the estate, the judgment will bind the estate in his hands, unless there be fraud or collusion. The administrator in such case is estopped to deny his former executorship. An executor *de son tort*, who had sold and delivered goods, belonging to the estate of the deceased, by a bill of sale with warranty of title, to A. at the request and on the credit of B., who knew that the assumed vendor was acting in his own wrong, was afterwards appointed administrator of the estate, and subsequently notified B. that he confirmed the sale; and B. said that the sale was fair and the price should be paid; and A. had always remained in possession of the goods; the administrator was held entitled to maintain an action against B. for the price of the goods. Hatch *v.* Proctor, 102 Mass. 351. The promise of an executor *de son tort*, to pay a debt of the deceased, will not prevent the bar of the statute of limitations to a suit for the debt brought against him afterwards, when

gether with the question as to what may be done by an administrator before letters of administration are granted. (*k*)

he is rightful administrator. Hazelden *v.* Elliott, 9 Leigh, 79. See *ante*, 265, note Whitesides, 2 Strobh. 353; Hansford *v.* (*r*).]

(*k*) *Post*, pt. I. bk. V. ch. I. § II.

* CHAPTER THE SIXTH.

OF THE EXECUTOR'S REFUSAL OR ACCEPTANCE OF THE OFFICE.

SECTION I.

When and how the Office may be refused.

Executors cannot be compelled to accept the office:

THE office of executor being a private one of trust, named by the testator, and not by the law, the person nominated may refuse, though he cannot assign the office; (*a*) and even if in the lifetime of the testator he has agreed to accept the office, it is still in his power to recede. (*b*)

but might be convened by the ordinary to accept or refuse.

But though the executor cannot be compelled to accept the executorship, whether he will or not, yet by stat. 21 Hen. 8, c. 5, s. 8, the ordinary might convene before him (*c*) any person made and named executor of any testament, "to the intent to prove or refuse the testament;" and if he neglected to appear, he was, previous to the stat. 53 Geo. 3, c. 127, punishable by excommunication for a contempt; (*d*) and might subsequently be dealt with in the mode substituted by that statute, s. 2, for excommunication. (*e*) This power of citation to take or refuse probate was, it is apprehended, transferred to the court of probate by the 23d section of the court of probate act, 1857, and a neglect to appear to the citation may be punished as for a contempt of the court under the 25th section.

* The time allowed to the person named executor, to deliberate

(*a*) Bac. Abr. Exors. E. 9. See Douglas *v.* Forrest, 4 Bing. 704, in the judgment of Best C. J.; [Dunning *v.* Ocean National Bank of the City of New York, 6 Lansing, 296, 298, and cases cited.]

(*b*) Doyle *v.* Blake, 2 Sch. & Lef. 239.

(*c*) See stat. 1 Edw. 6, c. 2, as to the form of the citation.

(*d*) Bro. Executors, pl. 90; Wentw. Off. Ex. 88, 14th ed.; Treat. on Eq. bk. 4, pt. 2, c. 1, s. 4.

(*e*) See stat. 2 & 3 W. 4, c. 93. (Act for enforcing Process upon Contempts in the Courts Ecclesiastical.)

whether he will accept or refuse the executorship, is uncertain, and left to the discretion of the judge, who has used, at his pleasure, not only within the year, but within a month or two, to issue his citation. (*f*) And now, if the executor administer, he will by stat. 55 Geo. 3, c. 184, s. 37, be liable to a penalty of 100*l.* and 10*l.* per cent. on the duty, if he omit to take probate within six months.

If he appear, either on citation or voluntarily, and pray time to consider whether he will act or not, the ordinary might, though the practice seems now obsolete, grant letters *ad colligendum* in the interim. (*g*) But if he appear, and refuse to act, or fail to appear to the above mentioned process, administration *cum testamento annexo* will be granted to another. (*h*)

Letters *ad colligendum*: administration *cum testamento annexo*.

And by stat. 21 & 22 Vict. c. 95, s. 16, "whenever an executor appointed in a will survives the testator but dies without having taken probate, and whenever an executor named in a will is cited to take probate and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor." (*i*)

Stat. 21 & 22 Vict. c. 95, s. 16: executor not acting or not appearing to a citation to be treated as if he had renounced.

(*f*) Swinb. pt. 6, s. 4; Godolph. pt. 2, c. 19, s. 1. [When a renunciation by one named as executor will be presumed from length of time, without qualifying or intermeddling with the estate, see Marr *v.* Peay, 2 Murph. (N. C.) 85.]

(*g*) Broker *v.* Charter, Cro. Eliz. 92; Treat. on Eq. bk. 4, pt. 2, c. 1, s. 4; Toller, 41; [*post*, 445.]

(*h*) Swinb. pt. 6, s. 1, pl. 3; s. 2, pl. 3, 4. See, as to administration *cum testamento annexo*, generally, *post*, pt. 1. bk. v. ch. III. § 1.

(*i*) [See Re Drayton, 4 McCord, 46; Allen J. in Hartnett *v.* Wandell, 60 N. Y. 356.] This enactment seems, in effect, to extend the 79th section of the stat. 20 & 21 Vict. c. 77 (*post*, 286), to the case of a party cited, who will not renounce or take any step. Therefore, where an executor to whom power has been reserved survives his acting co-executor, and does not appear to a citation, the case will stand as if his name had never appeared in the will, and the executors, if any, of the acting executor will be the representative of the original testator. In the Goods of Noddings, 2 Sw. & Tr. 15. So on the death of an executor, without having either renounced or taken probate, the executor of the survivor of two acting executors becomes the personal representative of the original deceased. In the Goods of Lorimer, 2 Sw. & Tr. 471. The section applies where the executor is cited to take probate of a *copy* of a will, and does not appear. Davis *v.* Davis, 31 L. J., P. M. & A. 216. [Renunciation by one named as executor may be implied from his refusal to act as such. Ayres *v.*

* Although, as above stated, an executor has his election whether he will accept or refuse the executorship, yet he may determine such election, by acts which amount to an administration. For if he once administer, it is considered that he has already accepted of the executorship, and the court may compel him to prove the will. (*j*) And by stat. 55 Geo. 3, c. 184, s. 37, as before mentioned, if he administer, and omit to take probate within six months after the death of the deceased, &c. he will forfeit 100*l.* and 10*l.* per cent. on the duty.

In what cases an executor may refuse:

he cannot if he once administer.

If an executor of an executor intermeddle in the administration of the effects of the first testator, he cannot refuse the administration of the effects of the latter; but it has been said that he may take upon himself the latter, and refuse the former. (*k*) However, the established practice of the prerogative court is to the contrary. (*l*)

Weed, 16 Conn. 291; Solomon *v.* Wixon, 27 Conn. 520; Thornton *v.* Winston, 4 Leigh, 152. Where an executor named in a will does not qualify or intermeddle with the estate for twenty years, it has been held, that a renunciation of his trust will be presumed. Marr *v.* Peay, 2 Murph. (N. Car.) 85. Where a person, named in the will as executor with other persons, being a judge of probate, received the will for probate from the other executors, allowed it to be proved before him, took bonds from the other executors, and assumed jurisdiction of the settlement of the estate under the will, it was held, that these acts were sufficient evidence of a renunciation of the trust, and were equivalent to an express refusal to accept it. Ayres *v.* Weed, 16 Conn. 291. As to the effect of a neglect to qualify as showing a refusal to act, see Uldrick *v.* Simpson, 1 S. Car. 283.]

(*j*) Godolph. pt. 2, c. 19, s. 2; Swinb. pt. 6, s. 2, pl. 6; s. 22, pl. 1; Bro. Exors. pl. 90; Wickenden *v.* Thomas, 2 Brownl. 58; Graysbrook *v.* Fox, 1 Plowd. 280, 280 *a*; Heusloe's case, 9 Co. 37 *b*; Treat. on Eq. bk. 4, pt. 2, c. 1, s. 3; Pytt *v.* Fendall, 1 Cas. temp. Lee, 553; Long *v.* Symes, 3 Hagg. 774; [Van Horne *v.* Fonda, 5 John. Ch. 388; Ambler *v.* Lindsay, L. R. 3 Ch. D. 198. If he proves the will generally without qualification he will be deemed to have accepted the trusts. Worth *v.* M'Arden, 1 Dev. & Bat. Eq. 199.]

(*k*) Shep. Touch. 464; Hayton *v.* Wolfe, Cro. Jac. 614; S. C. Palmer, 156; Hutton, 30; Wankford *v.* Wankford, 2 Freem. 520; 1 Salk. 309; [Worth *v.* M'Arden, 1 Dev. & Bat. (N. C.) Eq. 199; *ante*, 254, note (*b*).]

(*l*) In the Goods of Perry, 2 Curt. 655. Lord Holt certainly laid down in Wankford *v.* Wankford, that the executor of an executor may renounce being executor to the first testator. But it appears from the report in Freeman, that his lordship referred for this position to Hayton *v.* Wolfe. And it should be observed that, although, in that case, the court seems to have entertained the same opinion, yet, in fact, the point was not properly raised there; because the first executor had died without having obtained probate of the will of the first testator. Indeed, this is pointed out by Freeman in his report of Wankford *v.* Wankford; for after stating the dictum of Lord Holt, the reporter adds, "*Sed semble q'iste livre ne warrante cest point, q' in le case in Cro. le volunt ne*

There are some old cases, in which it is laid down, that if * an executor has once administered, not only is he compellable to undertake the office if the court desires it, but that the court has no jurisdiction to accept his refusal, and grant administration *cum testamento annexo* to another; (*m*) and in one case it was expressly holden, that if such an administrator bring an action, it is a good plea to say, that the executor made by the will has administered. (*n*) But these cases appear to have been decided while a great jealousy of the ecclesiastical court prevailed; and the law, it should seem, is now taken to be, that the court *may* (though perhaps he ought not) accept the testator's refusal, notwithstanding he has administered. (*o*) So if the executor has acted, and the court, not knowing it, commits administration to another, though the administration may be revoked, and the executor compelled to prove the will, (*p*) yet the grant of administration *cum testamento annexo*, until so revoked, is valid; and, consequently, in neither of these cases can a debtor to the testator, in answer to a suit by such administrator, set up the act *in pais* of the executor against his renunciation, in order to delay or prevent a recovery by the administrator. (*q*)

If the ordinary accepts his refusal, and grants administration, it is valid, although the executor has administered.

If one of several executors, after intermeddling with the effects, renounces, his renunciation is invalid, and the record of it on the probate granted to his co-executors ought to be cancelled. (*r*)

The only sense in which the committing of the administration under such circumstances can now be said to be void, is, as far as respects the protection of the executor; for if he has once administered, he will remain liable to be sued * as executor, both at law and in equity, in spite of his renunciation, and the consequent appointment of an administrator. (*s*) So if an executor administer to part

The executor is liable to be sued, although administration be granted to another, if he has administered.

fuit prove per le executor." See Brooke *v.* Haymes, L. R. 6 Eq. Cas. 25.

(*m*) Graysbrook *v.* Fox, 1 Plowd. 280, 280 *a*; Wankford *v.* Wankford, 1 Salk. 308; Hawkins & Lawse's case, 1 Leon. 155.

(*n*) Parten & Baseden's case, 1 Mod. 213.

(*o*) 1 Roll. Abr. Exor. C. 2, p. 907; Wentw. Off. Ex. 91, 14th ed. 2 Sch. & Lef. 237. *Factum valet*, says Wentworth, *quod fieri non debuit.* See, also, Jackson *v.* Whitehead, 3 Phillim. 577.

(*p*) Wentw. Off. Ex. 91, 14th ed.; Godolph. pt. 2, c. 31, s. 3.

(*q*) Doyle *v.* Blake, 2 Sch. & Lef. 237.

(*r*) In the Goods of Badenach, 3 Sw. & Tr. 465.

(*s*) Wentw. Off. Ex. 92, 14th ed.; Parsons *v.* Mayesden, 1 Freem. 151; Doyle *v.* Blake, 2 Sch. & Lef. 237; Rogers *v.* Frank, 1 Y. & Jerv. 409.

of the assets, he shall be charged with the receipts, as executor, though he renounced the executorship, and paid the money to the other executor who proved the will. (*t*)

The general question as to the liability, to creditors and legatees, of an executor who renounces after an act of administration, or who proves the will, and then professes to renounce his representative character, will be considered at large in a subsequent part of this treatise. (*u*)

What amounts to an administration.

With respect to what acts will amount to an administering, such as to render an executor compellable to take probate, two general rules may be laid down: 1st, That whatever the executor does with relation to the goods and effects of the testator, which shows an intention in him to take upon him the executorship, will regularly amount to an administration. 2dly, That whatever acts will make a man liable as an executor *de son tort*, (*v*) will be deemed an election of the executorship. (*w*)

Hence, it has been adjudged, that if the executor takes possession of the testator's goods, and converts them to his own use, or disposes of them to others, this is an administration. (*x*) So if he takes goods of a stranger, under an apprehension that they belonged to the testator, and administers them, this amounts to an administration. (*y*) As * where the testator being tenant at will of certain goods, his executor seized the goods, supposing them to belong to the testator, with an intent to administer; it was holden, that his intention appearing, this made him executor in law. (*z*)

Where a man who was named as one of several executors, in answer to an inquiry who were the executors, wrote a letter, saying, that he and others were executors, this was held to afford sufficient evidence that he had acted as executor. (*a*)

(*t*) Read *v.* Truelove, Ambl. 417.

(*u*) *Post*, pt. IV. bk. II. ch. II. § II.

(*v*) See *ante*, ch. V. p. 257 *et seq.* as to what acts will constitute a man *executor de son tort*. [Ambler *v.* Lindsay, L. R. 3 Ch. D. 198.]

(*w*) Godolph. pt. 2, c. 8, s. 1, and s. 6; Bac. Abr. tit. Executors, E. 10; Toller, 43; Rayner *v.* Green, 2 Curt. 248; but see Wentw. Off. Ex. c. 3, p. 94, 14th ed.; [Van Horne *v.* Fonda, 5 John. Ch. 388, 404.]

(*x*) Wentw. c. 3, p. 93, 14th ed.; [Van Horne *v.* Fonda, 5 John. Ch. 388;] or even take them into his hands, some say, without converting of them. Ib.

(*y*) 1 Roll. Abr. 917, pl. 12; Bac. Abr. tit. Executors, E. 10.

(*z*) 1 Roll. Abr. 917, pl. 13; Bac. Abr. tit. Executors, E. 10.

(*a*) Vickers *v.* Bell, Jurist, April 16, 1864; 3 N. R. 624; [4 De G., J. & S. 274.]

But if an executor seizes the testator's goods, claiming a property in them himself, though afterwards it appears that he had no right, yet this will not make him executor; for the claim of property shows a different view and intention in him than that of administering as executor. (*b*)

If an executor receives debts due to the testator, and, especially if he gives acquittances for such debts, this amounts to an election of the executorship; so, if he releases a debt due to the testator. (*c*)

So, if there are two executors, and one of them hath a specific legacy devised to him, and he takes possession of it, without the consent of his co-executor, this amounts to an administration; for a devisee cannot take a personal chattel devised to him, without the assent of the executor. (*d*)

In a modern case (*e*) the insertion of an advertisement calling on persons to send in their accounts, and to pay money due to the testator's estate, to A. and B. "his executors in trust," was held to make them compellable to take probate, and to subject them personally to the costs occasioned by their resistance; the estate being small, and left for two years and a half without a representative.

*An executor who has not proved is not to be considered as acting by assisting a co-executor, who has proved, in writing letters to collect debts, nor by writing directly to a debtor of the testator, and requiring payment. (*f*) But in Harrison *v.* Graham, (*g*) Barbara Graham by will appointed her mother, her sisters Margaret and Elizabeth, and her brother Robert, her executors, and died. Margaret alone proved the will, and acted chiefly as executor, and was described as the only acting one, in a letter of attorney executed by the others, who were therein described as executors, to empower Margaret to receive a quantity of stock. Robert, by virtue of another letter of attorney, executed by the other executors, transferred a quantity of the testatrix's S. S. stock, received the money, and paid it over the same day to

(*b*) Bac. Abr. tit. Executors, E. 10.

(*c*) Wentw. Off. Ex. 94, 14th ed.; Swinb. pt. 6, s. 22, pl. 2; Roll. Abr. 917, pl. 7, 8; Pytt *v.* Fendall, 1 Cas. temp. Lee, 553.

(*d*) 1 Roll. Abr. 917, tit. Executors, B. pl. 9; Bac. Abr. tit. Executors, E. 10. See *infra*, pt. III. bk. III. ch. IV. § III.

(*e*) Long *v.* Symes, 3 Hagg. 771.

(*f*) Orr *v.* Newton, 2 Cox, 274. See, also, Stacey *v.* Elph, 1 My. & K. 195.

(*g*) 3 Hill's MSS. 239; 1 P. Wms. 241, note (*y*) to 6th ed.

Margaret. After this she and the mother died, making Robert their executor. It did not appea that Robert had, under the first executorship, done any other act as executor, besides giving the one letter of attorney, and receiving the other. But Lord Hardwicke held that this was such an act of administration in Robert as should make him chargeable as to his own estate. (*h*)

An executor may renounce after he is sworn.

Taking the oath as executor is not to be considered as an intermeddling such as to preclude renunciation. (*i*) In a case indeed, decided 31 Car. 2, the executor named in the will had taken the usual oath, and then refused (but after a *caveat* entered), and another endeavored to obtain letters of administration. The executor came afterwards to desire the will under probate, and contested the granting of administration; and it was adjudged against him, supposing that he was bound by the refusal. But after an appeal to the delegates, a *mandamus* was prayed, and granted by the * court of king's bench; for that, having taken the oath, he could not be admitted to refuse, and the ecclesiastical court had no further authority. (*k*) However, if he has not administered, the court will now, upon his own application, dismiss him, and allow him to renounce probate, even after the usual oath, and an appearance given as executor. Such a renunciation was permitted in a modern case, (*l*) in order that the executor might be examined as

(*h*) The judgment in this case will be found fully stated, *post*, pt. IV. bk. II. ch. II. § II. [As to the effect of an executor proving the will generally without attempting to qualify the act, see Worth *v.* M'Arden, 1 Dev. & Bat. (N. C.) Eq. 199.]

(*i*) 3 Hagg. 216; [Miller *v.* Meetch, 8 Penn. St. 417.] But he cannot renounce after he has taken probate. In the Goods of Veiga, 32 L. J., P. M. & A. 9. [It has been held in Massachusetts that an executor, after probate of the will, accepting the trust, and giving bond for its faithful execution, cannot renounce the trust. Sears *v.* Dillingham, 12 Mass. 358. But it is now provided by statute that an executor or administrator may, upon his request, be allowed to resign his trust, when it appears to the probate court to be proper; and upon such resignation, the court shall grant letters of administration to some suitable person, with the will annexed, or otherwise as the case may require. Genl. Sts. c. 101, s. 5. See Russell *v.* Hoar, 3 Met. 187; Thayer *v.* Homer, 11 Met. 104. So in New Hampshire. Morgan *v.* Dodge, 44 N. H. 258. In North Carolina, the court of probate may accept the renunciation of an executor at any time before he has intermeddled with the effects of the testator, even after he has proved the will. So of the executor of an executor as to the first will. Mitchell *v.* Adams, 1 Ired. 298. But an executor who has entered upon the discharge of his trust cannot afterwards resign it. Haigood *v.* Wells, 1 Hill (S. Car.), 59; Washington *v.* Blunt, 8 Ired. Eq. 253. See Finn *v.* Chase, 4 Denio, 85; In re Mussault, T. U. P. Charlt. 259.]

(*k*) Anon. 1 Ventr. 335.

(*l*) Jackson *v.* Whitehead, 3 Phillim.

a witness; and Sir John Nicholl, in giving his judgment, seemed to doubt the correctness of the report of the former case, and said that at most it only decided that a voluntary renunciation is not so binding as to exclude an executor from the duties of the executorship.

How an executor may renounce:

With respect to the mode of refusal by the executor, it is laid down that refusal cannot be verbally, or by word, but it must be by some act entered or recorded in the spiritual court; and therefore must be done before some judge spiritual, and not before neighbors in the country. (*m*) But if the executor send a letter to the ordinary, by which he renounces, and the refusal be recorded, it is sufficient. (*m*[1]) As in a case where Sir Ralph Rowlet made the Lord Keeper Bacon, C. J. Catlin, and the master of the rolls, executors; they wrote a letter to the ordinary, that they could not attend the executorship, and therefore wished him to commit administration; who did so, making every one of their refusals to be recorded; and this was held good. (*n*) And accordingly it has been lately held that the renunciation need not be under seal. (*o*)

the refusal must not be *in pais*, but in the spiritual court:

Until the refusal is recorded, no person can take administration. (*p*)

577. See, also, Panchard *v.* Weger, 1 Phillim. 212; Meek *v.* Curtis, 1 Hagg. 129; In the Goods of Wilkinson, 3 Phillim. 96; Long *v.* Symes, 3 Hagg. 774. [See Sawyer *v.* Dozier, 5 Ired. (N. Car.) Law, 97.]

(*m*) Wentw. Off. Ex. 88, 14th ed.; Long *v.* Symes, 3 Hagg. 776; [Newton *v.* Cocke, 10 Ark. 169; Muirhead *v.* Muirhead, 6 Sm. & M. 451. In Stebbins *v.* Lathrop, 4 Pick. 33, 44, Wilde J. said: "If the executor refuse the executorship, his renunciation should be entered and recorded. A refusal by any act *in pais*, as a mere naked declaration to that effect, is not sufficient." So the refusal of those entitled to administration with the will annexed, after renunciation by the executor, should appear of record, before administration is granted to *a creditor*. Stebbins *v.* Lathrop, 4 Pick. 33. See Ayres *v.* Clinefelter, 20 Ill. 465; Casey *v.* Gardiner, 4 Bradf. Sur. 13. But it has been held in some cases that there may be a valid renunciation of the executorship of a will by matter *in pais*. Thornton *v.* Winston, 4 Leigh, 152. See Thompson *v.* Meek, 7 Leigh, 419; *ante*, 275, note (*i*).]

(*m*[1]) [Commonwealth *v.* Mateer, 16 Serg. & R. 416; Miller *v.* Meetch, 8 Penn. St. 417. But see Thompson *v.* Meek, 7 Leigh, 419.]

(*n*) Broker *v.* Charter, Cro. Eliz. 92; S. C. Owen, 44; Moor, 272; 1 Leon. 135; Wentw. Off. Ex. 88, 14th ed.; Godolph. pt. 2, c. 19, s. 4.

(*o*) In the Goods of Boyle, 3 Sw. & Tr. 426. [See Commonwealth *v.* Mateer, 16 Serg. & R. 416. By statute in New York, the renunciation is required to be by an instrument in writing, attested by two witnesses, and must be acknowledged or otherwise proved and filed. 2 R. S. 70, § 8.]

(*p*) 3 Hagg. 776; [Stebbins *v.* Lathrop, 4 Pick. 33, 44; Robertson *v.* McGeoch, 11

before whom, when the ordinary himself is executor:

*In case the ordinary himself were made executor, then he might refuse before his own commissary. (*q*)

form of renunciation:

If a party renounce in person, he takes an oath that he has not intermeddled in the effects of the deceased, and will not intermeddle therein with any view of defrauding the creditors. But he may renounce by proxy, and then the oath is dispensed with. (*r*)

executor declining the usual oath:

If the executor refuse to take the usual oath, or, being a Quaker, to make the affirmation, this amounts to a refusal of the office, and shall be so recorded. (*s*)

his renunciation cannot be in part:

An executor cannot in part refuse. He must refuse entirely, or not at all. (*t*) An exception has been supposed to exist in the case of his testator being executor to another person; for there, it has been said, he might well assent to be executor to the one testator, and refuse for the other. But the established practice of the prerogative court was to the contrary. (*u*)

the renunciation will not be received unless accompanied by the will.

It was the practice of the prerogative office of Canterbury not to receive the renunciation of a party, unless it be accompanied by the original will of the deceased, probate of which it purports to renounce. (*v*)

Paige, 640; Codding *v.* Newman, 3 N. Y. Sup. Ct. 364. But see Thompson *v.* Meck, 7 Leigh, 419.]

(*q*) Wentw. Off. Ex. 89; Bro. Ordinary, pl. 13. The usual practice of the registry has been to require renunciation to be under the hand of the party entitled to the grant. But where he is out of England, an authority to renounce by power of attorney may suffice. In the Goods of Rosser, 3 Sw. & Tr. 490.

(*r*) Toller, 42.

(*s*) Rex *v.* Raines, 1 Ld. Raym. 363, per Holt C. J.; Toller, 41. If the executor neglects probate for a year, this is a refusal irrevocable in the civil law. Bewacorne *v.* Carter, Moor, 273. [See *ante*, 275, note (*i*). One having been appointed by will an executor and also a trustee, will be deemed to have declined the appointment of trustee, if he give bond as executor and does not give bond as trustee. Williams *v.* Cushing, 34 Maine, 370; Groton *v.* Ruggles, 17 Maine, 137. The same is true, whether the executor is appointed trustee directly or is constituted such by construction of the will. Deering *v.* Adams, 37 Maine, 264, 265. See De Peyster *v.* Clendining, 8 Paige, 295; Judson *v.* Gibbons, 7 Wendell, 226; Hanson *v.* Worthington, 12 Md. 418; Knight *v.* Loomis, 30 Maine, 204; Wheatley *v.* Badger, 7 Penn. St. 459.]

(*t*) Paule *v.* Moodie, 2 Roll. Rep. 132; 11 Vin. Abr. 139, pl. 10. [See Thornton *v.* Winston, 4 Leigh, 152.]

(*u*) *Ante*, 276, note (*l*). [See 254, note (*b*).]

(*v*) In the Goods of Fenton, 3 Add. 35.

*SECTION II.

The Consequence of Renunciation by an Executor.

An executor, who has renounced, may, at a time before the grant of administration *cum testamento annexo* has passed the seal of the court, retract his renunciation. (*x*) And even an executor, who had renounced in order to become a witness in a suit commenced touching the validity of the will, might, at the termination of such suit, retract his renunciation, and take probate of the will: (*y*) but this could not be done without the consent of all parties in court. (*z*)

The renunciation may be retracted at any time before administration granted.

If there be a sole executor appointed who renounces, or several executors, who all renounce, administration *cum testamento annexo* will thereupon be granted to another, (*a*) and the sole executor in the one case, and each of the several executors in the other, thereupon became incapable of being at any time afterwards admitted to the executorship. (*b*) *It has indeed been said, that such in-

Where there is a sole executor, or several, who all renounce, and administration is granted:

(*x*) McDonnell *v.* Prendergast, 3 Hagg. 212, cited and recognized by Sir H. Jenner Fust in Harrison *v.* Harrison, 4 Notes of Cas. 455, 456; 1 Robert. 419; [Robertsen *v.* McGeech, 11 Paige, 640; Genl. Sts. Mass. c. 93, § 6; Dempsey's Will, 1 Tuck. Sur. 51.]

(*y*) Thompson *v.* Dixon, 3 Add. 272.

(*z*) 3 Hagg. 216. Sir John Nicholl observed, that the admission of the retractation in such a case had always presented difficulties to his mind. The executor was allowed to renounce, for the purpose of being examined as a witness to forward the ends of justice, and then was allowed to retract for the benefit of the estate. Ib.

(*a*) If there are several executors, they must all duly renounce, before administration with the will annexed can be granted. 1 Roll. Abr. 907, pl. 6; Toller, 44; [Matter of Maxwell, 3 N. J. Eq. (2 Green) 611. A will does not become void by the refusal of the executor to accept the trust. In such case administration is granted with the will annexed. So, if a testamentary disposition of property is made and no executor is named. Stebbins *v.* Lathrop, 4 Pick. 43; Jackson *v.* Jeffries, 1 Marsh. (Ky.) 88.]

(*b*) Broker *v.* Charter, Cro. Eliz. 92; S. C. Owen, 44; Moor, 272, by the name of Bewacorne *v.* Carter, 1 Leon. 135; Wentw. Off. Ex. 95, 14th ed.; Henslee's case, 8 Co. 37 *a*; Touchst. 466; Robinson *v.* Pett, 3 P. Wms. 251; [Thornton *v.* Winston, 4 Leigh, 152.] But if administration be committed in consequence merely of the default of the executor to come in to prove the will on the above mentioned process of citation, he had a right at any future time to appear and prove the will, and cause the administration to be revoked. Godolph. pt. 2, c. 31, s. 3; Wentw. Off. Ex. 92, 14th ed.; Baxter & Bale's case, 1 Leon. 90. But see now, stat. 21 & 22 Vict. c. 92, s. 16; *ante*, 275. [If a party named as executor in a will, is appointed administrator, before probate, and acts as such, he may, after probate of the will, take upon him-

capacity lasted only during the life of such administrator, and that after his death the renunciation might be retracted. (*c*) But in a modern case, where there were two executors, who had both renounced, and administration *cum testamento annexo* had been granted, one of the executors, upon the death of such administrator, wished to retract his renunciation, and to be admitted to take probate as executor; and in support of the motion for that purpose, it was urged, that an executor, after renunciation and administration granted, had still a right to probate whenever a vacancy occurred in the representation of the deceased. But the court refused to accede to the motion, on an objection of the inconvenience that might occur in other quarters from chains of executorship once broken being thus suffered to revive. Should this deceased, for instance, have been the surviving executor of other testators, and should administrations have been granted of their effects on the renunciation of his executors, if the chain of executorship were to revive, as proposed, there would be double and conflicting representation of such testators; the one by grant of administration, as above; the other by the revived chain of executorship. (*d*)

the renunciation can never be retracted:

But under the old law, where there were several executors, and some renounced before the ordinary, and one or more proved the will, the renunciation was not peremptory. (*d*[1]) Such as refused, however formally, might, at a subsequent time, come in and administer; (*e*) and although they had never acted during the lives, they might assume the executorship after the death of their co-executors. (*f*)

but where there are several executors, and some renounce, and others prove the will

self the office of executor under it; the fact that he has acted as administrator not being deemed in such a case a renunciation of his right to be executor. Taylor *v.* Tibbatts, 13 B. Mon. 177.]

(c) Toller, 42; 2 Roberts. on Wills, 171.

(*d*) In the Goods of Thornton, Add. 273; [Thornton *v.* Winston, 4 Leigh, 152.]

(*d*[1]) [Taggart's Petition, 1 Asbm. 321.]

(e) Swinb. pt. 6, s. 3, pl. 22; Bro. Executors, pl. 117; 1 And. 27; Godolph. pt. 2, c. 19, s. 4; Wentw. Off. Ex. 96, 14th ed.; Hensloe's case, 9 Co. 37 *a*; Middleton's case, 5 Co. 28 *a*; Brookes *v.* Brookes, 1 Salk. 3; 4 Burn E. L. 244; Treatise on Eq. bk. 4, pt. 2, c. 1, s. 2; Creswick *v.* Woodhead, 4 M. & Gr. 814, per Tindal C. J.; [Taggart's Petition, 1 Ashm. 321; Judson *v.* Gibbons, 5 Wend. 224; Bodle *v.* Hulse, 5 Wend. 313; Codding *v.* Newman, 3 Thomp. & C. (N. Y.) 364. The granting of probate and issuing letters testamentary to one or more of several executors are not a bar or estoppel to the subsequent administration by the others. Matter of Maxwell, 3 N. J. Eq. (2 Green) 611.]

(*f*) Pawlet *v.* Freak, Hardr. 111; Brooks *v.* Stroud, 7 Mod. 39; Wankford *v.* Wankford, 1 Salk. 307; House *v.* Lord Petre, 1 Salk. 311; Rex *v.* Simpson, 3 Burr. 1463; S. C. 1 W. Bl. 456; Hay-

the renunciation is not peremptory: it may be retracted, according to the practice of the civilians, at any time before an actual grant of administration *de bonis non*, but not afterwards.

And it * has been considered that if administration were committed to another, before refusal by the surviving executor, such administration would be void. (*g*) But it appears that this position is at variance with the long established practice of the ecclesiastical court; according to which it has never been deemed necessary that the surviving executor should be called upon a second time to renounce or refuse, before letters of administration were granted to another. And it was deliberately held by Sir H. Jenner Fust (*h*) on an elaborate review of the authorities, that this practice is right, and that though the surviving executor was entitled to come in and retract his renunciation, if he thought proper so to do, at any time before the grant of administration *de bonis non* had passed the seal, (*h*[1]) yet if he had not retracted, and his renunciation still remained recorded against him, it was not requisite that he should renounce a second time, or that he should be cited, before a good and valid grant of administration *de bonis non* to another could be made; and that the executor, after such a grant had been made, could not procure it to be revoked and obtain a grant of probate to himself, on a retractation of his renunciation made subsequently to the actual grant of administration *de bonis non*.

This decision was afterwards fully discussed, and, after a careful consideration of all the authorities and doctrines bearing on the subject, confirmed and adopted by the board of exchequer, on the ground that though the stat. * 21 Hen. 8, c. 5, s. 3, requires a refusal by the executor before any grant of administration can be made, yet it is silent as to the time when the refusal is to be

ward *v.* Dale, 2 Cas. temp. Lee, 333; Arnold *v.* Blencoe, 1 Cox, 426; Cottle *v.* Aldrich, 4 M. & Sel. 177; Strickland *v.* Strickland, 12 Sim. 253, 259; [Judson *v.* Gibbons, 5 Wend. 224; Perry *v.* De Wolf, 2 R. I. 103.] See, also, In re Deichman, 3 Curt. 124; *ante*, 247. According to the older practice of the civilians, if there were two executors, and one refused, and the other took probate, he that did refuse the executorship could not assume the office after the death of his fellow executor. Anon. Dyer, 160 *b*; Godolph. pt. 2, c. 7, s. 4; Wentw. 96, 14th ed.; 1 Salk. 311.

(*g*) Wankford *v.* Wankford, 1 Salk. 307, 308; House *v.* Lord Petre, Ib. 311; Fonblanque's Treat. on Eq. bk. 4, pt. 2, c. 1, s. 2, note (*d*).

(*h*) Harrison *v.* Harrison, Prerog. H. T. 1846; 4 Notes of Cas. 434; S. C. 1 Robert. 406.

(*h*[1]) [One of two executors, who has renounced, upon the removal of his co-executor for cause pursuant to statute, and before any letters of administration with the will annexed have been granted, may retract his renunciation, and thereupon have letters testamentary issued to him. Codding *v.* Newman, 3 Thomp. & C. (N. Y.) 364.]

made; and the ecclesiastical court have invariably treated a formal refusal made in court at any time after the testator's decease as binding, unless the refusing party afterwards, of his own accord, comes in and retracts his refusal; which practice the barons considered as consistent with the statute, and perfectly reasonable, and not conflicting with any positive decision in the temporal courts. (*i*)

And now by stat. 20 & 21 Vict. c. 77, s. 79, "where any person, after the commencement of this act, renounces probate of the will of which he is appointed executor, or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation of the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor." (*j*)

Stat. 20 & 21 Vict. c. 77, s. 79. Rights of an executor renouncing probate to cease as if he had not been named in the will.

Rule 50, P. R. No person renouncing in one character to take representation in another.

"By rule 50, P. R. (non-contentious business), no person who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the deceased in another character." (*k*)

Whether executors may, after

It is said by very eminent writers, that where a power is given to executors, they may exercise it, although they renounce probate of the will. (*l*) But with the greatest

(*i*) Venables *v.* The East India Comp. 2 Exch. 633.

(*j*) See In the Goods of Noddings and In the Goods of Lorimer, *ante*, 275, 276, note (*i*). There is nothing in this enactment to prevent the court from allowing a retractation of the renunciation according to the old practice in a case fit for it, *e. g.* where it has taken place after an intermeddling. 3 Sw. & Tr. 466. See In the Goods of Whitham, L. R. 1 P. & D. 303.

(*k*) [But see Briscoe *v.* Wickliffe, 6 Dana, 157, where it was held that a widow designated in a will as sole executrix, might decline to act in that capacity, and yet might be appointed to act as administratrix with the will annexed, and might act jointly with another administrator, in the latter capacity, and the acceptance of such appointment would not make her executrix in fact, but would rather be evidence of her renunciation. Nor would the appointment of the co-administrator be void or irregular. See, *ante*, 283, note (*b*); Sawyer *v.* Dozier, 5 Ired. 97; Miller *v.* Meetch, 8 Penn. St. 417. So it has been held in Missouri, that an executor, whose appointment is avoided by his being an attesting witness, may be appointed administrator with the will annexed. Murphy *v.* Murphy, 24 Misson. 526.] See In the Goods of Lofting, 3 Sw. & Tr. 307, from which it appears that the rule stated in the text is capable of modification by the court. See, also, In the Goods of Russell, L. R. 1 P. & D. 634.

(*l*) 1 Sugden on Powers, 138, 6th ed.; 2 Prest. on Abstr. 264.

*deference to their authority, it may be doubted whether the position is true, unless when the power is given them in their proper names, and without reference to their office as executors. (*m*)

renouncing, exercise a power.

If a power has been conferred on a party to a deed, his execu-

(*m*) See Perkins, No. 548, where the distinction is thus taken: "If a man will that A. and B., his executors, shall sell, &c. and they refuse before the ordinary, yet it seems they may sell, because they are certainly named, so that it appears the will of the testator is, that they shall sell, whether they refuse or not. But otherwise it shall be (as it seems) if he will that his executors shall sell, without expressing their names, and they all refuse before the ordinary, they cannot sell." See, also, the cases of Yates *v.* Compton, 2 P. Wms. 309, and Keates *v.* Burton, 14 Ves. 434 (which is cited by Sir E. Sugden). In the latter case, a power was given to "my said trustees and executors," and one of the executors died and the other renounced, without exercising it. Sir W. Grant observed, "The power is given to the executors, but they have not exercised it, and they have renounced the only character in which it was competent to them to exercise it." See Ford *v.* Ruxton, 1 Coll. 407; [Dunning *v.* The Ocean National Bank of the City of New York, 6 Lansing, 296. In Tainter *v.* Clark, 13 Met. 220, 226, it appeared that the testator appointed T. to be his sole executor, and authorized him to sell and convey such of his (testator's) property, as in T.'s judgment would best promote the interest of all concerned. T. declined to act as executor, and D. was appointed administrator with the will annexed; the question raised was whether the power to sell devolved upon D. After stating some reasons for holding that it did not, Wilde J. added: "There is another ground on which we hold, very clearly, that the power to sell has not been transmitted to the administrator, if by law it could be. Tucker, the donee of the power, has never renounced it, and the consequent trust, and we are not aware of any impediment to his executing it. He has, it is true declined the office of executor, but the power of selling real estate is no part of the business of an executor or administrator; unless he obtains license under the statute he has no interest in the land, and no authority to sell it, except the authority which may be derived from the statute. The executor in this case was the donee of a trust power which was distinct from the office of executor, and the trust might exist for years after the duties of the office of executor had been fully performed. This trust power has never been renounced, and consequently has not been transmitted to the administrator. This point has been very fully considered in Wills *v.* Cowper, 2 Ham. 124, and in Conklin *v.* Egerton, 21 Wend. 430." See *post*, 1797, note (*h*). "In the Year Book, 15 Hen. 7, 11, it is laid down for good law, 'that if a man has feoffees upon confidence, and makes a will that his executors shall alien his lands, then if the executors renounce administration of the goods, yet they may alien the lands, for the will of land is not a testamentary matter.'" Wilde J. in Tainter *v.* Clark, 13 Met. 227. In the subsequent case of Clark *v.* Tainter, 7 Cush. 567, the above observations of Judge Wilde were carried into practical effect. In addition to the above facts it appeared that T. subsequently accepted the office of trustee under the will; and it was held that he did not, by renouncing the office of executor, lose the power to sell as trustee under the will, and that sales and conveyance so made by him, after his acceptance of the trust, were valid as against the testator's residuary devisees and their heirs. See *post*, 1796, note (*h*); Shaw C. J. in Treadwell *v.* Cordis, 5 Gray, 359.]

tors, administrators, and assigns, and he dies, having appointed several executors, one of whom renounces, the others who act may well exercise the power. (*n*)

An executor who renounces may sue his co-executor.

If a debtor makes his creditor and another his executors, and the creditor neither intermeddles, nor proves the will, he may bring an action against the other executor. (*o*)

(*n*) Granville (Earl) *v.* M'Neile, 7 Hare, 156; [Bunner *v.* Storm, 1 Sandf. 357].

(*o*) Dorchester *v.* Webb, Sir W. Jones, 345; Rawlinson *v.* Shaw, 3 T. R. 557; [Hunter *v.* Hunter, 19 Barb. 631.]

*BOOK THE FOURTH.

OF PROBATE.

CHAPTER THE FIRST.

OF THE NECESSITY OF OBTAINING PROBATE IN THE COURT OF PROBATE, AND OF THE JURISDICTION AND AUTHORITY OF THAT COURT: AND THEREWITH OF THE ACTS AND LIABILITIES OF AN EXECUTOR BEFORE PROBATE.

SECTION I.

The Will must be proved in the Probate Court.

The ecclesiastical court was formerly the only court in which the validity of a will of personalty could be established or disputed.

It appears to have been a subject of much controversy, whether the probate of wills was originally a matter of exclusive ecclesiastical jurisdiction. (*a*) But whatever may have been the case in earlier times, it is certain that, at the time of the passing of the court of probate act (stat. 20 & 21 Vict. c. 77), the ecclesiastical court was the only court in which the validity of wills of personalty, or of any testamentary paper whatever relating to personalty, could be established or disputed. (*b*) An exception to this general rule was to be found in the case of certain courts baron that had had probate of wills time out of mind, and had always continued that usage. (*c*)

(*a*) Bac. Abr. Exors. E. 1; Dyke *v.* Walford, 5 Moore P. C. 434; S. C. 6 Notes of Cas. 309.

(*b*) Fonblanq. Treat. on Eq. pt. 2, c. 1, s. 1, note (*a*); Bac. Abr. Exors. E. 1; *post*, pt. 1. bk. v. ch. 1.; Gascoyne *v.* Chandler, 2 Cas. temp. Lee, 241. See *post*, pt. 1. bk. iv. ch. iii. § ix. as to the general question, of what instruments probate is necessary.

(*c*) Bac. Abr. tit. Exors. E. 6; Swinb. pt. 6, s. 11, pl. 3. Such a prescription existed in the manor of Mansfield and the manors of Cowley and Caversham, in Oxfordshire, the courts of which the author of Wentworth's Office of an Executor (supposed to be Mr. Justice Doddridge) says that he himself kept. P. 100, 14th ed.; Godolph. pt. 1, c. 20, s. 1.

In which of the ecclesiastical courts the will was to be proved.

* Regularly, the court in which the testament of a deceased person ought to have been proved was the court of the ordinary of the place wherein the testator dwelt, *i. e.* generally speaking the bishop of the diocese. (*d*)

Certain districts, however, are exempt from the jurisdiction of the ordinary of the diocese in which they lie, and are called peculiars, because they have a peculiar and special ordinary of their own. (*e*) And there is one sort of peculiar, called a royal peculiar, which is exempt from the jurisdiction, not only of the diocesan, but of the archbishop also, and which anciently were immediately subordinate to the see of Rome. (*f*) Consequently, in all these districts such special ordinaries had respectively a power, even of common right, to grant probate of the testaments and administration of the goods of those who died within them leaving no *bona notabilia* out of their limits. (*g*)

But if the deceased, at the time of his death, had effects to such an amount as to be considered notable goods, usually called *bona notabilia*, (*h*) within some other diocese * or peculiar than that in

(*d*) Godolph. pt. 1, c. 22, s. 2; 2 Inst. 398; Com. Dig. Administrator, B. 5; [*post*, 291, note (*o*[1]).]

(*e*) 2 Gibs. Cod. 973, note (*b*); Aughtie *v.* Aughtie, 1 Phillim. 201, note (*a*).

(*f*) See Smith *v.* Smith, 3 Hagg. 768; Easton *v.* Carter, 5 Exch. 8. By the stat. 25 Hen. 8, c. 19, these were placed immediately under the jurisdiction of the crown. See Parham *v.* Templer, 3 Phillim. 246; Johnson *v.* Ley, Skinn. 589; 3 Hagg. 763.

(*g*) 1 Salk. 42, *arguendo*.

(*h*) By the 93d of the canons of 1603, it was established that 5*l.* should be the sum or value of *bona notabilia*. These canons, though they do not bind the laity, *proprio vigore*, were certainly prescriptions to the ecclesiastical courts. More *v.* More, 2 Atk. 158; Middleton *v.* Crofts, 2 Atk. 653; S. C. 2 Stra. 158. And there are many provisions contained in them which are declaratory of the ancient usage and law of the church of England, which in that respect, and by virtue of such ancient allowance are binding on laymen. See, also, Marshal *v.* Bishop of Exeter, 7 C. B. N. S. 653; 13 C. B. N. S. 820. It should be added, that simple contract debts made *bona notabilia* where the *debtor* lived, whereas specialty debts constituted *bona notabilia* at the place where the specialty happened to be at the time of the death of the testator. France *v.* Aubery, 2 Cas. temp. Lee, 534. See Fernandes' Exors. case, L. R. 5 Ch. App. 314. [Gray J. in Pinney *v.* McGregory, 102 Mass. 186, 193, says: "To limit the power of granting administration to cases in which the goods are or the debtor resides in the commonwealth at the time of the death of the intestate would be to deny to the creditors and representatives of the deceased, whether citizens of this or of another state, all remedy whenever goods are brought into this state, or a debtor takes up his residence here, after the death of the intestate. The more liberal construction is necessary to prevent a failure of justice." See Dawes *v.* Boylston, 9 Mass. 337; Wheelock *v.* Pierce, 6 Cush. 288; Picquet, appt. 5 Pick. 65; Emery *v.* Hildreth, 2 Gray, 228; Wells J. in Merrill *v.* New England Ins. Co. 103 Mass. 247, 248. "Juris-

which he died, then the will must have been proved before the metropolitan of the province by way of special prerogative; (*i*) whence the courts where the validity of such wills were tried, and the offices where they were registered, were called the prerogative courts and the prerogative offices of Canterbury and York.

The consequence was, that questions of no little difficulty often arose with respect to the inquiry, whether the will was to be proved in the diocesan or in the prerogative court. And great inconvenience was also incurred where the deceased died possessed of goods in both the provinces of York and Canterbury. For it was held, that if there were *bona notabilia* in two dioceses of one province, and in two of the other, there must be two prerogative probates. (*k*) So if there were *bona notabilia* in one diocese only of the province of Canterbury, and in one of the province of York, each bishop must have granted probate; (*l*) or if within one province the testator had *bona notabilia* in divers dioceses, and in the other but in one diocese, then in the one place the will must have been proved before the archbishop, and in the other place before the particular bishop. (*m*)

But now by stat. 20 & 21 Vict. c. 77 (intituled *An act to amend the law relating to probates and letters of administration in England*), after reciting that "it is expedient that all jurisdiction in relation to the grant and revoca- 20 & 21 Vict. c. 7 s. 3. Testamentary

diction, or the right of administration in respect to debts due a deceased person, never follows the residence of the creditor. They are always *bona notabilia*, unless they happen to fall within the jurisdiction where he resided; judgments are *bona notabilia* where the record is, specialties where they are at the time of the creditor's decease, and simple contracts where the debtor resides." Vaughan *v.* Barrett, 5 Vt. 333, 337; Lord Abinger C. B. in Attorney General *v.* Bouwens, 4 M. & W. 191, 192; Bell J. in Taylor *v.* Barron, 35 N. H. 494; Thompson *v.* Gilman, 2 N. H. 291, 292; Emery *v.* Hildreth, 2 Gray, 228, 230, 231.]

(*i*) 4 Inst. 335.

(*k*) Gibs. Cod. vol. 1, p. 472, note (*w*); Burston *v.* Ridley, 1 Salk. 39; Twyford *v.* Treal, 7 Sim. 102.

(*l*) Burston *v.* Ridley, 1 Salk. 39.

(*m*) Wentw. Off. Ex. 110, 111, 14th ed.; [Bell J. in Taylor *v.* Barron, 35 N. H. 494.] And this has been considered to apply equally to the province of an Irish archbishop, with relation to either of the English ones, or *è converso*. 1 Roll. Abr. Exors. G. 1; Shaw *v.* Storton, 1 Freem. 102; Huthwaite *v.* Phaire, 1 Sc. N. C. 43; S. C. 1 M. & Gr. 159. [When a case is within the jurisdiction of the probate court in two or more counties in Massachusetts, the court which first takes cognizance thereof by the commencement of proceedings, shall retain the same; and administration first granted shall extend to all the estate of the deceased in the state, and exclude the jurisdiction of the probate court of every other county. Genl. Sts. c. 117, § 3. See People *v.* White, 11 Ill. 341.]

and other jurisdictions of ecclesiastical and other courts abolished.

tion of probates of wills and letters of administration in * England should be exercised in the name of her majesty in one court," it is enacted by sect. 3, that "the voluntary and contentious jurisdiction and authority of all ecclesiastical, royal peculiar, peculiar, manorial, and other courts and persons in England, now having jurisdiction or authority to grant or revoke probate of wills or letters of administration of the effects of deceased persons, shall, in respect of such matters, absolutely cease; and no jurisdiction or authority in relation to any matters or causes testamentary, or to any matter arising out of or connected with the grant or revocation of probate or administration, shall belong to or be exercised by any such court or person."

S. 4. Testamentary jurisdiction to be exercised in the queen's name by a court of probate.

And by sect. 4, "The voluntary and contentious jurisdiction and authority in relation to the granting or revoking probate of wills and letters of administration of the effects of deceased (*n*) persons now vested in or which can be exercised by any court or person in England, together with full authority to hear and determine all questions relating to matters and causes testamentary, (*o*) shall belong to and be vested in her majesty, and shall, except as hereinafter is mentioned, be exercised in the name of her majesty in a court to be called the court of probate, and to hold its ordinary sittings, and to have its principal registry at such place or places in London and Middlesex as her majesty in council shall from time to time appoint." (*o*[1])

(*n*) By the interpretation clause, sect. 2, "'Will' shall comprehend 'testament,' and all other testamentary instruments of which probate may now be granted, and 'administration' shall comprehend all letters of administration of the effects of deceased persons, whether with or without the will annexed, and whether granted for general, special, or limited purposes."

(*o*) By the interpretation clause, sect. 2, "'Matters and causes testamentary' shall comprehend all matters and causes relating to the grant and revocation of probate of wills or of administration."

(*o*[1]) [In Massachusetts, the probate court for each county has jurisdiction of the probate of wills, granting administration of the estates of persons who at the time of their decease were inhabitants of or residents in the county, and of all persons who die without the state leaving estate to be administered within such county. Genl. Sts. c. 117, § 2. And the rule is very general in the American States that letters testamentary or of administration shall be granted in the county where the testator or intestate resided at the time of his death. Holyoke *v.* Haskins, 5 Pick. 20; Stevens *v.* Gaylord, 11 Mass. 256; Cutts *v.* Haskins, 9 Mass. 543; Wilson *v.* Frazier, 2 Humph. 30; Johnson *v.* Corpenning, 6 Ired. (Law) 216; Collins *v.* Turner, 2 Tayl. (N. Car.) 105; M'Bain *v.* Wimbish, 27 Geo. 259; McCampbell *v.* Gilbert, 4

And by sect. 23, "The court of probate shall be a court of record, (o^2) and such court shall have the same powers, and its grants and orders shall have the same effect throughout all England, and in relation to the personal estate in all *parts of England of deceased persons, as the prerogative court of the archbishop of Canterbury and its grants and orders respectively now have in the province of Canterbury, or in the parts of such province within its jurisdiction, and in relation to those matters and causes testamentary, and those effects of deceased persons which are within the jurisdiction of the said prerogative court; and all duties which by statute or otherwise are imposed on or should be performed by ordinaries generally, or on or by the said prerogative court, in respect of probates, administrations, or matters or causes testamentary within their respective jurisdictions, shall be performed by the court of probate; provided that no suits for legacies, or suits for the distribution of residue, shall be entertained by the court or by any court or person whose juris-

S. 23. The court to have throughout all England the same powers as the prerogative court within the province of Canterbury.

J. J. Marsh. 592; Estate of Harlan, 24 Cal. 182; George *v.* Watson, 19 Texas, 354; McChord *v.* Fisher, 18 B. Mon. 193; Cocke *v.* Finley, 29 Miss. 127. But if a debtor, who owes the estate of a person deceased in another state, resides in or removes into the state of New Hampshire, such indebtedness under the statute of New Hampshire, constitutes property in that state, which will justify the appointment of an administrator of said estate in the county where the debtor resides. Stearns *v.* Wright, 51 N. H. 600, 611. The "proper county" for obtaining administration in cases of non-residents dying and leaving lands in a particular state, is the county where such lands, or a part of them, lie. Bowles *v.* Rouse, 8 Ill. 409; Spraybury *v.* Culberson, 32 Geo. 299; Rutherford *v.* Clark, 4 Bush (Ky.), 47. Where a will had been properly admitted to probate in one county, and an administrator had been there appointed and he died before the estate was fully settled, and a new administrator had been appointed by the probate court of another county, it was held that this last appointment was void, because the court had no jurisdiction, and the court in which the will was first admitted to probate had acquired full jurisdiction by that act, and could not be ousted until the estate had been fully administered. People *v.* White, 11 Ill. 341; *ante*, 290, note (*m*). The appointment of an administrator in a jurisdiction where the deceased never resided, and in which he owned no property at the time of his death has been held to be absolutely void. Miltenberger *v.* Knox, 21 La. Ann. 399. In Pinney *v.* McGregory, 102 Mass. 189, Gray J. said: "We are not aware that any particular amount of property has ever been held requisite to sustain a grant of original administration in Massachusetts." No assets within the state are necessary in Alabama to original administration upon the estate of one domiciled there. Watson *v.* Collins, 37 Ala. 587; S. C. 1 Ala. Sel. Cas. 515. See *post*, 430, note (*h*).]

(o^2) [Courts of probate are courts of record by statute in New Hampshire. Tebbets *v.* Tilton, 24 N. H. 120, 124; Bell C. J. in Morgan *v.* Dodge, 44 N. H. 258.]

diction as to matters and causes testamentary is hereby abolished." (o^8)

(o^8) [In Wood *v.* Stone, 39 N. H. 574, Fowler J. said: "Courts of probate are of limited and special jurisdiction, restricted, unless enlarged by statute, to the probate of wills, the administration and settlement of estates, and the distribution thereof among the heirs and legatees, and other like administrative and ministerial acts. They have no juries, and the proceedings in them are not according to the course of the common law. Originally their powers were almost entirely administrative and ministerial." Yet these courts, having been made by statute courts of record, are to be regarded as courts of general jurisdiction on the subjects to which they relate, and are entitled to all the presumptions in favor of their proceedings which are allowed in the case of other tribunals of general jurisdiction. Their judgments, where they have jurisdiction, are conclusive. They may be reëxamined on appeal, but cannot be impeached collaterally, except for fraud and want of jurisdiction in the court. Sargent J. in Stearns *v.* Wright, 51 N. H. 609, and cases cited; Tebbets *v.* Tilton, 24 N. H. 120; Morgan *v.* Dodge, 44 N. H. 255, 257, 258. In this last case, Bell C. J. said: "In this state, courts of probate exercise many powers solely by virtue of the provisions of our statutes; but they have a very extensive jurisdiction not conferred by statute, but by a general reference to the existing law of the land, that is, to that branch of the common law known and acted upon for ages, the probate or ecclesiastical law. Kimball *v.* Fiske 39 N. H. 120." In Hayes *v.* Hayes, 48 N. H. 226, Perley C. J. said: "Where our statutes have not introduced a change, the ecclesiastical law may be resorted to as a safe guide for the interpretation of our probate laws. The substance of our system is borrowed from that law, and the methods and remedies in our courts of probate, except where others are provided by statute, follow the general course of procedure in the ecclesiastical courts. One peculiarity in the jurisdiction of those courts is, that they have no direct process for enforcing their own decrees. Resort was necessarily had to the temporal courts for aid, to enforce the sentences of the ecclesiastical jurisdiction. In this respect our law has followed the examples of the English, and has not, as a general rule, confided the execution of their own decrees to the courts of probate, but left them to be enforced by suits at law on the bonds required to be given to secure performance of the orders and decrees of that court. The general policy of the law requires that security shall be given by bond, that parties who act under the authority of the probate court, and are held to account in that court, shall discharge their duties faithfully and obey the orders and decrees of the court, leaving the rights of parties interested to be enforced by action in other courts on the bonds required to be given in that court." See, *post*, 295. By statute in Massachusetts, if, upon an appeal from the probate of a will, it appears from the reasons of appeal that the sanity of the testator or the attestation of the witnesses in his presence is in controversy, the supreme judicial court may, for the determination thereof, direct a real or feigned issue to be tried by a jury in the same court, at the expense of the appellant if the issue is found against him. Gen. Sts. c. 92, § 20. So in New Hampshire, Rev. Sts. c. 170, § 14; Patrick *v.* Cowles, 45 N. H. 555. So in Maine, Rev. Sts. c. 63, § 26. But in Bradstreet *v.* Bradstreet, 64 Maine, 209, Appleton C. J. said: "Courts of probate are of special and limited jurisdiction. Their proceedings are not according to the course of the common law. They have no juries. Neither party, upon appeal, can claim as a matter of right, a trial by jury. The judge of the appellate court may form an issue when, in his judgment, any question of fact occurs proper for a trial by jury, and not otherwise. The issue is to be found and tried

Court of probate substituted for the ecclesiastical courts universally.

Hence it appears that the exclusive jurisdiction in the probate of wills and granting of administration, which formerly belonged to the ecclesiastical courts, is now completely and universally throughout England transferred to the newly created court of probate. (*p*)

The executor cannot rely on his title in the temporal courts, without the production of the probate of the ordinary:

The consequence of this exclusive jurisdiction is, that an executor cannot assert or rely on his right in any other court, without showing that he has previously established it in the court of probate (*q*) the usual proof of which * is, the production of a copy of the will by which he is appointed, certified under the seal of the court. This is usually called the probate, or the letters testamentary. (*r*) In other words, nothing but the probate

at law, but as in equity, to inform the conscience of the court, and under its direction. Higbee *v.* Bacon, 11 Pick. 423; Wood *v.* Stone, 39 N. H. 575; Patrick *v.* Cowles, 45 N. H. 553." See Roderigas *v.* East River Savings Institution, 15 Am. Law Reg. (N. S.) 205.]

(*p*) By sect. 23, all suits pending at the time of the act, in any court in England, respecting any grant of probate or administration shall be transferred to the court of probate (but this enactment is not to apply to the privy council). And by stat. 21 & 22 Vict. c. 95, s. 14, in the same way all non-contentious business also shall be deemed to have been transferred to the court of probate, and all oaths and bonds sworn and executed as required by any ecclesiastical court in reference to such business, prior to January 11, 1858 (the day when the court of probate act, 1857, came into operation) shall be as effectual as if sworn or executed in pursuance of the court of probate act or this act. [A judge of probate, who has written a will, is, in New Hampshire, disqualified to sit upon the probate of it, but, upon appeal, the will may be proved in the court above. Moses *v.* Julian, 45 N. H. 52. The will written by the judge of probate, and executed under his direction, though in violation of law, is not void. Moses *v.* Julian, *supra;* Stearns *v.* Wright, 51 N. H. 600. As to disqualification of a judge of probate on the ground of interest, relationship, or affinity, see Moses *v.* Julian, 45 N. H. 52; Hull *v.* Thayer, 105 Mass. 219; Gay *v.* Minot, 3 Cush. 352; Bacon, appellant, 7 Gray, 391; Sigourney *v.* Sibley, 21 Pick. 101; Aldrich, appellant, 110 Mass. 189; Stearns *v.* Wright, 51 N. H. 600; *post*, 587, note (*e*); Cottle, appellant, 5 Pick. 483; Coffin *v.* Cottle, 9 Pick. 287. As to the difference between the effect of interest as a disqualification of a judge of probate, and relationship, see Wells J. in Aldrich, appellant, 110 Mass. 193, 194.]

(*q*) Hensloe's case, 9 Co. 38 *a;* Wentw. Off. Ex. 83, 14th ed.; Treat. on Eq. bk. 4, pt. 2, c. 1, s. 2; Chaunter *v.* Chaunter, 11 Vin. Abr. 205; [Tappan *v.* Tappan, 30 N. H. 50; Willard *v.* Hammond, 21 N. H. 385; Strong *v.* Perkins, 3 N. H. 517, 518; Kittredge *v.* Folsom, 8 N. H. 111; Lord Romilly M. R., L. R. 6 Eq. 222; Kinnebrew *v.* Kinnebrew, 35 Ala. 628.]

(*r*) The "letters testamentary" incorporate by necessary and express reference the will annexed. Therefore, when oyer was craved of the letters testamentary, the plaintiff was bound to give a copy as well of the will as of the certificate of the ordinary. Daly *v.* Mahon, 4 Bing. N. C. 235. [The trust confided to an executor is defined by his letters testamentary,

(or letters of administration with the will annexed, when no executor is therein appointed, or the appointment of executor fails), or other proof tantamount thereto of the admission of the will in the court of probate is legal evidence of the will in any question respecting personalty. (*s*) The will of a deceased sovereign of the realm is no exception to this rule, notwithstanding (as it has already appeared (*t*)) no probate of such a will can be granted by the court of probate. (*u*)

but he derives his title from the will and not the probate:

The probate is, however, merely operative as the authenticated evidence, (*u*[1]) and not at all as the foundation of the executor's title; (*u*[2]) for he derives all his interest from the will itself, (*u*[3]) and the property of

which constitute the commission under which he acts. Gibbons *v.* Riley, 7 Gill, 81.]

(*s*) Rex *v.* Netherseal, 4 T. R. 260; Newton *v.* Metropolitan Railway, 1 Dr. & Sm. 583. [It is expressly provided by statute in Massachusetts that no will shall be effectual to pass real or personal estate, unless it has been duly proved and allowed in the probate court; and the probate of a will devising real estate shall be conclusive as to its due execution, in like manner as of a will of personal estate. Genl. Sts. c. 92, § 38. The same law prevails in many other states. See Swazey *v.* Blackman, 8 Ohio, 5; Bailey *v.* Bailey, 8 Ohio, 245; Hall *v.* Ashby, 9 Ohio, 95; Wilson *v.* Tappan, 6 Ohio, 172; Budd *v.* Brooke, 3 Gill, 198; Moore *v.* Greene, 2 Curtis, 202; Wilkinson *v.* Leland, 2 Peters, 655; Ratcliff *v.* Ratcliff, 12 Sm. & M. 134; Dublin *v.* Chadbourn, 16 Mass. 433; Shumway *v.* Holbrook, 1 Pick. 114; Spring *v.* Parkman, 3 Fairf. 127; Hutchins *v.* State Bank, 12 Met. 421; Fuller, ex parte, 2 Story, 327, 332; Fortune *v.* Buck, 23 Conn. 1.] If a will be made in a foreign country, and proved there, disposing of goods in England, the executor cannot have action on such probate, but ought to prove the will here. Lee *v.* Moore, Palm. 165; Tourton *v.* Flower, 3 P. Wms. 370. See *post*, pt. I. bk. IV. ch. III. § VI. p. 362; [1929, note (*b*); Leonard *v.* Putnam, 51 N. H. 247, 250, 251; Lord Romilly M. R. in Hood *v.* Lord Barrington, L. R. 6 Eq. 218, 222.]

(*t*) *Ante*, 14.

(*u*) Ryves *v.* Duke of Wellington, 9 Beav. 579.

(*u*[1]) [See Succession of Vogel, 20 La. Ann. 81. The probate ascertains nothing but the original validity of the will as such, and that the instrument, in fact, is what it purports on its face to be. Fuller, ex parte, 2 Story, 332.]

(*u*[2]) [In Hood *v.* Lord Barrington, L. R. 6 Eq. 218, 224, where it was claimed that "it is not the probate which gives the power, but the will which gives the power," Lord Romilly M. R. said: "I dissent from the proposition stated in that form. What the will does is, it gives the power to obtain the probate; but when once the probate is obtained, the probate confers the power and the title on the executors to dispose of the property as they think fit." See Gay *v.* Minot, 3 Cush. 352; Wood *v.* Nelson, 9 B. Mon. 600.]

(*u*[3]) [Eastman J. in Willard *v.* Hammond, 21 N. H. 385; Allen J. in Hartnett *v.* Wandell, 60 N. Y. 349, 350. But an executor derives his power to sue, not from the will, but from the letters testamentary, and consequently can sue only in courts to which the power of those letters extends. Dixon *v.* Ramsay, 3 Cranch, 319; *post*, 361.]

the deceased vests in him from the moment of the testator's death. (*x*) Hence the probate, when produced, is said to have relation to the time of the testator's death. (*y*)

relation of the probate to the testator's death.

* It should further be observed that a court of equity considers an executor as trustee for the legatees in respect to their legacies, and, in certain cases, as trustee for the next of kin of the undisposed-of surplus; (*y*[1]) and as all trusts are the peculiar objects of equitable cognizance, courts of equity will compel the executor to perform these his testamentary trusts with propriety. (*y*[2]) Hence, although in those courts, as well as in courts of law, the seal of the court of probate is conclusive evidence of the *factum* of a will, (*z*) an equitable jurisdiction has arisen of *construing* the will, in order to enforce a proper performance of the trusts of the executor. The courts of equity are consequently sometimes called courts of construction, in contradistinction to the court of probate. (*z*[1])

Courts of equity are courts of construction of wills:

It should be observed, that as long as the ecclesiastical courts

(*x*) Hensloe's case, 9 Co. 38 *a*; Graysbrook *v.* Fox, Plowd. 281; Comber's case, 1 P. Wms. 767; Smith *v.* Milles, 1 T. R. 480; Woollcy *v.* Clark, 5 B. & Ald. 744; S. C. 1 Dowl. & Ryl. 409; Treat. on Eq. bk. 4, pt. 2, c. 1, s. 2; [Wilson *v.* Wilson, 54 Missou. 213.]

(*y*) Graysbrook *v.* Fox, Plowd. 281; Wentw. Off. Ex. 115, 14th ed.; Whitehead *v.* Taylor, 10 Ad. & El. 210; Ingle *v.* Richards, 28 Beav. 366; [Fuller, ex parte, 2 Story, 327; Strong *v.* Perkins, 3 N. H. 517, 518; Fleeger *v.* Poole, 2 McLean, 189; Hill *v.* Tucker, 13 How. (U. S.) 458, 466; Hall *v.* Ashby, 9 Ohio, 96; Spring *v.* Parkman, 3 Fairf. 127. So upon the probate of the will (in which no executor is named) and the appointment of an administrator with the will annexed, the personal property vests in him by relation from the death of the testator. Gray J. in Drury *v.* Natick, 10 Allen, 174.]

(*y*[1]) [This is so held in all cases in the United States. 2 Story Eq. Jur. § 1208; Hays *v.* Jackson, 6 Mass. 153; Hill *v.* Hill, 2 Hayw. 298; Wilson *v.* Wilson, 3 Binn. 557.]

(*y*[2]) [A will contained the following provision. "Should any questions arise as to the meaning of this instrument, I direct that the distribution of my estate shall be made to such persons and associations as my executors shall determine to be my intended legatees and devisees, and their construction of my will shall be binding on all parties interested." Three executors were named, one of whom was interested as a legatee and another was a near relative of one of the legatees. It was held, 1st. That the provision in question was a qualification of all the legacies and devises, which the testator had full power to make. 2d. That the executors had full power to act in the matter, and that their interest and relationship did not affect their power. 3d. That if their power was abused, a court of equity would restrain them. 4th. That the executor directly interested might properly decline to act upon any matter affecting his interest. Wait *v.* Huntington, 40 Conn. 9.]

(*z*) See *post*, pt. I. bk. VI. ch. I.

(*z*[1]) [See Hayes *v.* Hayes, 48 N. H. 219, 229, 230.]

had the exclusive testamentary jurisdiction, they were also courts of construction as well as courts of probate; because suits for legacies might have been brought therein. Indeed, the cognizance of legacies in former times belonged exclusively to the ecclesiastical jurisdiction; for the court of chancery, till Lord Nottingham extended the system of equitable jurisprudence, administered no relief to legatees. (*a*) But the new court of probate is not a court of construction; (*a*[1]) for, as it has already appeared, (*b*) the 23d section of the act by which it was created expressly prohibits it from entertaining any such suit.

and so were the ecclesiastical courts:

but the new court of probate is not.

By section 24, "The court of probate may require the attendance of any party in person, or of any person whom it may think fit to examine or caused to be examined, in any suit or other proceeding in respect of matters or causes testamentary, and may examine or cause to be examined, upon oath or affirmation, as the case may require, parties and witnesses by word of mouth; and may either before or after, or with or without such examination, cause them or any of * them to be examined on interrogatories, or receive their or any of their affidavits or solemn affirmations, as the case may be; and the court may by writs require such attendance, and order to be produced before itself or otherwise any deeds, evidences, or writings, in the same form, or nearly as may be, as that in which a writ of *subpœna ad testificandum*, or of *subpœna duces tecum*, is now issued by any of her majesty's superior courts of law at *Westminster* and every person disobeying any such writ shall be considered as in contempt of the court, and also be liable to forfeit a sum not exceeding one hundred pounds."

21 & 22 Vict. c. 77, s. 24. Power of court of probate to examine witnesses.

As to production of deeds, &c.

By section 25, "The court of probate shall have the like powers, jurisdiction, and authority, for enforcing the attendance of persons required by it as aforesaid; and for punishing persons failing, neglecting, or refusing to

Sect. 25. Power of the court to enforce orders.

(*a*) Deeks *v.* Strutt, 5 T. R. 692.

(*a*[1]) [See Hayes *v.* Hayes, 48 N. H. 219, 229, 230. In this case the question was upon the construction of a will which created a trust, and related to the conflicting claims of different parties to the beneficial interest in the fund. The probate court was called upon to settle the construction of the will, determine the rights of the parties, and enforce the execution of the trust. It was held that these questions properly belonged to the general jurisdiction in equity.]

(*b*) *Ante*, 291, 292.

produce deeds, evidences, or writings, or refusing to appear or to be sworn, or make affirmation or declaration, or to give evidence, or guilty of contempt, and generally for enforcing all orders, decrees, and judgments, made or given by the court under this act, and otherwise in relation to the matters to be inquired into and done by or under the orders of the court under this act, as are by law vested in the high court of chancery for such purposes in relation to any suit or matter depending in such court." (*c*)

21 & 22 Vict. c. 95, s. 17. Judge of the court of probate may amend grants made before Jan. 11, 1858.

By stat. 21 & 22 Vict. c. 95, s. 17, "The judge of the court of probate shall have and exercise the same power of altering and amending grants of probate and letters of administration, made before January 11, 1858, (*d*) as any ecclesiastical court had and exercised in respect of such grants."

Cases of grants void or voidable by reason of *bona notabilia* made before the probate act.

In order to meet the case of grants made before the act, which were void or voidable by reason of there being *bona * notabilia*, (*e*) and also of grants which, though not void or voidable, were not sufficiently extensive by reason of not reaching property situate out of the jurisdiction of the court that made the grant, the following enactments have been inserted in the court of probate act, 1857, 20 & 21 Vict. c. 77.

20 & 21 Vict. c. 77, s. 86. Void and voidable probates and administrations.

By section 86, "All grants of probates and administrations made before the commencement of this act, which may be void or voidable by reason only that the courts from which respectively the same were obtained had not jurisdiction to make such grants, shall be as valid as if the same had been obtained from courts entitled to make such grants: provided that any such grants of probate or administration shall not be made valid by this act, when the

(*c*) [See, *ante*, 292, note (o[1]).] This section does not constitute an order of the probate court for payment of money a charge on land, within the stat. 1 & 2 Vict. c. 110, s. 13. Pratt *v.* Bull, 1 De G., J. & S. 141; S. C. 4 Giff. 117. [Judges of the probate courts in Massachusetts may keep order in court, and punish any contempt of authority in like manner as such contempt might be punished in the superior court. Genl. Sts. c. 117, § 33. When costs are awarded to be paid by one party to the other, the probate courts may issue execution therefor in like manner as is practised in the courts of common law. Genl. Sts. c. 92, § 18; c. 117, § 26.]

(*d*) The day when the court of probate act, 1857, came into operation. [See Waters *v.* Stickney, 12 Allen, 1; Richardson *v.* Hazelton, 101 Mass. 108, 109.]

(*e*) See *ante*, 289.

same shall before the commencement of this act have been revoked or determined by any court of competent jurisdiction to have been void; nor shall this act prejudice or affect any proceedings pending at the time of the passing of this act in which the validity of any such probate or administration shall be in question. If the result of such proceeding shall be to invalidate the same, such probate or administration shall not be rendered valid by this act; and if such proceedings abate or become defective by reason of the death of any party, any person who but for this act would have any right by reason of the invalidity of such probate or administration shall retain such right, and may commence proceedings for enforcing the same within six calendar months after the death of such party."

S. 87. Probates or administrations granted before this act comes into operation.

And by sect. 87, "Legal grants of probate and administration made before the commencement of this act, and grants of probate and administration made legal by this act, shall have the same force and effect as if they had been granted under this act; but in every such case there shall be due and payable to her majesty such further stamp duty, if any, as would have been chargeable on any probate or administration * which, but for this act, would or ought to have been obtained in respect of the personal estate not covered by the grant; and all inventories and accounts in respect thereof shall be returnable to the court of chancery, and all bonds taken in respect thereof may be enforced by or under the authority of the court of chancery, at the discretion of the court." (*f*)

S. 88. Probate or administration may be granted of personal estate not

And by sect. 88, "Provided, that where any probate or administration has been granted before the commencement of this act, and the deceased had personal estate in *England*, not within the limits of the jurisdiction of the court by which the probate or administration was granted,

(*f*) The 86th section having provided for cases where the probate was void or voidable on the ground of error as to *bonâ notabilia*, the 87th section applies to the case where the grant was legal or made legal by the act, but does not affect the whole property. And the effect of the latter section is to give the grant the same force and effect as if granted by the court of probate, on payment of the stamp duty which would have been payable on the additional grant, which would have been requisite but for the act. See In the Goods of Freckelton, 1 Sw. & Tr. 16; In the Goods of Tucker, 2 Sw. & Tr. 122. See, also, In the Goods of Elwell, 1 Sw. & Tr. 27; Bouverie *v.* Maxwell, L. R. 1 P. & D. 272.

or otherwise not within the operation of the grant, it shall be lawful for the court of probate to grant probate or administration only in respect of such personal estate not covered by any former probate or administration, and such grant may be limited accordingly." (*g*)

affected by the former grants.

By stat. 21 & 22 Vict. c. 95, s. 20, "All second and subsequent grants of probate or letters of administration shall be made in the principal registry, or in the district registry where the original will is registered or the original grant of letters of administration has been made, or in the district registry to which the original will or a registered *copy thereof, or the record of the original grant of administration, have been transmitted by virtue of a requisition issued in pursuance of section eighty-nine of 'The Court of Probate Act,' and for and in respect of such second or subsequent grants of probate or letters of administration to be made in a district registry, it shall not be requisite that it should appear by affidavit that the testator or intestate had a fixed place of abode within the district in which the application is made."

21 & 22 Vict. c. 95, s. 20. Second and subsequent grants to be made where the original will or the original letters of administration are deposited.

By the court of probate act, 1857, 20 & 21 Vict. c. 77, s. 54, "Where it shall appear by affidavit of the person, or some one of the persons applying for probate or letters of administration, that the testator or intestate had at the time of his death his fixed place of abode in one of the districts specified in schedule (A) to this act, and that the personal estate in respect of which such probate or letters of administration should be granted under this act, exclusive of what the deceased shall have been possessed of or entitled to as a trustee and not beneficially, but without deducting anything on account of the debts due and owing from the deceased, is under the value of 200*l.*, and that the deceased at the time of his death was not seised or entitled beneficially of or to any real estate, or that the value of the real estate of or to which he was seised or entitled beneficially at the time of his death was under the value of 300*l.*,

20 & 21 Vict. c. 77, s. 54 (now repealed). Jurisdiction of county courts.

(*g*) This section appears to be intended to meet the case of a grant which is expressly limited to property within the jurisdiction of the court which grants it, and which, therefore, cannot be made operative by section 87. In the Goods of Tucker, 2 Sw. & Tr. 123; In the Goods of Cooper, 1 Sw. & Tr. 66. See, also, In the Goods of Elwell, 1 Sw. & Tr. 27.

the judge of the county court having jurisdiction in the place in which it shall be sworn that the deceased had at the time of his death his fixed place of abode, shall have the contentious jurisdiction and authority of the court of probate in respect of questions as to the grant and revocation of probate or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto."

This section is repealed by stat. 21 & 22 Vict. c. 98, s. 11; see *post*, 301.

By section 55, "On a decree being made by a judge of a county court for the grant or revocation of a probate or administration in any such cause, the registrar of the * county court shall transmit to the district registrar of the district in which it shall have been sworn that the deceased had at the time of his decease his fixed place of abode a certificate under the seal of the county court of such decree having been made; and thereupon, on the application of the party or parties in favor of whom such decree shall have been made, a probate or administration in compliance with such decree shall be issued from such district registry; or, as the case may require, the probate or letters of administration theretofore granted shall be recalled or varied by the district registrar according to the effect of such decree."

Sect. 55. Registrar of county court to transmit certificate of decree for grant or revocation of probate.

By section 56, "The judge of any county court before whom any disputed question shall be raised relating to matters and causes testamentary under this act shall, subject to the rules and orders under this act, have all the jurisdiction, power, and authority to decide the same and enforce judgment therein, and to enforce orders in relation thereto, as if the same had been an ordinary action in the county court."

Sect. 56. The judge of the county court to decide causes and enforce judgments as in other cases.

By section 57, "The affidavit as to the place of abode and state of the property of a testator or intestate which is to give contentious jurisdiction to the judge of a county court under the previous provisions shall, except as hereinafter provided, be conclusive for the purpose of authorizing the exercise of such jurisdiction, and the grant or revocation of probate or administration in compliance with the decree of such judge; and no such grant of probate or administration shall be liable to be recalled, revoked,

Sect. 57. Affidavit of the facts giving the county courts jurisdiction to be conclusive, unless disproved while the matter is pending.

or otherwise impeached, by reason that the testator or intestate had no fixed place of abode within the jurisdiction of such judge, or within any of the said districts at the time of his death, or by reason that the personal estate, sworn to be under the value of 200*l.* did in fact amount to or exceed that value, or that the value of the real estate of or to which the deceased was seised or entitled beneficially at the time of his death amounted to or exceeded 300*l.*; provided that where it shall be shown to the judge of a county court before whom any matter is * pending under this act, that the place of abode or state of the property of the testator or intestate in respect of whose will or estate he may have been applied to for grant or revocation of probate or administration has not been correctly stated in the affidavit, and if correctly stated would not have authorized him to exercise such contentious jurisdiction, he shall stay all further proceeding in his court in the matter, leaving any party to apply to the court of probate for such grant or revocation, and making such order as to the costs of the proceedings before him as he may think just."

Sect. 59. Not obligatory to apply for probate, &c. to district registries or county court, but application may in every case be made to court of probate.

By section 59, "It shall not be obligatory on any person to apply for probate or administration to any district registry, or through any county court, but in every case such application may be made through the principal registry of the court of probate, wherever the testator or intestate may at the time of his death have had his fixed place of abode: provided, that where in any contentious matter arising out of any such application it is shown to the court of probate that the state of the property and place of abode of the deceased were such as to give contentious jurisdiction to the judge of a county court, the court of probate may send the cause to such county court, and the judge thereof shall proceed therein as if such application and cause had been made to and arisen in his court in the first instance." (*h*)

Sect. 60. Rules and orders for regulating the pro-

By section 60, "For regulating the procedure and practice of the county courts, and the judges, registrars, and officers thereof, in relation to their jurisdiction and proceedings under this act, rules and orders may be from time to

(*h*) See Slater *v.* Alvey, L. R. 2 P. & D. 154. By 21 & 22 Vict. c. 95, s. 12, this section shall, so far as the county court or a judge thereof are concerned, apply to an application for the revocation of a grant of probate or administration, as well as to an application for such grant.

cedure of county courts under the act to be made by the judges now having authority for the like purpose.

time framed, amended, and certified by the county court judges appointed for the time being to frame rules and orders for regulating the practice of the county courts under the act of the session holden in the nineteenth and twentieth * years of her majesty, chapter one hundred and eight, and shall be subject to be allowed or disallowed or altered, and shall be in force from the day named for that purpose by the lord chancellor, as in the said act is provided in relation to other rules and orders regulating the practice of the same courts; and for establishing rules and orders to be in force when this act comes into operation, the power given by this enactment shall be exercised as soon as conveniently may be after the passing of this act."

Stat. 21 & 22. Vict. c. 77, s. 54, repealed.

By stat. 21 & 22 Vict. c. 96, s. 11, section 54 of the stat. 21 & 22 Vict. c. 77 (see *ante*, 298), is repealed.

Stat. 21 & 22 Vict. c. 95, s. 10. Where personalty is under 200*l.* county court to have distribution.

And by stat. 21 & 22 Vict. c. 95, s. 10, "Where it appears by affidavit to the satisfaction of a registrar of the principal registry, that the testator or intestate, in respect of whose estate a grant or revocation of a grant of probate or letters of administration is applied for, had at the time of his death his fixed place of abode in one of the districts specified in schedule (A) to the said 'Court of Probate Act,' and that the personal estate in respect of which such probate or letters of administration are to be or have been granted, exclusive of what the deceased may have been possessed of or entitled to as a trustee, and not beneficially, but without deducting anything on account of the debts due and owing from the deceased, was at the time of his death under the value of 200*l.*, and that the deceased at the time of his death was not seised or entitled beneficially of or to any real estate of the value of 300*l.* or upwards, the judge of the county court having jurisdiction in the place in which the deceased had at the time of his or her death a fixed place of abode shall have the contentious jurisdiction and authority of the court of probate in respect of questions as to the grant and revocation of probate of the will or letters of administration of the effects of such deceased person, in case there be any contention in relation thereto."

21 & 22 Vict. c. 95, s. 13.

By stat. 21 & 22 Vict. c. 95, s. 13, "the power and authority to make rules and orders for regulating the proceedings of the county courts shall extend and be applicable * to

all proceedings in the county courts under this act, and also to framing a scale of costs and charges to be paid to counsel, proctors, solicitors, and attorneys, in respect of proceedings in county courts, under the said court of probate act or this act."

Power to make rules and orders and frame scales of fees for the county courts.

By stat. 20 & 21 Vict. c. 77 (court of probate act, 1857), sect. 58, "Any party who shall be dissatisfied with the determination of the judge of the county court in point of law, or upon the admission or rejection of any evidence in any matter or cause under this act, may appeal from the same to the court of probate in such manner and subject to such regulations as may be provided by the rules and orders to be made under this act, and the decision of the court of probate on such appeal shall be final."

Stat. 20 & 21 Vict. c. 77, as to appeals from the county court to the court of probate.

SECTION II.

What the Executor may do before Probate.

Upon the principles stated in the course of the preceding section (p. 293), it has been held that the executor, before he proves the will in the probate court, may do almost all the acts which are incident to his office, except only some of those which relate to suits. (*i*)

(*i*) Godolph. pt. 2, c. 20, s. 1; Wentw. Off. Ex. 81, 14th ed.; Treat. on Eq. bk. 4, pt. 2, c. 1, s. 2; Wankford *v.* Wankford, 1 Salk. 301; Humphreys *v.* Ingledon, 1 P. Wms. 753; [Easton *v.* Carter, 5 Exch. 8; Venables *v.* East India Co. 2 Exch. 633; Mitchell *v.* Rice, 6 J. J. Marsh. 625; *ante*, 293, notes; Rand *v.* Hubbard, 4 Met. 256, 257; Tappan *v.* Tappan, 30 N. H. 50; *post*, 587, note (*e*); Strong *v.* Perkins, 3 N. H. 517; Kittredge *v.* Folsom, 8 N. H. 110, 111; Shirley *v.* Healds, 34 N. H. 407, 411, 412; Lane *v.* Thompson, 43 N. H. 320. In Kittredge *v.* Folsom, above cited, Parker J. said: "It may well deserve consideration whether, under our statute, which provides that no person shall intermeddle with the estate of any person deceased, or act as the executor or administrator thereof, or be considered as having that trust, until he shall have given bond to the judge of probate, an individual named executor can do any act as such until after the probate of the will. The bond is to be given to the judge upon the probate of the instrument." In Massachusetts and in most of the American States, there are statutes requiring that wills shall be proved, and that executors under them shall give bonds for the faithful discharge of their duties. In such states executors have no authority to act until they are appointed by the probate court and have given the bonds required. A refusal or neglect to give such bonds will be considered a refusal of the trust. Luscomb *v.* Ballard, 5 Gray, 403; Carter *v.* Carter, 10 B. Mon. 327; Mitchell *v.* Rice, 6 J. J. Marsh. 625; Robertson *v.* Gaines, 2 Humph. 381; Monroe *v.* James, 4 Munf. 195; Johnson's Appeal, 9 Penn. St. 416; Simpson's Ap-

Thus he may seize and take into his hands any of the testator's effects, (*k*) and he may enter peaceably into the house of the heir, for that purpose, and to take specialties and other securities for the debts due to the deceased. (*l*) He may pay or take releases of debts owing to the estate; (*m*) and he may receive or release debts which are owing to it; (*n*) and distrain for rent due * to the testator. (*o*) And if before probate the day occur for payment upon bond made by or to the testator, payment must be made to or by the executor, though the will be not proved, upon like penalty as if it were. (*p*) So he may sell, give away, or otherwise dispose at his discretion of the goods and chattels of the testator, before probate; (*q*) he may assent to or pay legacies; (*r*) he may enter on the testator's terms for years, (*s*) and he may gain a settlement by residing in the parish where the land lies. (*t*)

peal, 9 Penn. St. 416; Miller *v.* Meetch, 8 Penn. St. 417; Roseboom *v.* Moshier, 2 Denio, 61; Hanson *v.* Worthington, 12 Md. 418; Knight *v.* Loomis, 30 Maine, 208; Groton *v.* Ruggles, 17 Maine, 137; Williams *v.* Cushing, 37 Maine, 370; Deering *v.* Adams, 34 Maine, 264; Wood *v.* Sparks, 1 Dev. & Bat. 396; Trask *v.* Donaghue, 1 Aiken (Vt.), 373; Gaskill *v.* Gaskill, 7 R. I. 478; Sawyer's Appeal, 16 N. H. 459; Mahony *v.* Hunter, 30 Ind. 246; Hatch *v.* Proctor, 102 Mass. 351; Shaw C. J. in Rand *v.* Hubbard, 4 Met. 257; Martin *v.* Peck, 2 Yerger, 298; Gay *v.* Minot, 3 Cush. 352; McKeen *v.* Frost, 46 Maine, 239, 248; Gardner *v.* Gantt, 19 Ala. 666; Echols *v.* Barrett, 6 Geo. 443; Calloway *v.* Doe, 1 Blackf. 372. In Missouri an executor has no authority until he has qualified, although, if he intermeddles and subsequently qualifies, his letters will relate back and cover his former acts. Stagg *v.* Green, 47 Misson. 500. So in Massachusetts, Hatch *v.* Proctor, 102 Mass. 351.]

(*k*) Godolph. pt. 2, c. 20, s. 1; Wentw. Off. Ex. 81, 14th ed.; [Killebrew *v.* Murphy, 3 Heisk. (Tenn.) 546.]

(*l*) Godolph. pt. 2, c. 20, s. 3; Wentw. Off. Ex. 81, 14th ed.

(*m*) Godolph. pt. 2, c. 20, s. 3; Wentw. Off. Ex. 81, 14th ed.

(*n*) Co. Litt. 292 *b*; Graysbrook *v.* Fox, Plowd. 281; Middleton's case, 5 Co. 28 *a*; Godolph. pt. 2, c. 20, s. 1; Wentw. Off. Ex. 81, 14th ed.; Wankford *v.* Wankford, 1 Salk. 306, 307; Wills *v.* Rich, 2 Atk. 285.

(*o*) Whitehead *v.* Taylor, 10 Ad. & El. 210.

(*p*) Godolph. pt. 2, c. 2, s. 3; Wentw. Off. Ex. 18, 14th ed. The penalty is now saved by bringing the principal and interest and costs into court, under stat. 4 Ann. c. 16, s. 13.

(*q*) Godolph. pt. 2, c. 20, s. 3; Wentw. Off. Ex. 82, 14th ed. He may release or assign any part of the personal estate before probate. By Lord Macclesfield, 1 P. Wms. 768, Comber's case. It is consequently no objection to the title of an assignee of a patent, that the assignors, the executors of the grantee, had omitted to register the probate until after the date of the assignment. Elwood *v.* Christy, 17 C. B. N. S. 754.

(*r*) Godolph. pt. 2, c. 20, s. 1; Wentw. Off. Ex. 82, 14th ed.

(*s*) Rex *v.* Stone, 6 T. R. 298; Dyer, 367 *a*. And the executor of the grantee of the next avoidance of a church may grant the advowson before probate. Smithley *v.* Chomeley, Dyer, 135 *a*.

(*t*) 6 T. R. 295.

And although he should die, after any of these acts done, without proving the will, yet do these acts so done stand firm and good. (*u*) Where a termor devised his term to another whom he made his executor and died; and the devisee entered and died without any probate; it was held that the term was legally vested in the executor by his entry, and an execution of the devise, without any probate. (*x*) So if an executor assents to a legacy, and dies before probate, yet the assent is good enough. (*y*) So all payments made to him are good, and shall not be defeated, though he dies and * never proves the will. (*z*) In a word, the executor's not proving the will does, upon his death, determine the executorship, but not avoid it. (*a*)

These acts stand good though he die without proving the will:

It must, however, be carefully observed in this place, that although an executor may, before probate, by assignment of a term for years, or other chattel of a testator, or by an assent to a specific legacy, give a valid title to the assignee or legatee; yet, if it be necessary to support that title by deducing it from the assignment or assent, it also becomes requisite to show the right to make the assignment or give the assent; which can only be effected by producing the probate, or other evidence of the admission of the will in the court of probate; for, as it has already appeared, the fact of a particular person having been appointed executor to another can be proved by no other means, either in courts of law or equity. (*b*) If the executor died after the assignment or assent, without having obtained probate, letters of administration *cum testamento annexo* must be produced instead. (*c*)

If acts done by an executor before probate are relied on for title or sought to be enforced, a subsequent probate must be shown.

Again, although an executor can, before probate, make an assignment and give a receipt for purchase-money, which are

(*u*) Wentw. Off. Ex. 82, 14th ed.; Brazier *v.* Hudson, 8 Sim. 67.

(*x*) Dyer, 367 *a*; Rex *v.* Stone, 6 T. R. 298; Fenton *v.* Clegg, 9 Exch. 680.

(*y*) Anonymous, Freem. Chanc. Cas. 28, pl. 22 *b*; Johnson *v.* Warwick, 17 C. B. 516.

(*z*) Wankford *v.* Wankford, 1 Salk. 306, 307.

(*a*) By Lord Holt, in Wankford *v.* Wankford, 1 Salk. 309. *Quære*, whether, when a debtor makes his creditor his executor, who dies after having intermeddled with his goods, but before probate and before any election made to retain, the executor of the executor may retain. See Croft *v.* Pike, 3 P. Wms. 182, and *post*, pt. III. bk. II. ch. II. § VI.

(*b*) See Pinney *v.* Pinney, 3 B. & C. 335; *post*, 307. [See Marcy *v.* Marcy, 6 Met. 360.]

(*c*) Johnson *v.* Warwick, 17 C. B. 516.

binding, yet a purchaser is not bound to pay the purchase-money till probate, because, till the evidence of title exists, the executor cannot give a complete indemnity. (*d*)

He cannot maintain actions before probate:

An executor cannot maintain actions before probate unless such as are founded on his *actual* possession; (*d*[1]) for in actions where he sues in his representative character, he may be compelled, by the course of pleading, to produce the letters testamentary at the trial, or in some cases, by an application * to the court, at an earlier stage of the cause; (*e*) and in those actions where he sues in his individual capacity, relying on his *constructive* possession as executor, although he does not name himself as executor in his declaration, nor make any profert, yet, generally speaking, it will be necessary for him to prove himself executor at the trial, (*f*) which he can only do by showing the probate. For example, where an executor brings trespass *de bonis asportatis*, or trover, upon his testator's possession, and a conversion in his lifetime, he necessarily describes himself as executor in his declaration, and his character as such may be traversed. And where the goods were taken or converted after the testator's death, although, since the property in the goods draws to it a possession in law, he may declare on this *constructive* possession of his own, notwithstanding he has never had actual possession, without naming himself executor, still, if his title to the property should be put in issue by the pleadings, he must show that title as executor at the trial by producing the probate, in order to prove his constructive possession. (*g*)

except where he has had actual possession:

In cases, indeed, where the testator has *actually* been possessed of the property which is the subject of the action, before it came to the hands of the defendant, such possession is, according to the general principle, of itself, sufficient, without showing any title, to establish a *primâ facie* case, either in replevin, trover, or trespass, when the prop-

(*d*) Newton *v.* Metropolitan Railway Company, 1 Dr. & Sm. 583.

(*d*[1]) [Tappan *v.* Tappan, 30 N. H. 50, 69; Hutchins *v.* State Bank, 12 Met. 423, 424; Pond *v.* Makepeace, 2 Met. 114; 2 Chitty Pl. (16th Am. ed.) 120, and cases cited; Cocke *v.* Walter, 1 Eng. (Ark.) 404.]

(*e*) Webb *v.* Adkins, 14 C. B. 401. See *post*, pt. v. bk. i. ch. i.

(*f*) Blainfield *v.* March, 7 Mod. 141, by Holt C. J.; S. C. 1 Salk. 285; Holt, 44; 2 Saund. 47 *z*, note to Wilbraham *v.* Snow.

(*g*) Hunt *v.* Stevens, 3 Taunt. 113. And any defect in the probate, e. *g.* the want of a proper stamp, will be as fatal as the non-production. Ib.

erty has come to the defendant's hands, or been converted, by tort, (*h*) or in debt or assumpsit, when the defendant has acquired it by a contract with the executor. (*i*) In such case it is evident * that the actual possession of the plaintiff is a *primâ facie* title, without reference to the circumstances under which such possession has been obtained, whether as executor or by any other means. (*k*) Accordingly, in a modern case, (*l*) a sheriff's officer had seized and sold a pony, claimed by the plaintiff, a widow, under an execution against a third party, who lodged with her. The action was brought against the officer, for money had and received, to recover the amount of the sale money. It appeared that the pony had been bought by the lodger for the plaintiff with money provided by her, but at that time, and for several months afterwards, her husband was alive. After his death, however, the plaintiff fed the pony, and paid bills for its hay and shoeing, though it was used as generally by the lodger as by her. No probate of will or letters of administration were produced. It was objected, that assuming even that the plaintiff might have maintained trespass for the taking of the pony, she could not maintain this action, which was founded on a contract; and that the pony having been the property of the husband, passed on his death to his personal representative, and it had not been shown that the plaintiff was either executrix or administratrix. But it was held that there was evidence, though perhaps slight, that the plaintiff was in possession of the pony at the time it was seized; and if so, since she might clearly have maintained trespass against a wrong-doer, she might waive the tort, and * maintain this action to recover the money produced by the sale. (*m*)

(*h*) Wentw. Off. Ex. 84, 14th ed.; Plowd. 281, in Graysbrook *v.* Fox. See Elliott *v.* Kemp, 7 M. & W. 306, 312, 314.

(*i*) Wentw. Off. Ex. 84, 85, 14th ed.

(*k*) On this principle in a late case, where three out of four executors made a sale of the goods of their testator, it was held that the three might sue without naming themselves executors, and without joining the fourth executor; although the goods were sold as the goods of the testator. Brassington *v.* Ault, 2 Bing. 177. The distinction above pointed out might seem unnecessarily labored in the present treatise, had it not been laid down in previous works on the same subject as an absolute proposition that an executor may *maintain* actions of trespass or trover, before probate, for such of the effects of the testator as never came to his actual possession, taken or converted after the testator's decease. See Toller, 47; 2 Roberts on Wills, 172, 173.

(*l*) Oughton *v.* Seppings, 1 B. & Ad. 241.

(*m*) See, also, accord. White *v.* Mullett, 6 Exch. 713, 715; and see, further, Wallor *v.* Drakeford, 1 El. & Bl. 749.

nor can his grantee:

And the law is the same with respect to the grantee of the executor. Accordingly, in an action of trover for a horse and gig, which the plaintiff claimed as the vendee of an executor, it was held, that as at the time of the trial the ecclesiastical court had not granted probate, and the executor had never had actual exclusive possession of the gig and horse, the plaintiff could not make out his title, though he produced the will appointing his vendor executor. (*n*) In this case, the plaintiff and defendant both claimed title to the property; and Lord Tenterden, in his address to the jury, observed, that if the plaintiff had proved a clear, undisputed possession, it might have been sufficient; but it appeared that the defendant, before and after the sale to the plaintiff, used the gig and horse.

but he may commence an action before probate:

and arrest the defendant:

But although an executor cannot *maintain* actions before probate, except upon his actual possession, yet he may advance in them as far as that step where the production of the probate becomes necessary, and it will be sufficient if he obtains the probate in time for that exigency. (*o*) Thus where he sues as executor, he may commence the action before probate, (*p*) and arrest a debtor to the estate; (*q*) for, as it has been before observed, the probate, although obtained after action brought, shall, when produced, have relation to the death of the testator, so as to perfect and consummate the will from that period. (*r*) So where a reversion of a term * comes

(*n*) Pinney *v.* Pinney, 8 B. & C. 335.

(*o*) Wills *v.* Rich, 2 Atk. 285; Easton *v.* Carter, 5 Exch. 8, 14.

(*p*) 1 Roll. Abr. 917, A. 2; Martin *v.* Fuller, Comb. 871; Wankford *v.* Wankford, 1 Salk. 302, 303.

(*q*) Admitted by Saunders C. J. in Duncomb *v.* Walker, Skin. 87.

(*r*) Plowden, 281; 1 Roll. Abr. 917, A. 2. But this relation, it has been said, shall not prejudice a third person; and therefore where a debtor, after being arrested by an executor before probate, and set at large on bail, paid a debt to J. S., the debtor was adjudged upon that principle, it is reported, not to be a bankrupt from the time of the arrest, so as to invalidate the payment. Duncomb *v.* Walter, 3 Lev. 57; S. C. Skin. 22; T. Raym. 479; 2 Show. 253; 1 Freem. 539; S. C. in error; Ventr. 370; Skin. 87. And see Toller, 471; Wentw. Off. Ex. note by Curson to p. 84, 14th ed. But the case of Duncomb *v.* Walter is very obscurely reported; and the point above stated is not necessarily involved in the decision of it, as reported in Skinner, p. 88 (where the word "not" seems omitted by an error of the press), and in Shower; nor is it easy to comprehend on what ground the doctrine can rest. Lord Holt, in 1 Salk. 110, said he was not satisfied with the judgment; but he probably referred to the relation of the bankruptcy merely. In this latter respect, however, Duncomb *v.* Walter has been confirmed by the modern decisions. See Rose *v.* Green, 1 Burr. 437; Barnard *v.* Palmer, 1 Camph. 509; Eden B. L. 36. [The doctrine that letters testamentary, when issued, relate back to the death of

to him, he may avow before probate for such rent as hath accrued after the death of the testator, (*s*) and if such an issue is joined that it becomes necessary for him to prove his title by executorship (as for instance, if *non tenuit* should be pleaded), it will be sufficient if he obtains probate in time to produce it in evidence at the trial. So in the cases above considered, where the executor brings an action without naming himself executor, on his constructive possession, he may declare before probate, and if his title to the property be put in issue by the pleadings, he may take probate at any time before the trial, and that will enable him to support the action. (*t*)

in some cases he may avow or declare before probate:

So an executor, before probate, may file a bill in equity (in which bill, however, it is said he must allege that he has proved the will), (*u*) and the subsequent probate makes the * bill a good one, if obtained at any time before hearing. (*x*) And a commission of bankrupt may be taken out by an executor before he has obtained probate. (*y*)

he may file a bill before probate:

and take out a commission of bankruptcy:

the testator, and legalize all intermediate acts of the executor, must be understood to cover those acts only which might have been done by him had he been executor at the time. Bellinger *v.* Ford, 21 Barb. 311.]

(*s*) Wankford *v.* Wankford, 1 Salk. 307, per Holt C. J.; Whitehead *v.* Taylor, 10 Ad. & El. 210.

(*t*) It is said an executor may maintain a *quare impedit*, if he be entitled to the next presentation of a church, which became void, without showing forth the will. Wentw. Off. Ex. 84, 14th ed. But if by the course of the pleadings it should become a part of his case to prove his title, he certainly can only do so by producing the probate; and it may be doubtful whether the passage above cited is, in any case, law, inasmuch as it should seem that executors must show their title in the declaration in *quare impedit*.

(*u*) Humphreys *v.* Ingledon, 1 P. Wms. 753; but see *contra*, Newton *v.* Metropolitan Railway, 1 Dr. & Sm. 583; *post*, 309, note (*x*).

(*x*) Humphreys *v.* Humphreys, 3 P. Wms. 351. And in the case of Patten, executrix, *v.* Panton, in the exchequer, 1793, it was said, *arguendo*, that it had been determined by that court about three years ago, that it is sufficient if the probate were obtained at any time before hearing. 3 Bac. Abr. 53, by Gwillim, Executors, E. 14. But a plea that the executor has not obtained probate was lately allowed, on the ground that the cause must be considered as having come on to be heard. Simons *v.* Milman, 2 Sim. 241. See, also, Jones *v.* Howells, 2 Hare, 353, per Wigram V. C.; *post*, pt. v. bk. i. ch. ii. In Newton *v.* Metropolitan Railway Company, 1 Dr. & Sm. 583, a bill by executors for a specific performance alleged, as the fact was, that the executors had not proved. Notice of motion for an injunction was given, and at that time when the motion, but for the press of business, would have been heard, there was no probate; but when the motion was actually heard, the probate was in court; and it was held by Sir R. Kindersley V. C. that the defendants could not resist the motion upon the ground of demurrer. See, also, Beardmore *v.* Gregory, 34 L. J. Ch. 392.

(*y*) Ex parte Paddy, 3 Madd. 241; S. C.

he may be sued before probate.

On the other hand, if he have elected to administer, he may also, before probate, be sued at law or in equity by the deceased's creditors, whose rights shall not be impeded by his delay, and to whom, as executor *de jure* or *de facto*, he has made himself responsible. (*z*) So a bill may be filed against an executor, before probate, by a residuary legatee, for an account of the estate and effects of the testator, and to have the assets secured. (*a*) So, before probate, an executor may be compelled to discover the personal estate of his testator, though a suit be pending in the spiritual court respecting the validity of the will. (*b*)

If he die before probate, his executor shall not be executor to the first testator.

* If an executor dies before probate, although, as already mentioned, the acts which he may legally do before probate stand firm and good, yet his executor may not prove both wills, and so become executor to both the testators. (*c*) But administration of the goods of the first testator, with the will annexed to it, is to be committed to the executor of the executor if the first executor be residuary legatee of the first testator; or to such other person as may be so appointed; otherwise to the next of kin of the first testator. (*d*)

1 Buck, 235; Rogers *v.* James, 7 Taunt. 147; S. C. 2 Marsh. 425.

(*z*) Wentw. Off. Ex. 86, 87, 14th ed.; Plowd. 280; Toller, 49. It is clear upon the grounds which have already been stated (see pp. 277, 278), that if he has administered, he will be liable, not only before probate, but though he should refuse to take probate, and administration should be committed to another. See the observations of Best C. J. in Douglas *v.* Forest, 4 Bing. 704.

(*a*) Blewitt *v.* Blewitt, 1 Younge, 541.

(*b*) Dulwich College *v.* Johnson, 2 Vern. 49. See, also, Phipps *v.* Steward, 1 Atk. 285; Fonbl. Treat. on Eq. bk. 4, pt. 2, c. 1, s. 2, note (*b*).

(c) Isted *v.* Stanley, Dyer, 372 *a*; Hayton *v.* Wolfe, Cro. Jac. 614; S. C. Palm. 153; Hutton, 30; Wentw. Off. Ex. 82, 14th ed.; Day *v.* Chatfield, 1 Vern. 200; Wankford *v.* Wankford, 1 Salk. 308, in Lord Holt's judgment; S. C. 1 Freem. 520.

(*d*) Dyer, 372 *a*; Wentw. Off. Ex. 82, 14th ed.; Godolph. pt. 1, c. 20, s. 2. See *post*, pt. 1. bk. v. ch. III. § 1.

*CHAPTER THE SECOND.

OF THE MANNER OF OBTAINING PROBATE, AND THE PRACTICE OF THE ECCLESIASTICAL COURT WITH RESPECT THERETO.

SECTION I.

By whom the Will should be proved: and herewith of the Production and Deposit of Testamentary Papers.

THE person alone by whom the testament can be proved, is the executor named in it, (*a*) whom (as before stated) the court of probate may cite to the intent to prove the testament, and take upon him the execution thereof, or else to refuse the same. (*b*) This may the court do, not only *ex officio*, but at the instance of any party having an interest, which interest is proved by the oath of the party. (*c*) But such party should, in prudence as well as fairness, communicate to the executor, previous to caus-

The executor may be cited to prove by the ordinary:

at the instance of any party having an interest.

(*a*) 1 Salk. 309. [The person whose duty it would properly be to initiate measures for the proof of the will, is the executor named in it. But in the American States it is not exclusively his right, nor always the practice, for the executor to do so. In Texas an executor named in a will, by neglecting to prove it within thirty days, does not lose the right to be appointed executor, if he presents a valid excuse for his neglect. Stone *v.* Brown, 16 Texas, 425.]

(*b*) Swinb. pt. 6, s. 12, pl. 1; Godolph. pt. 1, c. 20, s. 2; *ante*, 274. [This authority in the judge of probate is incident to his general jurisdiction of the probate of wills, and the power of granting administrations. Stebbins *v.* Lathrop, 4 Pick. 42. The statute penalty for neglecting to exhibit a will is merely cumulative. Stebbins *v.* Lathrop, 4 Pick. 33, 42. See State *v.* Pace, 9 Rich. Law (S. Car.), 355. It has been held that the devisees and legatees of a will may bind themselves to destroy it by parol agreement or in writing. Phillips *v.* Phillips, 8 Watts, 195. See Adams *v.* Adams, 22 Vt. 50.] As to the form of the citation, see stat. 1 Edw. 6, c. 2.

(*c*) Ib. Some think it may be done at the instance of such as have no interest, to the intent that thereby they may be certified whether the testator left them a legacy. Godolph. pt. 1, c. 20, s. 2. [In Stebbins *v.* Lathrop, 4 Pick. 33, 42, Wilde J. said: "By our law, whoever has a

ing such a decree of citation to issue, the ground of such a proceeding; otherwise the former may have to pay the costs. Thus, in a modern case, where the testator was domiciled and died in Scotland, a creditor cited the executor, under the seal of the prerogative court of Canterbury, to accept or refuse probate, with the usual intimation. The executor, *sub modo*, denied the jurisdiction of the court, by reason that the deceased, while living, and at the time of his death, had no goods, chattels, or credits, within the province of Canterbury, sufficient to * found the jurisdiction of the court, alleging that he was willing to take probate on being satisfied to the contrary. The creditor upon this was compelled to disclose assets within the province; whereupon the executor retracted his qualified denial, and prayed probate; which was granted to him, and the creditor was condemned in the costs, as incurred solely by reason of his undue suppression of the fact of there being assets. (*d*)

When the will is destroyed or concealed by the executor, (*d*[1]) if it be proved plainly, a legatee may go to a court of equity for a decree upon the head of spoliation and suppression; although the general rule is to cite the executioner in the ecclesiastical court. (*e*)

The holder of a will may be

If the executor has not the will in his custody, but some other person, then may such person be compelled to exhibit the same. (*f*) And it is sufficient to prove that once

right to offer a will in evidence, or to make title under it, may insist on having it proved. A creditor, therefore, of a devisee has this right for the purpose of obtaining satisfaction of his debt; otherwise there might be a failure of justice." Any person interested in a will may have it proved. Stone *v.* Hereford, 8 Blackf. 452; Foster *v.* Foster, 7 Paige, 48; Matter of Greeley, 15 Abb. Pr. (N. S.) 393.]

(*d*) Lyon *v.* Balfour, 2 Add. 501.

(*d*[1]) [As to the right of devisees and legatees to destroy a will, see *ante*, 311, note (*b*); Adams *v.* Adams, 22 Vt. 50.]

(*e*) By Lord Hardwicke in Tucker *v.* Phipps, 3 Atk. 360.

(*f*) Swinb. pt. 6, c. 12, pl. 2; Godolph. pt. 1, c. 20, s. 2; Bethun *v.* Dinmure, 1 Cas. temp. Lee, 158; [Stebbins *v.* Lathrop, 4 Pick 33, 42. In Massachusetts, and in other states, persons, other than the register of the probate court, having the custody of wills, are required, within a certain time after the death of the testator, to deliver them into the probate court which has jurisdiction of the case, or to the executors named in the will; and are made subject to imprisonment, and liability for damages, in case of neglect so to deliver, after being duly cited for that purpose by the court. Genl. Sts. Mass. c. 92, § 16. See Hill *v.* Davis, 4 Mass. 137; Loring *v.* Oakey, 98 Mass. 267; Stebbins *v.* Lathrop, 4 Pick. 33; Smith *v.* Moore, 6 Greenl. 274. By statute 1875, c. 210, persons named as executors in wills, and having custody thereof, are required, within thirty days after knowledge of the death of the testator, to deliver such wills into the probate court, under penalty for default.

he had it; for he is presumed still to have the same, unless he affirms upon his oath that it is not in his possession. (*g*)

cited to bring it into the ecclesiastical court.

By the court of probate act, 1857, s. 26, "The court of probate may, on motion or petition, or otherwise in a summary way, whether any suit or other proceeding shall or shall not be pending in the court with respect to any probate or administration, order any person to produce and bring into the principal or any district registry, or otherwise as the court may direct, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession or under the control of such person; and if it be not shown that any such paper or writing is in the possession or under the control of such person, but it shall appear that there are reasonable grounds for believing that he has the knowledge of any such paper or writing, the court may direct such person to attend for the purpose of being examined in open court, or upon interrogatories respecting the *same, and such person shall be bound to answer such questions or interrogatories, and if so ordered, to produce and bring in such paper or writing, and shall be subject to the like process of contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing, as he would have been subject to in case he had been a party to a suit in the court, and had made such default; and the costs of any such motion, petition, or other proceeding, shall be in the discretion of the court."

20 & 21 Vict. c. 77, s. 26. Order to produce any instrument purporting to be testamentary.

Further, by stat. 21 & 22 Vict. c. 95, s. 23, it is enacted that "It shall be lawful for a registrar of the principal registry of the court of probate, and whether any suit or other proceeding shall or shall not be pending in the said court, to issue a subpœna requiring any person to produce and bring into the principal or any district registry, or otherwise as in the said subpœna may be directed, any paper or writing being or purporting to be testamentary, which may be shown to be in the possession, within the power, or under the control of such person; and such person, upon being duly served with the said subpœna, shall be bound to produce and bring in such

21 & 22 Vict. c. 95, s. 23. Registrar may issue subpœnas.

Proceedings against persons suspected of concealing wills, &c. are provided for by statute in Massachusetts. Genl. Sts. c. 92, § 17. So in Pennsylvania, by act of March 15, 1832, § 7.]

(*g*) Ib.

paper or writing, and shall be subject to the like process of contempt in case of default as if he had been a party to a suit in the said court, and had been ordered by the judge of the court of probate to produce and bring in such paper or writing."

Solicitor who prepared the will has no lien on it.

It has been more than once laid down by Lord Eldon, that the lien of an attorney or solicitor does not extend to the original will executed by his client; and that he cannot refuse the production of it. (*h*) On a late occasion (*i*) a rule was obtained in the court of king's bench to show cause why a writ in the nature of a writ of prohibition should not *issue to the judge of the prerogative court of Canterbury, commanding him to stay all proceedings against John Law, in the matter of Joseph Wood, deceased, until the lien of him, John Law, and of Richard Coates, on the will of Joseph Wood, should have been satisfied or discharged. It appeared from the affidavits sworn in support of the application, that Law and Coates were attorneys, and had been employed as such by the deceased; he died indebted to them in 200*l.* for business done, including the preparation of the will, which he had deposited with them. After his death, Law admitted that the will was in his hands, but refused to give it up to the widow until his account was settled. Whereupon he was served with a citation from the prerogative court, at the instance of the widow, requiring him to appear in that court, and bring in and leave in the registry there the original will. It was further sworn that Sir J. Nicholl, the judge of the prerogative court, had, on a day subsequent to the day on which the citation required the will to be brought in, declared, upon the case being mentioned, that the claim of lien was no excuse for not bringing in the will; and that if it was not brought in on or before the next sitting of the court, he should pronounce Law to be in contempt. It was urged in support of the application, that as a lien was claimed, which is a matter of common law, the court ought to interfere to prevent the spiritual court from proceeding. But the court of king's bench, after argument, discharged the rule, on the ground that the spiritual court had, at all events, jurisdiction to order the will to be brought in; and that it was not to be

(*h*) Georges *v.* Georges, 18 Ves. 294; Lord *v.* Wormleighton, Jac. 580; Balch *v.* Symes, 1 Turn. & Russ. 87. He engages to make a will effectual for the purposes of the testator; which it cannot be unless it is produced elsewhere. Jacob. 581.

(*i*) Ex parte Law, 2 Ad. & El. 45.

presumed, that when they had ordered the will in, they would do anything improper.

In Brown *v.* Coates, (*j*) Sir John Nicholl strongly inclined to an opinion, that a mere holder of a will, monished to bring it into the prerogative court, could not be allowed to dispute the jurisdiction, and put the other party to proof of *bona notabilia*, prior to giving up the will.

Holder of a will not allowed to dispute jurisdiction.

* Disputed wills ought to be lodged in the registry of the court of probate for custody. On one occasion Sir John Nicholl observed, (*k*) "Practitioners have no right to keep wills in their possession. I have, in several instances, stated, that the expense necessary to get a will out of the hands of a party must fall upon those who withhold it."

Disputed wills ought to be lodged in the registry.

It has been the constant practice of the prerogative court, to order all testamentary papers to be brought in when required. And a duplicate is a part of a will, and to be considered a testamentary paper within this rule. (*l*)

Order to bring in all testamentary papers.

Whether the will respected personal estate only, or whether it was a mixed will, concerning both lands and goods, it was, after probate, deposited, together with all other testamentary papers, in the registry of the ecclesiastical court in which it had been proved. And now, by the 66th section of the court of probate act, 1857 (20 & 21 Vict. c. 77), "there shall be one place of deposit under the control of the court of probate, at such place in London or Middlesex as her majesty may by order in council direct, in which all the original wills brought into the court or of which probate or administration with the will annexed is granted under this act in the principal registry thereof, and copies of all wills the originals whereof are to be preserved in the district registries, and such other documents as the court may direct, shall be deposited and preserved, and may be inspected under the control of the court and subject to the rules and orders under this act." (*m*) If it should be needed in order * to be put

Deposit of will in registry: when and how it can be got out.

20 & 21 Vict. c. 77, s. 66. Place of deposit of original wills.

(*j*) 1 Add. 345.

(*k*) Cunningham *v.* Seymour, 2 Phillim. 250.

(*l*) Killican *v.* Parker, 1 Cas. temp. Lee, 662.

(*m*) By sect. 67, "The judge shall cause to be made from time to time, in the principal registry of the court of probate, calendars of the grants of probate and administration in the principal registry, and in the several district registries of the court, for such periods as the judge may think fit, each such calendar to contain a note of every probate or administration

in evidence in some other judicial proceeding, the attendance of the registrar, or other proper officer with it must be procured. In some cases, an order of the court of chancery may be obtained that it shall be delivered out by the registrar on giving security to return it. (*n*) And the ecclesiastical court itself has, on several occasions, ordered the will to be delivered out of its registry for the legal purpose of its being sent to the proper place for its custody. (*o*) The last of these orders (*p*) appears to have been a decree that the will and codicils of Napoleon Bonaparte should be delivered out (after notarial copies had been made) in order to be sent to the legal authorities in France to be recorded there in the proper place.

Stat. 20 & 21 Vict. c. 77, s. 64: probate to be evidence of the will in suits as to real estate, unless the validity of the will is disputed.

But with respect to cases where it was formerly necessary to produce the original will, in order to establish a devise of real estate, it is enacted by stat. 20 & 21 Vict. c. 77 (court of probate act), s. 64, that on notice being given of intending to put the probate in evidence, the probate shall be sufficient evidence of the will and its validity, unless the * other party shall give notice that he intends to dispute the validity of the will.

This subject, and the enactment contained in the 62d section of the same statute, that the probate shall be conclusive, of the validity of the will, in all proceedings affecting the real estate,

with the will annexed granted within the period therein specified, and also a note of every other administration granted within the same period, such respective notes setting forth the dates of such grants, the registry in which the grants were made, the names of the testators and intestates, the place and time of death, the names and descriptions of the executors and administrators, and the value of the effects; and the calendars to be so made shall be printed as the same are from time to time completed." By s. 68, "The registrars shall cause a printed copy of every calendar to be transmitted through the post or otherwise, to each of the district registries, and to the office of her majesty's prerogative in *Dublin*, the office of the commissary of the county of *Midlothian*, in Edinburgh, and such other offices, if any, as the court of probate shall from time to time by rule or order direct; and every printed copy of a calendar so transmitted as aforesaid shall be kept in the registry or office to which it is transmitted, and may be inspected by any person on payment of a fee of one shilling for each search, without reference to the number of calendars inspected." By s. 69, "An official copy of the whole or any part of a will, or an official certificate of the grant of any letters of administration, may be obtained from the registry or district registry where the will has been proved or the administration granted, on the payment of such fees as shall be fixed for the same by the rules and orders under this act."

(*n*) See *post*, § IX.

(*o*) *Post*, § VII.

(*p*) In re Napoleon Bonaparte, 2 Robert. 606.

where the probate has been granted after proof in solemn form, &c. will be considered hereafter, (*q*) together with the general doctrine of the effect of probate.

Stat. 20 & 21 Vict. c. 77, s. 89. Judges of present ecclesiastical courts and others to transmit all wills, &c. to the registry.

By the court of probate act, 1857, s. 89, "The acting judge and registrar of every court, and other person now having jurisdiction to grant probate or administration, and every person having the custody of the documents and papers of or belonging to such court or person, shall, upon receiving a requisition for that purpose, under the seal of the court of probate, from a registrar, and at the time and in the manner mentioned in such requisition, transmit to the court of probate, or to such other place as in such requisition shall be specified, all records, wills, grants, probates, letters of administration, administration bonds, notes of administration, court books, calendars, deeds, processes, acts, proceedings, writs, documents, and every other instrument relating exclusively or principally to matters or causes testamentary, to be deposited and arranged in the registry of each district or in the principal registry, as the case may require, so as to be easy of reference, under the control and direction of the court."

Stat. 21 & 22 Vict. c. 96, s. 27. Requisitions may be issued for the transmission of a single paper.

And by stat. 21 & 22 Vict. c. 96, s. 27, "Whereas doubts have been entertained whether a requisition can be issued under section 89 of the court of probate act for the transmission of one or more papers only, not being all the papers and documents in the custody of the person to whom any such requisition may be addressed: be it therefore enacted and declared, that the said section shall be construed to extend to all requisitions, whether for the transmission of one or of more records, wills, grants, probates, letters of administration, * administration bonds, notes of administration, court books, calendars, deeds, processes, acts, proceedings, or other instruments relating exclusively or principally to matters and causes testamentary."

(*q*) *Post*, pt. I. bk. VI. ch. I.

SECTION II.

When the Will is to be proved.

The testator may record and register his will in his lifetime.

If the testator be yet living, the judge may not proceed to the proving of his testament, at the petition either of the executor or any other, saving at the request of the testator himself; but, at his petition, the testament may be recorded and registered among other wills; but it is not to be delivered forth under the seal of the ordinary with a probate; because it is of no force as long as the testator lives, who also may revoke or alter the same at any time before his death. (*r*)

20 & 21 Vict. c. 77, s. 91. As to depositories for safe custody of the wills of living persons.

And now by 91st section of the probate act, 1857 (20 & 21 Vict. c. 77), it is enacted, that "One or more safe and convenient depository or depositories shall be provided, under the control and directions of the court of probate, for all such wills of living persons as shall be deposited therein for safe custody; and all persons may deposit their wills in such depository upon payment of such fees and under such regulations as the judge shall from time to time by any order direct. (*r*[1])

The time, after the testator's death, (*s*) when the will is to * be

(*r*) Swinb. pt. 6, s. 13, pl. 1.

(*r*[1]) [Provisions for the deposit and safe keeping of wills of living persons have been made by statute in Massachusetts, and probably in other states. See Genl. Sts. of Mass. c. 92, §§ 12, 13, 14, 15.]

(*s*) If the death of the party cannot be proved by sufficient witnesses, recourse must be had to the presumption of law; for which see Swinb. pt. 6, s. 13, pl. 2; Godolph. pt. 1, c. 20, s. 3; Dean *v.* Davidson, 3 Hagg. 554; In the Goods of Hutton, 1 Curt. 595. Or in the case of a person long absent, and in parts far remote, and transmarine, to common fame. Swinb. pt. 6, s. 13, pl. 2; Godolph. pt. 1, c. 20, s. 3. In the common law courts, a jury may presume that a man is dead at the expiration of seven years from the time when he was last known to be living. Per Lord Ellenborough, in Doe *v.* Jesson, 6 East, 84; [Loring *v.* Steineman, 1 Met. 204; Learned *v.* Corley, 43 Miss. 687; Foulks *v.* Rhea, 7 Bush (Ky.), 568; Adams *v.* Jones, 39 Geo. 479; Hancock *v.* American Life Ins. Co. 62 Missou.; 3 Central Law Jour. 595. Before the presumption of death arises as to any one in such cases, it must be shown that he was absent for the seven years or more from a place where he had an *established residence*. Stinchfield *v.* Emerson, 52 Maine, 465. The rule is thus stated by Howard J. in Stevens *v.* McNamara, 36 Maine, 178, 179. "Ordinarily, in the absence of evidence to the contrary, the continuance of the life of an individual to the common age of man, will be assumed by presumption of law. The burden of proof lies upon the party alleging the death of the person; but, after an absence from his home or place of residence seven years,

proved is somewhat uncertain, and left to the discretion of the judge, according to the distance of the

Time within which

without intelligence respecting him, the presumption of life will cease, and it will be incumbent on the other party asserting it, to prove that the person was living within that time. 2 Stark. Ev. 365; 1 Greenl. Ev. § 41, and cases cited." It is not necessary that the party alleged to be deceased should be proved to have been absent from the country; it is sufficient, if it appears that he has been absent for seven years from the particular state of his residence, without being heard from. Newman *v.* Jenkins, 10 Pick. 515; Innis *v.* Campbell, 1 Rawle, 373; Spurr *v.* Trimble, 1 A. K. Marsh. 278; Primm *v.* Stewart, 7 Texas, 178; Woods *v.* Woods, 2 Bay, 476; Wambough *v.* Schank, 1 Penning. 167; Stevens *v.* McNamara, 36 Maine, 176; Whiteside's Appeal, 23 Penn. St. 114; Hancock *v.* American Life Ins. Co. 62 Missou.; 3 Central Law Jour. 595. The presumption of death, as a limitation of the presumption of life, must be taken to run exclusively from the termination of the prescribed period; so that the jury are bound to presume that the person lived throughout the whole period of seven years, unless there are circumstances in evidence tending to show the contrary. Burr *v.* Sim, 4 Whart. 150. The presumption of the death of a person from his absence for more than seven years without being heard from is, however, merely a presumption of fact, and may be rebutted; and for the purpose of rebutting it, evidence is admissible to show that the person has been heard of as living within that time, though by others than members of his family. Flynn *v.* Coffee, 12 Allen, 133.] See, also, as to this presumption, Doe *v.* Deakin, 4 B. & Ald. 433; Doe *v.* Griffin, 15 East, 293; Watson *v.* King, 1 Stark. 121; Doe *v.* Nepean, 5 B. & Ad. 86; S. C. on error, 2 M. & W. 894; Sillick *v.* Booth, 1 Y. & Coll. C. C. 117; Watson *v.* England, 14 Sim. 28; Dowley *v.* Winfield, 14 Sim. 277; Bowden *v.* Henderson, 2 Sm. & G. 360; Taylor on Ev. 168 *et seq.* 2d ed.; In the Goods of Turner, 3 Sw. & Tr. 476; In re Tindall's Trust, 30 Beav. 151; In re Benham's Trusts, L. R. 4 Eq. Ca. 416; In re Beasney's Trusts, L. R. 7 Eq. Cas. 498; [Lapsley *v.* Grierson, 1 H. L. Cas. 498; Stouvenel *v.* Stephens, 2 Daly (N. Y.), 319; Oppenheim *v.* Wolf, 3 Sandf. Ch. 571; Gerry *v.* Post, 13 How. Pr. 118; Eagle *v.* Emmett, 4 Bradf. Sur. 117; Clarke *v.* Cummings, 5 Barb. 359, 364; King *v.* Paddock, 18 John. 141; Merritt *v.* Thompson, 1 Hilton, 550; McCartee *v.* Camel, 1 Barb. Ch. 455; Moehring *v.* Mitchell, 1 Barb. Ch. 264.] There is no legal presumption as to the *time* of his death. Doe *v.* Nepean, *ubi supra;* In the Goods of Smith, 2 Sw. & Tr. 508; Thomas *v.* Thomas, 2 Dr. & Sm. 298. [The burden of proving that the death of a person, presumed to be dead because he has not been heard of for seven years, took place at any particular time within the seven years, lies upon the party who claims a right, to the establishment of which that fact is essential. In re Phene's Trusts, L. R. 5 Ch. App. 139; In re Lewes's Trusts, L. R. 6 Ch. App. 356; S. C., L. R. 11 Eq. 236; Whiting *v.* Nicholl, 46 Ill. 220; Clarke *v.* Canfield, 2 McCarter (N. J.), 119, 121; Hancock *v.* American Life Ins. Co. 62 Missou.; 3 Central Law Jour. 595; Newman *v.* Jenkins, 10 Pick. (2d ed.) 515, 516, and cases cited in note (1); Smith *v.* Knowlton, 11 N. H. 191; Primm *v.* Stewart, 7 Texas, 178; Burr *v.* Sim, 4 Whart. 150; Bradley *v.* Bradley, 4 Whart. 173; Whiteside's Appeal, 23 Penn. St. 114. But in Kelly *v.* Drew, 12 Allen, 107, it was decided that where a woman married a second husband, after living separate from her first husband for about four years without hearing of him or of his death, and did not hear of him for sixteen years afterwards, the presumption was that she was the lawful wife of the second husband. The court said: "Under the circum-

the will ought to be proved.

place, the weight of the will, the quality of the executors, the absence of the witnesses, the importunity of creditors and legatees, and other circumstances incident thereto. (*t*) And now by stat. 55 Geo. 3, c. 184, s. 37, it is enacted that, "if any person shall take possession of, and in any manner administer, any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased, within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased; every person so offending shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds per centum on the amount of the stamp duty payable on the probate of the will, or letters of administration of the estates and effects of the deceased. (*u*)

Rule when five years have elapsed since the death.

* By a modern regulation of the prerogative court of Canterbury, where probate was applied for after the expiration of five years from the death of the testator, the delay must have been satisfactorily accounted for, by an affidavit made by the executor or other competent person. (*x*)

stances of this case, the presumption of the wife's innocence in marrying again might well overcome any presumption that a man not heard from for four years before the second marriage, or for sixteen years afterwards, was alive and her lawful husband when she married the second time." See Greensborough *v.* Underhill, 12 Vt. 604. As to the kind of evidence admissible on the question of death within the seven years, see Tisdale *v.* Conn. Mut. Life Ins. Co. 26 Iowa, 170; Hancock *v.* American Life Ins. Co. 62 Missou.; 3 Central Law Jour. 595, 596.] As to presuming the death of a legatee, see In re Lewes's Trusts, L. R. 6 Ch. App. 356; S. C. L. R. 11 Eq. Cas. 236; In re Phene's Trusts, L. R. 5 Ch. App. 139; [Hickman *v.* Upsall, L. R. 20 Eq. 136.]

(*t*) Godolph. pt. 1, c. 20, s. 3. [See Gray J. in Waters *v.* Stickney, 12 Allen, 17.] Yet, regularly, testaments ought to be insinuated to the official or commissary of the bishop within four months next after the testator's death. Ib. And the ordinary may sequester the goods of the deceased, until the executors have proved the testament. Ib.

(*u*) Proceedings may also be taken against him under stat. 28 & 29 Vict. c. 101, s. 57, as to which see *post*, pt. I. bk. VII.

(*x*) Gwynne on Probate and Legacy Duties, 10. See In the Goods of Darling, 3 Hagg. 561. [A will may be proved in the probate court in Massachusetts, at any time, even after the lapse of twenty years, for the purpose of establishing a title to real estate; Shumway *v.* Holbrook, 1 Pick. 114; although original administration could not by statute be granted after twenty years. Gray J. in Waters *v.* Stickney, 12 Allen, 12, 13; Marcy *v.* Marcy, 6 Met. 370. The production of

By rule 43 of the "general rules and orders for the registrars of the principal registry (made in 1862)," "No probate or letters of administration with the will annexed shall issue until after the lapse of seven days from the death of the deceased, unless under the direction of the judge, or by order of two of the registrars." Rule 43, P. R.

And by rule 45, "In every case where probate or administration is, for the first time, applied for after the lapse of three years from the death of the deceased, the reason of the delay is to be certified to the registrars. Should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may see fit." Rule 45.

SECTION III.

Of the Practice of the Court of Probate, and herewith of Proof of Wills in Common Form.

By the court of probate act, 1857, 20 & 21 Vict. c. 77, s. 13, "There shall be established for each of the districts specified in schedule (A) to this act, and at the places respectively mentioned in such schedule, a public registry attached to and under the control of the court of probate, hereinafter referred to as 'The District Registry.'" 20 & 21 Vict. c. 77, s. 13. District registries to be established.

By the 46th section of the same statute, "Probate of a will or letters of administration may, upon application for that purpose to the district registry, be granted in common form by the district registrar in the name of the court of probate, and under the seal appointed to be used in such * district registry, if it shall appear by affidavit of the person or some or one of the persons applying for the same that the testator or intestate, as the case may be, at the time of his death had a fixed place of abode within the district in which the application is made, and such place of abode being stated in the affidavit, and such probate or letters of administration shall have effect over the personal estate of the deceased in all parts of *England* accordingly." (*y*) S. 46. Probates and administration may be granted in common form by district registrars, if it shall appear by affidavit that the testator, &c. had a fixed place of abode.

a will without probate can be of no force, however ancient it may be.]

(*y*) It is not obligatory to apply for probate or administration to any district reg-

And by sect. 47, "Such affidavit shall be conclusive for the purpose of authorizing the grant by the district registrar of probate or administration; and no such grant of probate or administration shall be liable to be recalled, revoked, or otherwise impeached by reason that the testator or intestate had no fixed place of abode within the district at the time of his death, and every probate and administration granted by any such district registrar shall effectually discharge and protect all persons paying to or dealing with any executor or administrator thereunder, notwithstanding the want of or defect in such affidavit, as is hereby required."

S. 47. Affidavit to be conclusive for authorizing grant of probate.

By sect 48, "The district registrar shall not grant probate or administration in any case in which there is contention as to the grant, until such contention is terminated or disposed of by decree or otherwise, or in which it otherwise appears to him that probate or administration ought not to be granted in common form."

S. 48. District registrar not to make grants when there is a contention.

And by sect. 49, "Notice of every application to any district registrar for the grant of probate or administration, shall be transmitted by such district registrar to the registrars of the principal registry by the next post after such application shall have been made; and such notice shall specify the name and description, or addition [if any], of the testator or intestate, the time of his death, and the place of his abode at his decease, as stated in the affidavit made in * support of such application, and the name of the person by whom the application has been made, and such other particulars as may be directed by rules or orders under this act; and no probate or administration shall be granted in pursuance of such application until such district registrar shall have received a certificate under the hand (*z*) of one of the registrars of the principal registry, that no other application appears to have been made in respect of the goods of the same deceased person, which certificate the said registrar of the principal registry shall forward as soon as may be to the district registrar; all such notices in respect of applications in the district registries shall be filed and kept in the

S. 49. As to transmission of notice of application for grants of probate, &c. to district registrar.

istry, but the application may, in every case, be made to the court of probate. See sect. 59, stated *ante*, 300.

(*z*) By stat. 21 & 22 Vict. c. 59, s. 26, the certificate need not be under the hand, but may be issued under a stamp provided for that purpose.

principal registry, and the registrars of the principal registry shall, with reference to every such notice, examine all notices of such applications which may have been received from the several other district registries, and the applications which may have been made for grants of probate or administration at the principal registry, so far as it may appear necessary to ascertain whether or no application for probate or administration, in respect of the goods of the same deceased person, may have been made in more than one registry, and shall communicate with the district registrars as occasion may require in relation to such applications."

S. 51. District registrars to transmit lists of probates and administrations and copies of wills.

And by sect. 51, "On the first *Thursday* of every month, or oftener, if required by any rules or orders to be made in that behalf, every district registrar shall transmit to the registrars of the principal registry a list in such form and containing such particulars as may be from time to time required by the court of probate, or by any rules or orders under this act, of the grants of probate and administration made by such district registrar up to the last preceding *Saturday*, and not included in a previous return, and also a copy certified by the district registrar to be a correct * copy (*a*) of every will to which any such probate or administration relates."

S. 52. District registrars to preserve original wills.

And by sect. 52, "Every district registrar shall file and preserve all original wills of which probate or letters of administration, with the will annexed, may be granted by him, in the public registry of the district, subject to such regulations as the judge of the court of probate may from time to time make in relation to the due preservation thereof, and the convenient inspection of the same."

S. 29. Practice of the court to be according to the present practice of the prerogative court.

By sect. 29, "The practice of the court of probate shall, except otherwise provided by this act, or by the rules or orders to be from time to time made under this act, be, as far as the circumstances of the case will admit, according to the present practice of the prerogative court." (*b*)

By sect. 30, "And to the intent and end that the procedure and practice of the court may be of the most sim-

(*a*) By stat. 21 & 22 Vict. c. 95, s. 25, these copies may be certified and transmitted under a stamp provided for that purpose.

(*b*) Sir C. Cresswell appears to have been of opinion that this section applies to the procedure only of the court, and not to the principles on which it is to act. In the Goods of Oliphant, 1 Sw. & Tr. 525.

ple and expeditious character, it shall be lawful for the lord chancellor, at any time after the passing of this act, with the advice and assistance of the lord chief justice of the court of queen's bench, or any one of the judges of the superior courts of law to be by such chief justice named in that behalf, and of the judge of the said prerogative court, to make rules and orders to take effect when this act shall come into operation for regulating the procedure and practice of the court, and the duties of the registrars, district registrars, and other officers thereof, and for determining what shall be deemed contentious, and what shall be deemed non-contentious business, and, subject to the express provisions of this act, for fixing and regulating the time and manner of appealing from the decisions of the said court, * and generally for carrying the provisions of this act into effect; and after the time when this act shall come into operation, it shall be lawful for the judge of the court of probate from time to time, with the concurrence of the lord chancellor and the said lord chief justice, or any one of the judges of the superior courts of law to be by such chief justice named in this behalf, to repeal, amend, add to, or alter any such rules and orders as to him, with such concurrence as aforesaid, may seem fit."

S. 30. Rules and orders to be made for regulating the procedure of the court.

Under the powers conferred by this section, a great many very copious, minute, and explicit rules and orders were in the years 1862 and 1863 made for the guidance of practitioners in the court of probate, both in respect of contentious and non-contentious business, and for the instruction as well of the principal registrars as of district registrars, together with a very large collection of forms. As to which it is thought more expedient to refer to the books of practice, (*c*) than by inserting them to encumber this treatise by such a very long statement as would be requisite for that purpose.

These rules, orders, and directions are for the most part founded on the doctrines and practice previously established in the prerogative court with regard to the making, &c. of wills, which have already been stated in the progress of this work. And inasmuch as the practice of the court as established at the time when the act passed, may, perhaps, be in some degree useful in illustrating and expounding the "orders, rules, and instructions," it is proposed to leave unaltered such portions of the last edition of this work as related in the established practice of the prerogative court, which,

(c) Coote's Practice; Dodd & Brook's Practice.

as it has already appeared, subject to the rules, &c. are to regulate the practice of the court of probate.

A testament may be proved in two ways; either in common form, or by form of law; which latter mode is *also called the solemn form, and, sometimes, proving *per testes*. (*d*)

A will is proved in common form, when the executor presents it before the judge, and in the absence, and without citing the parties interested, produces witnesses to prove the same; who testifying, by their oaths, that the testament exhibited is the true, whole, and last will and testament of the deceased, the judge thereupon, and sometimes upon less proof, doth annex his probate and seal thereto. (*e*) The affidavit required of the executor is to be in this form:

In her Majesty's Court of Probate. The Principal Registry. In the Goods of A. B. deceased.

Executor's oath.

I, C. D. of in the county of , make oath and say, that I believe the paper hereto annexed, and marked by

(*d*) Swinb. pt. 16, s. 14, pl. 1; Godolph. pt. 1, c. 20, s. 4. [The solemn form agrees with the practice in Massachusetts in all cases of the probate of wills. Gray J. in Waters *v.* Stickney, 12 Allen, 4.] There is another kind or form of proving testaments, which in the civil law is called *apertura testimenti*, which form respects written or closed testaments, in the making whereof amongst other solemnities the civil law required that the witnesses should put their seals; and after the death of the testator, at the opening of the written or closed testament, the same law required that the same witnesses should be called by the magistrate to acknowledge their seals or to deny the sealing. But this form is not of any use with us. Ib.

(*e*) Swinb. pt. 6, s. 14, pl. 2; Godolph. pt. 1, c. 20, s. 4. [Proof of wills in common form has been adopted and practised upon in some of the American States. The modes of proceeding vary in some respects from the English method. In New Hampshire, if the probate of a will is not contested, the judge may allow and approve the same in common form, upon the testimony of one of the subscribing witnesses thereto, although the others may be living, and within the process of the court. Rev. St. N. Hamp. c. 157, § 6. As to the proof of wills in common and in solemn form in this state, see, further, Noyes *v.* Barber, 4 N. H. 406; and George *v.* George, 47 N. H. 44, 45, as to wills proved without notice. As to the law of Mississippi upon this subject, see Cowden *v.* Dobyns, 5 Sm. & M. 82; of North Carolina, see Etheridge *v.* Corprew, 3 Jones (Law), 14; of Tennessee, see Gibson *v.* Lane, 9 Yerger, 475; Byrn *v.* Fleming, 3 Head, 658; of South Carolina, see Brown *v.* Gibson, 1 Nott & McC. 326. When it appears to the probate court in Massachusetts, by the consent in writing of the heirs-at-law, or other satisfactory evidence, that no person interested in the estate intends to object to the probate of a will, the court may grant probate thereof upon the testimony of one only of the subscribing witnesses. Genl. Sts. c. 92, § 19. But a decree establishing a will in this mode is equally conclusive with a decree made after the most ample contestation. The essential facts to be shown to entitle a paper to probate are, of course, the same in the case of an uncontested as in the case of a contested probate.]

me, to contain the true and original last will and testament, with a codicil thereto, of A. B., late of deceased; and that I am the sole executor therein named, and that I will well and faithfully administer the personal estate and effects of the said testator by paying his just debts and the legacies contained in his will and codicil so far as the same shall thereto extend and the law bind me, and that I will exhibit a true and perfect inventory of all and singular the said estate and effects, and render a just and true account thereof whenever required by law so to do. That the testator died at on the day of 18 , (*f*) and that the whole of the personal * estate and effects of the said testator does not amount in value to the sum of pounds to the best of my knowledge and belief .

Sworn by the said C. D. at this day of 18 .

Before me. (*g*)

Proctor's oath *in animam constituentis.*

By the ancient canon law, a proctor having a special proxy might make oath instead of the executor or administrator, and swear upon the soul of his client. (*h*) But now by canon 132, it is ordered, that "forasmuch as in the probate of testaments and suits for administration of the goods of persons dying intestate, the oath usually taken by proctors of courts *in animam constituentis* is found to be inconvenient; therefore, from henceforth every executor or suitor for administration shall personally repair to the judge in that behalf or his surrogate, and in his own person, and not by proctor, take the oath accustomed in these cases. But if by reason of sickness, or age, or any other just let or impediment, he be not able to make his personal appearance before the judge, it shall be lawful for the judge (there being faith first made by a credible person of the truth of his said hinderance or impediment) to grant a commission to some grave ecclesiastical person, abiding near the party aforesaid, whereby he shall give power and authority to the said ecclesiastical person in his stead to minister the accustomed oath above mentioned to the executor or suitor for such administration, requir-

(*f*) By a rule of the prerogative court of Canterbury, the time of the death was required to form part of the oath. See the reason for this, *post*, pt. I. bk. IV. ch. II. § VII. And by stat. 55 Geo. 3, c. 184, s. 38, no ecclesiastical court shall grant any probate without first requiring and receiving an affidavit from the applicant of the amount in value of the effects of the deceased. As to which, see *post*, pt. I. bk. VII.

(*g*) *Ante*, 325, note (*f*).

(*h*) 1 Oughton, tit. 6, s. 4, note (*c*).

ing his said substitute, that by a faithful and trusty messenger he certify the said judge truly and faithfully what he hath done therein."(*i*)

Practice of administering the oath where the executor is infirm, or lives at a distance.

Accordingly, if the executor be infirm, or live at a distance, it is usual to grant a commission or requisition to the archbishop or bishop, in England or Ireland (as the case may be), or if in Scotland, the West Indies, or other *foreign parts, to the magistrates or others competent authority, to administer the oath to be taken previous to granting probate of the will. (*j*)

Where a commission had issued to take the affidavits of executors to the testamentary scripts of the deceased, and the commission was, in the usual form, addressed to two clergymen, and directing that the executors should be sworn in the presence of a notary public; it was held that it was insufficiently executed, the oath having been administered in the presence of two witnesses, instead of a notary public. (*k*)

Manner of obtaining probate in common form:

With respect to the manner of obtaining probate in common form, it is necessary to consider the subject, first, with respect to wills made before the 1st of January, 1838, and which therefore are not within the operation of the stat. 1 Vict. c. 26 (*Act for the Amendment of the Law with respect to Wills*). Secondly, with respect to wills made on or after that date, &c. and to which, consequently, that statute extends.

1st, of wills made before Jan. 1, 1838: when they are perfect on the face:

First, with respect to wills made before the 1st of January, 1838. Where a will is perfect on the face of it, it is only required for probate in common form, where there is no subscribing witness, that an affidavit should be made by two persons to the signature of that will being in the handwriting of the testator. (*l*) If the will is at-

(*i*) 1 Gibs. Cod. 470, tit. 24, c. 3.

(*j*) Toller, 65. By order of the prerogative court of Canterbury certain forms were prescribed for the commission of swearing executors residing in the country, and for the oath to be administered. See 3 Burn E. L. 233, 234, Phillimore's edition. Though the forms pointed out by the requisition have not been followed, yet if this is owing to the refusal of the authorities in a foreign country to execute the requisition in the prescribed forms, the court would accept a return showing a virtual compliance with the object of the requisition. In the Goods of Towndrow, 2 Robert. 437.

(*k*) Jones *v.* Jones, 2 Phillim. 241.

(*l*) Brett *v.* Brett, 3 Add. 224; rule 20, P. R. (Non-contentious Business). In a modern case, probate in common form of an unattested will was granted on the affidavit of one person only as to handwriting, a solicitor and intimate acquaintance; the sister of the deceased, being her

tested by one subscribing * witness, the affidavit of one person to handwriting is then only required; and if it be attested by two subscribing witnesses, then the oath of the executor alone is sufficient, without any affidavits as to the writing. (*m*)

where a subscribing witness is also a legatee:

By stat. 1 Vict. c. 26, s. 15, every legacy to an attesting witness shall be void. (*m*[1]) But if a subscribing witness is also a legatee in any will to which that statute does not extend, in such case (as the statute 25 Geo. 2, c. 6, does not apply to wills of personalty, and therefore the witness does not lose his legacy) (*n*) the party has been considered in the spiritual court as no witness, being incompetent from interest. Accordingly, if of two subscribing witnesses to a will, one is a legatee, the practice has been to require affidavit of one person to probate of the will in common form, as if the will were subscribed by a single witness; if both subscribing witnesses are legatees, to require an affidavit of two persons to handwriting, just as it would be if the will were wholly unattested. (*o*)

when they are imperfect on the face:

probate will not be granted.

But where probate in common form is sought of an instrument which, on the face of it, is imperfect (whether the imperfection consists in its being incomplete in the body of it, or merely in the execution, as in the want of signature, or of * subscribing witnesses where there is an attestation clause, (*p*) or the like), two things are required by the court before probate will be allowed. 1. There must be

executor and sole next of kin and in distribution, also deposing that from the deceased's retired habits and infrequency of writing, no second affidavit of handwriting could be procured; the deceased, too, having been dead nine months, and no other application made. In the Goods of Keeton, 4 Hagg. 209.

(*m*) Brett *v.* Brett, 3 Add. 224; rules 18 & 19, P. R. (Non-contentious Business). It is said by Godolphin, pt. 1, c. 21, s. 4, that where there is no controversy or dispute touching the will, there the single oath of the executor alone is sufficient for the probate, in common form. And Oughton, vol. 1, tit. 6, s. 4, speaking of probate in the common form says, *quod fit solo juramento executoris.* The above passage in Godolphin is cited by Dr Burn in his Ecclesiastical Law, vol. 4, p. 317, Phillimore's edition, who adds, that such is the practice throughout the province of Canterbury; but that within the province of York it has been usual (though now discontinued in some of the dioceses) to swear also one witness.

(*m*[1]) [In Massachusetts all beneficial devises, legacies, and gifts to a subscribing witness to a will are void, unless there are three other competent subscribing witnesses to the same. Genl. Sts. c. 92, § 10.]

(*n*) See *post*, pt. III. bk. III. ch. I. § I.

(*o*) 3 Add. 225. This practice continues, notwithstanding stat. 6 & 7 Vict. c. 85; *post*, 345. See, also, rule 22, P. R. (Non-contentious Business).

(*p*) See *ante*, 85.

affidavits stating facts, which, if established in solemn form of law (*i. e.* by plea and depositions) would sustain the instrument, as a will, in case it was disputed. 2. There must be consent, implied or expressed, from all parties interested. (*q*)

unless upon affidavits stating a case which would establish the will upon solemn proof:

Therefore, as on the one hand, however complete the consent of the parties interested, the court will not grant probate in common form of a testamentary paper, which the court is convinced could not, if opposed, be maintained as a will; (*r*) so, on the other, although the affidavits disclose a case, which might (supposing the will were contested) establish the instrument as testamentary, the court will refuse probate in common form, unless the parties interested are consenting or cited. (*s*)

and unless all parties interested are consenting or cited:

The rule is the same where, from erasures, interlineations, or other similar causes, it appears *primâ facie*, on the document itself, that the instrument is deliberative. (*t*)

the same law, where a paper is deliberative on the face of it.

It follows, that where minors are parties interested, since they cannot give a proxy of consent, probate in common form cannot, generally speaking, be obtained of an instrument imperfect on the face of it. (*u*)

Minors cannot consent to probate in common form.

* Secondly, with respect to wills made on or after the 1st day of January, 1838. If the will be perfect on the face of it, and there is an attestation clause, reciting that the solemnities required by the statute 1 Vict. c. 26, s. 9, have been complied with (*e. g.* "signed and declared by the above named testator, as and for his last will and testament,

2dly, of wills made on or after Jan. 1, 1838:

(*q*) In the Goods of Thomas, 1 Hagg. 695; In the Goods of Herne, 1 Hagg. 225; In the Goods of Hurrill, 1 Hagg. 253; In the Goods of Wenlock, 1 Hagg. 551.

(*r*) In the Goods of Tolcher, 2 Add. 16.

(*s*) In the Goods of Edmonds, 1 Hagg. 698; In the Goods of Adams, 3 Hagg. 258. If the deceased was illegitimate, the consent of the crown must be obtained. In the Goods of Robinson, 1 Hagg. 643.

(*t*) In the Goods of Herne, 1 Hagg. 222; Braham *v.* Burchell, 3 Add. 254. See, also, In the Goods of Colberg, 2 Curt. 832.

(*u*) In the Goods of Gibbs, 1 Hagg. 376; In the Goods of Ross, 1 Hagg. 471; In the Goods of Thomas, 1 Hagg. 697. And issue that may be born after probate granted will not be bound by the decree. In the Goods of Taylor, 1 Hagg. 642. Where ink alterations in a will are carefully made, and not improbably final, the court will not, on the non-appearance, after personal service of executors appointed, and of minor legatees materially benefited thereby, grant probate, in common form, of the paper as originally executed. Ravenscroft *v.* Hunter, 2 Hagg. 65.

in the presence of us present at the same time, who, in his presence and in the presence of each other, have hereunto set our names as witnesses thereto. John Styles, Richard Nokes "), probate in common form may be obtained upon the oath of the executor alone.

But if there is no attestation clause, or if there is a clause which does not state a performance of all the prescribed ceremonies, an affidavi is required from one of the subscribing witnesses, by which it must appear that the will was executed in compliance with the statute. (*x*) But this rule may be dispensed with, if the witnesses, after diligent inquiry, are not forthcoming. (*y*)

Where it appears from the affidavits, the attestation clause being imperfect, that the will was not properly attested by the witnesses under the statute, the court cannot decree administration to pass to the effects of the deceased *as dead intestate;* for there might be collusion. All that the court will do in such cases is to reject the prayer for probate, leaving the parties to take out administration if they think proper; as notwithstanding the court declines to grant probate, the will might be propounded and established. (*z*)

probate of wills exhibiting alterations and obliterations.

If a will, bearing date on or after January 1, 1838, has * upon the face of it any unattested obligation, interlineation, or alteration, the practice is to require an affidavit, showing whether they were made before or after the execution of the will. (*a*)

Where alterations are satisfactorily shown to have been made

(*x*) In the Goods *v.* Johnson, 2 Curt. 341; In the Goods of Batten, 7 Notes of Cas. 290; rule 4, P. R. (Non-contentious Business). Where one of the witnesses deposed that the will was signed in the presence of himself and the other witness, the other witness having no recollection as to the fact, probate was allowed. In the Goods of Hare, 3 Curt. 54. See, also, *ante*, 101.

(*y*) In the Goods of Luffman, 5 Notes of Cas. 183; In the Goods of Dickson, 6 Notes of Cas. 278.

(*z*) In the Goods of Ayling, 1 Curt. 913. See, also, In the Goods of Watts, 1 Curt. 594.

(*a*) Rules 8, 9, & 10, P. R. (Non-contentious Business). One of the subscribed witnesses will suffice, if he can speak positively. But if none of them can do so, they should all, whatever be their number, join in the affidavit. In the Goods of Townshend, 5 Notes of Cas. 146. If none of them can depose negatively or affirmatively, the practice is for the executor to join in the affidavit and depose that he cannot adduce any farther or other evidence, and then probate will be granted of the will as it originally stood. When two witnesses join in one affidavit, both must depose to the due execution. In the Goods of Batten, 7 Notes of Cas. 290. See *ante*, 145, as to probate where words are completely obliterated.

before the execution, it is usual to engross the probate copy of the will *fair*, inserting the words interlined in their proper places, and omitting words struck through or obliterated. But in cases where the construction of the will may be affected by the appearance of the original paper, the court will order the probate to pass in *fac-simile*. (*b*) And it appears to have been sometimes supposed that the grant of such a probate leaves it open to a court of construction to inquire whether such alterations of the will were made under such circumstances as to be effectual. (*c*) But it is plain, it should seem, that unless the court of probate had adjudged that the obliterations or other alterations had been effectually made, the decree would have been for probate of the will in its original state. A *fac-simile* probate, therefore, of a will made after the new wills act came into operation, is conclusive, in the temporal courts, that the will was in that state before its execution, *i. e.* that the testator duly executed it with the alterations or cancellations upon it. (*d*) And the object of the *fac-simile* is that the * alterations, &c. may possibly help to show the meaning of the testator; as, for example, in a case where a testator says, "I give A. B. an annuity of 500*l.*, and I also give him 1,000*l.*;" and the testator then strikes out down to and including the words "500*l.*" (*e*)

Probate in *fac-simile*.

In a late case (*f*) a testator, having duly executed a will, made a later one, betraying on the face of it insanity. The executors of the earlier will took out a decree calling on all persons interested in the later paper to propound it, with an intimation that, on not appearing, the court would decree probate of the earlier will. The persons cited executed proxies declining to propound the later paper, and consenting to probate of the earlier one; and Sir H. Jenner Fust accordingly decreed probate of it in common form, without the later paper having been propounded at all, and said that the

Probate after citation of persons interested to propound a later paper.

(*b*) See *post*, pt. I. bk. VI. ch. I.; In the Goods of Raine, 34 L. J. N. S., P. M. & A. 125; S. C. 11 Jur. N. S. 587; In the Goods of Smith, 3 Sw. & Tr. 889.

(*c*) Shea *v.* Boschetti, 18 Beav. 321; 3 De G., M. & G. 778, 779.

(*d*) Gann *v.* Gregory, 3 De G., M. & G. 777; *post*, pt. I. bk. VI. ch. I.

(*e*) Gann *v.* Gregory, 3 De G., M. & G. 780 Suppose, again, the words "to be equally divided amongst them" interlined (without any *caret* to show where they were intended to come in), and in such a position that they are applicable to two sets of legatees. In such a case, it should seem, there must, of necessity, be a *fac-simile* probate.

(*f*) Palmer *v.* Dent, 2 Robert. 284; S. C. 7 Notes of Cas. 555.

course which had been taken was that which ought to be adopted in all similar instances.

SECTION IV.

Proof of Wills in Solemn Form or per Testes.

Part of the contentious business of the court.

This is a part of the "contentious business" of the court, (*g*) and is, consequently, subject to all the rules and orders made in 1862 in respect thereof. (*g*[1])

Proof in solemn form under the old practice:

* When a will is to be proved in solemn form, according to the old practice, it is requisite that such persons as have interest (that is to say, the widow and next of kin of the deceased, to whom the administration of his goods ought to be committed, if he died intestate) should be cited to be present at the probation and approbation of the testament, in whose presence the will is to be exhibited to the judge, and petition to be made by the party who prefers the will, and enacted for the receiving, swearing, and examining of the witnesses upon the same, and for the publishing or confirming thereof; whereupon witnesses are received and sworn accordingly, and are examined every one of them secretly and severally, not only upon the allegation or articles made by the party producing them, but also upon interrogations administered by the adverse party, and

(*g*) By rule 3 (Contentious Business), "All proceedings in the court of probate, or in the registries thereof in respect of business not included in the court of probate act, 1857, under the expression, common form business (except the warning of caveats), shall be deemed to be contentious business." By the court of probate act, 1857, s. 2 (interpretation clause), "common form business" shall mean the business of obtaining probate and administration, where there is no contention as to the right thereto, including the passing of probates and administrations through the court of probate in contentious cases when the contest is terminated, and all business of a non-contentious nature to be taken in the court in matters of testacy and intestacy, not being proceedings in any suit, and also the business of lodging "caveats against the grant of probate or administration." It is remarkable that the expression, "common form business," thus elaborately interpreted, does not occur in any other part of the act.

(*g*[1]) [It very often happens, that what is called the *solemn* probate of a will is matter of form merely, preliminary to the contestation of its validity in the tribunal of the last resort. Foster J. in Moulton's Petition, 50 N. H. 537. The proceeding to test the validity of a will is a proceeding *in rem*. The *res* — the will is *sub judice*. Benoist *v.* Murrin, 48 Missou. 48. And all persons interested have a right to intervene and become parties at any time before the final decision. Sawyer *v.* Dozier, 5 Ired. (Law) 97; Patton *v.* Allison, 7 Humph. 320.]

the depositions committed to writing; afterwards the same are published, and in case the proof be sufficient, the judge by his sentence of decree pronounces for the validity of the testament. (*h*)

According to the new practice under the court of probate act, 1857, declarations and pleas are substituted for the old modes of pleading. And forms for declarations and pleas are furnished by the rules, 1862 (contentious business). under the new practice.

And by rule 4, "Executors or other parties who, previously to the passing of the 'Court of Probate Act, 1857,' might prove wills in solemn form of law, shall be at liberty to prove wills under similar circumstances, and with the same privileges, liabilities, and effect, as heretofore."

* Rule 5. "Next of kin and others, who, previously to the passing of the said act, had a right to put executors or parties entitled to administration with will annexed upon proof of a will in solemn form of law, shall continue to possess the same rights and privileges, and be subject to the same liabilities with respect to costs as heretofore."

Rule 6. "Parties who previously to the passing of the said act had a right to intervene in a cause may do so, with leave of the judge of one of the registrars, obtained by order on summons, subject to the same limitations and the same rule with respect to costs as heretofore."

The difference between the common form and the solemn form, with respect to citing the parties interested, works this diversity of effect: viz, that the executor of the will proved in common form may, at any time within thirty years, be compelled, by a person having an interest, to prove it *per testes* in solemn form. (*i*) Thus, a probate of a codicil, granted in common form in 1808, was, upon The executor may, after proof in common form, be cited to prove the will *per testes*.

(*h*) Swinb. pt. 6, s. 14, pl. 3; Godolph. pt. 1, c. 20, s. 4. [As to the probate of a will in solemn form, and what is required in such a proceeding, see Brown *v.* Anderson, 13 Geo. 171. In Noyes *v.* Barber, 4 N. H. 409, Richardson C. J. said: "We understand a probate in solemn form to be a probate made by a judge, after all persons whose interests may be affected by the will have been notified, and had an opportunity to be heard on the subject." See Foster J. in Moulton's Petition, 50 N. H. 537. This mode of proof only is now generally required in the American States; and a decree allowing and approving a will in this form is ordinarily conclusive in the common law courts. 2 Greenl. Ev. § 692.] See, as to examination of the witnesses by word of mouth, stat. 20 & 21 Vict. c. 77, s. 31; *post*, 345.

(*i*) Godolph. pt. 1, c. 20, s. 4; [Noyes *v.* Barber, 4 N. H. 406; Brown *v.* Gibson, 1 Nott & McC. 326; Gibson *v.* Lane, 9 Yerger, 473; Gray J. in Waters *v.* Stick-

the citation of the executor by a next of kin to prove it *per testes* in due form of law, revoked in 1818, (*k*) and one granted in 1807, * by a similar proceeding revoked in 1820. (*l*) So that if the witnesses be dead in the mean time, it may endanger the whole testament. Whereas, the testament being proved in solemn form of law, the executor is not to be compelled to prove the same any more; and although all the witnesses afterwards be dead, the testament still retains its full force. (*m*)

The executor himself may prove the will in solemn form in the first instance.

Hence, not only are wills proved in solemn form, at the instance of persons who desire to invalidate them, (*n*) but, the executor himself may, and in prudence often does for greater security, propound and prove the will, in the first instance, *per testes*, of himself, citing the next of kin, and "all others pretending interest in general,"

ney, 12 Allen, 4.] Indeed Swinburne, pt. 6, s. 14, pl. 4, seems to consider ten years as the limit within which the executor may be compelled to prove; but this probably is a typographical mistake for thirty. See 4 Burn E. L. 318, Phillimore's ed. However, in Hoffman *v.* Norris (Prerog. 1805), reported in a note to Newell *v.* Weeks, 2 Phillim. 231, Sir Wm. Wynne, says, "I do not know that there is any specific time that limits a party." See, also, Merryweather *v.* Turner, 3 Curt. 802, 817; In the Goods of Topping, 2 Robert. 620, by Sir J. Dodson, accord. But where a party who is thus entitled to call in the probate and put the executor to proof of the will, chooses to let a long time elapse before he takes this step, he is not entitled to any indulgence at the hands of the court. He is entitled to have the law strictly administered and to nothing beyond it. Blake *v.* Knight, 3 Curt. 553. And under such circumstances the court (having regard to the infirmity of the witnesses' memory after the lapse of time) is, it should seem, somewhat astute to discover circumstances whereupon to found an inference that the formalities required for a due execution of the will have been gone through. See the cases collected, *ante*, 101. [In some of the American States, periods for the contestation of the probate of wills have been prescribed by statutes, to which the reader is referred. See Roy *v.* Segrist, 19 Ala. 810; Nalle *v.* Fenwick, 4 Rand. 418; Parker *v.* Brown, 6 Grattan, 554. But in other states there is but one form or time of probate, and, when it has been made in that form, it is conclusive, and not subject to any subsequent review or reëxamination. In all cases, where the validity of a will has been once fully contested in the manner pointed out by statute for contestation, review, or reëxamination, that is conclusive on all persons. Scott *v.* Calvit, 3 How. (Miss.) 157, 158; Nalle *v.* Fenwick, 4 Rand. 588; Hodges *v.* Bauchman, 8 Yerger, 186; Malone *v.* Hobbs, 1 Robinson, 346.]

(*k*) Satterthwaite *v.* Satterthwaite, 3 Phillim. 1.

(*l*) Finucane *v.* Gayfere, 3 Phillim. 405.

(*m*) Swinb. pt. 6, s. 14, pl. 4.

(*n*) In such case it is laid down that the proctor of the party disputing the will, at the time of exhibiting the will, ought to accept the contents thereof so far forth as it makes for the benefit of his client; otherwise if any legacy is given to him in the will, he shall lose it for his general impugning of the will. 1 Oughton, tit. 6, s. 10; 4 Burn E. L. 819, Phillimore's ed. But this doctrine is, it should seem, obsolete.

to "see proceedings;" which being done, the will shall not be set aside afterwards (provided there be no irregularity in the process) when the witnesses are dead. (*o*)

But the executors cannot be allowed to issue a citation against the legatees under a codicil, which they do not believe to be a true codicil of the deceased, calling on them to propound and prove it if they think fit. The proper course is for the executors to prove the will in solemn form, and cite the next of kin and the asserted legatees under the codicil to see the will proved. (*v*)

The next of kin, as such merely, are entitled to call for proof in solemn form of the deceased's will, of common right. And the mere acquiescence of a next of kin to the probate being taken in the common form is no bar to the exercise of this right, even though he has received a legacy as due to him under the will; for he is still at liberty to * call in the probate, and put the executor on proof of that identical will *per testes*. (*q*) A strong instance of this occurs in the case of Core *v.* Spenser (which was decided in the prerogative court of Canterbury, in 1796), (*r*) where Spenser, the executor, was cited to bring in the probate of a will, taken in 1788, eight years before, at the suit of Core, whose mother had received an annuity under that will for five of the eight years; and she, Core herself, her mother dying at the end of the fifth year, for the remaining three. Spenser, in

The executor may be compelled to prove in solemn form by a next of kin, who has acquiesced and received a legacy.

(*o*) 1 Ought. tit. 6, s. 5; tit. 222, s. 1, 2. [In the American States, formal notice in some newspaper or newspapers, most likely to convey information to all parties interested, is generally required in cases where it is not waived by such parties, and, that notice being given, all parties will be bound by the proceedings in the probate of the will whether contested or uncontested. *Post*, 564, note (*i*); Parker *v.* Parker, 11 Cush. 524; Smith J. in Cross *v.* Brown, 51 N. H. 489. No particular form of notice is prescribed by statute in Massachusetts; it is therefore left to the discretion of the judge to whose jurisdiction the subject appertains; the sufficiency of the notice in other respects is also within the discretion of the judge of probate; and where no appeal is taken from his decree it is not open to the parties to contest the sufficiency of the notice. Hubbard J. in Marcy *v.* Marcy, 6 Met. 367, 368. See Wells *v.* Child, 12 Allen, 330, 332. As to what is sufficient evidence that notice of proceedings had been given, to sustain a decree admitting a will to probate, and whether the fact of notice should appear in the decree, see Marcy *v.* Marcy, 6 Met. 360.]

(*p*) In the Goods of Benbow, 2 Sw. & Tr. 488.

(*q*) Bell *v.* Armstrong, 1 Add. 370; Merryweather *v.* Turner, 3 Curt. 802; Bell *v.* Raisbeck, Privy Council, 20th Feb. 1844, cited 3 Curt. 814, *per curiam*. See, also, Gascoyne *v.* Chandler, 2 Cas. temp. Lee, 242.

(*r*) 1 Add. 374, in Sir J. Nicholl's judgment in the case of Bell *v.* Armstrong.

that case, appeared under protest, and contended that Core was barred from putting him on proof of the will. But the court thought otherwise, and overruled the protest. However, long acquiescence, unaccounted for by any special circumstances, and acts done by a next of kin under the provisions of the will, may (if no fact appear which excites a reasonable suspicion of the genuineness or validity of the will) amount to such a waiver of his rights as to preclude him from putting the will in suit. (*s*) So where a will had been declared well proved in the court of chancery, after an order for an issue *devisavit vel non* had been discharged on the petition of the heiress-at-law (also sole next of kin) and her husband, and an annuity bequeathed to her regularly received during fourteen years, the court refused, at the prayer of the heiress-at-law and her husband, to call on the executors to prove that will in solemn form. (*t*)

but he must bring his legacy into court:

And before a legatee, who has received all or part of his legacy, can be permitted thus to dispute the will, he must bring into court the amount of the legacy paid to him, to abide the event of the suit. (*u*)

legatee who has renounced administration with the will annexed:

* A legatee who has renounced administration *cum testamento annexo*, as legatee and next of kin, whereupon it has been granted to another, is not barred by such renunciation from contesting the will; and he may therefore cite such administrator to bring the letters of administration into court to prove the will by witnesses, or to show cause why the deceased should not be pronounced to have died intestate, and why administration should not be granted to himself. (*v*)

if the executor himself propounds the will, a next of kin, though not cited, cannot call for proof, if

But when the executor propounds and proves the will, *per testes*, of himself, duly citing the next of kin "to see proceedings," all next of kin so cited are, generally speaking, thereby forever barred; and if he so propounds and proves the will against *certain* only of the deceased's next of kin, without having cited them all to see proceedings, the others, even though uncited, if to a certain

(*s*) Hoffman *v.* Norris, 2 Phillim. 230, in a note to Newell *v.* Weeks; Braham *v.* Burchell, 3 Add. 257, 258.

(*t*) Merryweather *v.* Turner, 3 Curt. 802.

(*u*) 1 Add. 374; Braham *v.* Burchell, 3 Add. 256, 257; [Hamblett *v.* Hamblett, 6 N. H. 333.] *Secus*, where the legatee is a minor. Goddard *v.* Norton, 5 Notes of Cas. 76.

(*v*) Gascoyne *v.* Chandler, 2 Cas. temp. Lee. 241.

extent privy to and aware of the suit, shall not put the executor on proof *per testes* of the will, so once already proved, a second time. (*x*)

privy to the first suit.

It is clearly established that before a person can be permitted to contest a will, the party propounding has a right to call on him to show that he has some interest. (*y*)

What interest a party must have to entitle him to oppose a will.

Any interest, however slight, and even, it seems, the bare possibility of an interest, is sufficient to entitle a party to oppose a testamentary paper. Thus where a testator disposed * of all his personal estate by his will and gave his real estate, but none of his personal, to his brother's children, and by a codicil he gave them pecuniary legacies, revoking the devise to them of the real estate which was of greater value than the legacies; it was held that they might oppose the codicil alone, notwithstanding their only right to a share of the personalty was under it. (*z*) Though a next of kin may, as such, oppose all the testamentary papers, he has not a right to oppose any particular one he may think fit; for some interest in it, however remote, is necessary. (*a*)

A creditor cannot dispute the validity of a will, unless he has had a grant of administration.

A creditor has only a right to have a *constat* of the estate of the deceased, to see whether there are assets sufficient to pay the debts; but he cannot controvert the validity of a will; for it is indifferent whether he shall receive his debt from an executor or an administrator; and if a creditor was admitted to dispute the validity of a will, it would create infinite trouble, expense, and delay to executors. (*b*)

(*x*) Newell *v.* Weeks, 2 Phillim. 224; Bell *v.* Armstrong, 1 Add. 372. Accordingly it was held by Sir C. Cresswell, that a next of kin, though not cited to see proceedings, and not having intervened, if in fact cognizant of a suit between the executor and another next of kin, ending in the establishment of the will, is not at liberty in any way to oppose probate of such will being taken; and where on a verdict, the court had pronounced for a will and a next of kin so situated had entered a caveat, the court directed probate to issue, in spite of the caveat, and condemned the next of kin in costs. Ratcliffe *v.* Barnes, 2 Sw. & Tr. 486. See Wytcherley *v.* Andrews, L. R. 2 P. & D. 327.

(*y*) Hingeston *v.* Tucker, 2 Sw. & Tr. 596. [See, as to interest, *post*, 534, note (q^1), 536, note (*l*), 574, note (g^1).] But when two persons oppose a will, one cannot call upon the other to propound his interest. Hingeston *v.* Tucker, 2 Sw. & Tr. 596.

(*z*) Kipping *v.* Ash, 1 Robert. 270. But see the observations of Sir C. Cresswell on this case in Crispin *v.* Doglioni, 2 Sw. & Tr. 17. See, also, Dixon *v.* Allinson, 3 Sw. & Tr. 572.

(*a*) Baskcomb *v.* Harrison, 2 Robert. 118; S. C. 7 Notes of Cas. 275.

(*b*) Burroughs *v.* Griffiths, 1 Cas. temp. Lee, 544; Menzies *v.* Pulbrook, 2 Curt. 845.

But when administration has been granted to a creditor, he may oppose a will; he is the same for this purpose as the next of kin. (*c*)

And he may contest a will without costs; because he is the appointee of the court and defends in that character, and does not appear simply as a creditor. (*d*)

If nobody who has a right appears to oppose the will, the court is not obliged, *ex officio*, to order a citation to issue to call the next of kin. (*e*)

A legatee cannot set up a will which has been pronounced against after being litigated by next of kin, or by the executor of another will.

A legatee cannot set up a will, after it has been litigated between the executor and next of kin, or between the executor and the executor of another will, and pronounced * against, unless he can show the parties agreed to set aside the will by fraud or collusion. (*f*) But if he is afraid the executor will not do justice, he may intervene for his interest pending the suit. (*g*)

Next of kin not liable to costs, when he compels the executor to proof *per testes:*

According to the old practice of the prerogative court, when an executor has been called upon by a next of kin to prove the will *per testes*, and has sufficiently proved it, if the party who caused him to do this merely cross-examined the witnesses produced in support of the will, he is not subject to costs, generally speaking. (*h*) A case, notwithstanding, may happen, in which a next of kin may exercise his undoubted right in this matter so vexatiously as to make himself responsible, if not wholly, in part for the costs of his opponent. (*i*) And there is a difference between next of kin,

(*c*) 1 Phillim. 159, 160, *per curiam*.

(*d*) 2 Curt. 851.

(*e*) 1 Cas. temp. Lee. 544.

(*f*) Bittleston *v.* Clark, 2 Cas. temp. Lee, 250; Hayle *v.* Hasted, 1 Curt. 236; or unless, as it is said, there has been neglect or mismanagement in the conduct of the suit. 1 Curt. 240; [Gray J. in Waters *v.* Stickney, 12 Allen, 5, 6.]

(*g*) 2 Cas. temp. Lee, 250.

(*h*) 1 Oughton, tit. 6, s. 7; Reeves *v.* Freeling, 2 Phillim. 56; Urquhart *v.* Fricker, 3 Add. 56. *Secus autem si proposuerit, ac in probando defecerit; tunc enim pars victa erit condemnanda in expensis: saltem a tempore propositionis hujusmodi.* 1 Oughton, tit. 6, s. 8; Evans *v.* Knight, 1 Add. 229; Farlar *v.* Farlar, 1 Sw. & Tr. 124; Summerell *v.* Clements, 3 Sw. & Tr. 39, acc.

(*i*) 3 Add. 57. As where a next of kin acquiesced in the probate, and received his legacy, and then after a considerable interval cited the executor to prove the will. Bell *v.* Armstrong, 1 Add. 375. And where a next of kin and residuary legatee under a prior will, suing *in formâ pauperis*, put the executor of a later will to proof *per testes*, after seven years' acquiescence in the probate, and the proofs then adduced were perfectly clear and satisfactory; the court condemned the party in costs, suspending the taxation while he continued a pauper. Wagner *v.* Mears, 2 Hagg. 524.

who are favorites of the court, and the legatees under a former will; for, though such a legatee may call for proof, *per testes*, of a will, by which his interests under a former will are prejudiced, and may interrogate the witnesses produced in support of that will, he does this at the risk of being condemned in costs, if the court has reason to suspect him of undue litigation. (*k*)

secus, of a legatee under a prior will:

* Where an executor, who has obtained probate of a former will, or a creditor who has a grant of administration, opposes a later will, he has the same right to do so without being subject to costs, as where a will is opposed by next of kin. (*l*) But costs may be decreed against a party who has taken probate of a will which he knew was not the last will of the deceased. (*m*)

And so it is as to an executor who has obtained probate of a former will, or creditor who has a grant of administration.

By rule 41 (contentious business), "In all cases the party opposing a will may, with his plea, give notice to the party setting up the will, that he merely insists on the will being proved in solid form of law, and only intends to cross-examine the witnesses produced in support of the will; and he shall thereupon be at liberty to do so, and to be subject to the same liabilities in respect of costs as he would have been under similar circumstances according to the practice of the prerogative court." (*n*)

Rule 41. Contentious proceedings:

The subsequent practice has been that a next of kin who avails himself of this rule shall be in the same position as a next of kin in the prerogative court, *i. e.* not liable to costs; but if he calls witnesses in support of pleas of undue execution, and incapacity, or the like, his liability to costs will be in the discretion of the court, and he will not, generally speaking, be condemned in costs, if there was a reasonable ground for litigation. (*o*) But a failure to establish pleas of undue influence

subsequent practice.

(*k*) Urquhart *v.* Fricker, 3 Add. 58. See, also, on this subject, Mansfield *v.* Shaw, 3 Phillim. 22; Boston *v.* Fox, 29 L. J., P. M. & A. 68, from which cases it appears that the executor of a former will has the same right as a next of kin.

(*l*) 1 Phillim. 160, note (*e*) to Dabbs *v.* Chisman. See, also, Lovett *v.* Harkness, 1 Cas. temp. Lee, 332.

(*m*) Martin *v.* Robinson, 2 Cas. temp. Lee, 535.

(*n*) If the party opposing a will does not deliver the notice of his intention not to call witnesses until after he has delivered his plea, he loses the protection against condemnation in costs given by the above rule, and the question of costs is left to the discretion of the court. Bone *v.* Whittle, L. R. 1 P. & D. 249.

(o) Bramley *v.* Bramley, 3 Sw. & Tr. 430.

and fraud will, as a general rule, be followed by condemnation in costs. (*p*)

* Very material alterations in the law, with respect to probate in solid form of wills relating to real estate, have been effected by the court of probate act, 1857 (20 & 21 Vict. c. 77). One of the great objects of the act was to prevent the possibility of a double trial on the same will. And accordingly it is enacted by sect. 61, that where the validity of a will affecting real estate is disputed on proving it in solemn form or any other contentious cause, the heir-at-law, devisees, &c. shall be cited. And by sect. 62, after proof in solemn form, or where the validity of the will is otherwise decided on, the decree of the court shall be binding on all persons interested in the real estate.

20 & 21 Vict. c. 77, s. 61. Heir, &c. to be cited when a will is proved in solemn form affecting real estate.

S. 62. Where the validity of the will is decided on, the decree of the court is to be binding on the persons interested in the real estate:

But by sect. 63 it is provided that the probate, decree, or order of the court shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party.

S. 63: provided they have been cited.

These sections and others connected with and following them will be found stated verbatim, and the whole subject of the probate of disputed wills affecting real estate will be considered, in a subsequent part of this treatise, (*q*) together with the inquiry as to the effect of probate generally.

Liability to costs of heir-at-law when cited.

The position of an heir-at-law cited under the 61st section is similar to that of the next of kin when cited to see proceedings in the prerogative court, and therefore, though if he contents himself with putting the executor to proof

(*p*) Summerell *v.* Clements, 3 Sw. & Tr. 35; Smith *v.* Smith, L. R. 1 P. & D. 239; Bone *v.* Whittle, L. R. 1 P. & D. 249. [Where cases are contested, in Massachusetts, either before the probate court or supreme court of probate, costs in the discretion of the court may be awarded to either party, to be paid by the other, or to either or both parties, to be paid out of the estate which is the subject of the controversy, as justice and equity shall require. Genl. Sts. c. 117, § 25. See Woodbury *v.* Obear, 7 Gray, 472, in which it was held that the executor named in an instrument which has been approved as a will by the judge of probate is not to be charged with the costs of an appeal, in which it is found that the will was made under his undue influence. In Waters *v.* Stickney, 12 Allen, 17, Gray J. said: "As the case involves an important question of law, upon which the appellant might reasonably desire the opinion of this court as the supreme court of probate, the common rule in probate causes must be followed, and no costs allowed to either party." Osgood *v.* Breed, 12 Mass. 536.]

(*q*) Pt. I. bk. VI. ch. I.

of the will, and cross-examining the witnesses, is not liable to costs; if he places pleas of undue influence and fraud on the record, and fails in proof of them, he is liable to costs. (*r*)

When costs decreed out of the estate, when to be paid by the unsuccessful party.

The inquiry as to the cases in which costs will be decreed out of the estate of the deceased, and the general question as *to when the unsuccessful party will be condemned in costs, will be discussed hereafter. (*s*)

Rule 78. Order for citation of heir, &c.

It remains to be mentioned in this place that by rule 78 (contentious business), it is ordered that "Any person proceeding to prove a will in solemn form, or to revoke the probate of a will, may, if the will affects real estate, apply to the judge, or to a registrar, in his absence, for an order authorizing him to cite the heir or heirs-at-law or other person or persons having or pretending interest in such real estate to see proceedings; and the judge or registrar on being satisfied by affidavit that the will in question does affect or purport to affect the real estate, will make an order authorizing the person applying to cite the heir or heirs-at-law or other such person or persons as aforesaid; provided always, that the judge may give any special directions as to the persons to be cited which he may think the justice of the case requires." (*t*)

SECTION V.

Evidence in Testamentary Causes.

By the law of the ecclesiastical

It is now proposed to consider some rules of the law of evidence, formerly prevalent in the ecclesiastical court, with respect to the admission of a disputed will to probate. (*t*[1])

(*r*) Fyson *v.* Westrope, 1 Sw. & Tr. 279.

(*s*) Pt. I. bk. IV. ch. II. § VII.

(*t*) Where an executor propounds the latter of two wills, the court will direct a citation to issue against the devisees under the earlier will and against the heir-at-law, although already before the court as defendant in the suit. Lister *v.* Smith, 3 Sw. & Tr. 53. The fact of one co-heir being an infant and child of a plaintiff is no ground for the court refusing to allow such co-heir to be cited. Nichols *v.* Binns, 1 Sw. & Tr. 19. In this case Sir C. Cresswell observed, that the 61st and 63d sections do not seem quite consistent. The former is more imperative in its terms than the latter.

(*t*[1]) [The burden is upon the party offering the will for probate to show that the instrument propounded is the last will and testament of the testator. Roberts *v.* Welch, 46 Vt. 164; Williams *v.* Robinson, 42 Vt. 658; Delafield *v.* Parish, 25 N. Y. 9, 97. And in this as in all other questions involved, the trial proceeds as in an ordinary civil action, each party producing evidence to maintain the issues on his part. See Hastings *v.* Rider, 99 Mass.

courts, one witness is not sufficient without other admiuicular proof.

By the general law of the ecclesiastical courts, one witness did not make full proof; and if the spiritual court refused to admit the testimony of a single witness, no *mandamus* or *prohibition would lie; (*u*) for where the

625. And the burden of proof remains with the person offering the will throughout the trial. See Theological Seminary at Auburn *v.* Calhoun, 25 N. Y. 422; Collier *v.* Idley, 1 Bradf. Sur. 94; Rider *v.* Legg, 51 Barb. 260; Nexsen *v.* Nexsen, 2 Keyes (N. Y.), 229; Isham *v.* Gibbons, 1 Bradf. Sur. 69; *ante*, 21, notes (x^3), (x^4); 112 *et seq.* The course of proceeding, in Michigan, in a case of contested sanity of a testator, is very fully and clearly stated by Mr. Justice Cooley, in Taff *v.* Hosmer, 14 Mich. 309, 315–318. As it very much resembles the course of proceeding in like cases in many other states, it may, perhaps, properly be quoted at considerable length. The learned judge says: "It appears that the proponents, being allowed to go forward with their evidence, confined it to an examination of the subscribing witnesses, who testified to the formal execution of the will, and that Jackson [the testator] at the time was of sound mind. The contestant then put in evidence tending to show a want of testamentary capacity, and rested his case. The proponents were then allowed by the court, against the objection of the contestant, to go fully into the question of sanity; not by way of reply merely, but to put in affirmative evidence as fully as if the ground had not been covered by their evidence at the outset. And at the conclusion of the proofs, the proponents were allowed also, against objection, to open and close the argument. It is inferrible from the record that the judge did not allow the proponents to put in the affirmative evidence of Jackson's sanity, after the contestant had rested, as a matter of discretion merely, but on the ground of legal right. There can be no doubt that the practice followed by the circuit judge, in this case, is that which has always prevailed in this state. The party assuming the burden of establishing a will, has not supposed himself bound, in his opening, to go farther than to give evidence by the subscribing witnesses, of those facts which would make out, *primâ facie*, a valid testamentary instrument, and has left all further evidence on the subject of mental capacity to be brought in by way of answer to that adduced by the contestant. The evidence at the opening has usually been of a formal character, and the proponent has confined himself to inquiries of a general nature respecting the signing and attestation, and whether, at the time, the party appeared to understand the business in which he was engaged. He has not been required to put in his whole case on the question of mental capacity before resting, and the cases are probably exceptional, where he has gone beyond calling the subscribing witnesses, unless they failed to testify to such facts as would establish a *primâ facie* case. So far as the order of proof is concerned, we cannot, in the least, doubt that this practice is altogether sensible and correct. To prove that the decedent was not insane, is to prove that an exceptional state of facts did not exist; in other words, it is to prove a negative; and on general principles very slight evidence only should be demanded of the party called upon to take the burden of proving such a state of facts. Stephens *v.* Young, 9 Mich. 500. And this evidence is generally with entire propriety confined to the time when the will was executed; the subscribing witnesses being allowed to express their opinions upon what they observed at that time, however limited may

(*u*) Chadron *v.* Harris, Noy Rep. 12. Godolph. pt. 1, c. 21, s. 1; 18 Vin. Abr. Prohibition, Q. 7; Evans *v.* Evans, 3 Notes of Cas. 427, 428; S. C. 1 Robert. 165; Taylor *v.* Taylor, 6 Notes of Cas. 558.

matter is wholly of ecclesiastical cognizance, as the probate of wills, although the proceedings of the spiritual court were con-

have been their opportunity for observation, and not being required to go farther, except upon cross-examination. The defence then takes the case, and enters upon proof of the alleged incompetency. But now, although all the proofs are to point to the decedent's condition at the moment when the will was executed, from the very nature of the case the evidence will almost always immediately diverge widely from that which has been put in by the proponent, and instead of being confined to rebutting the *primâ facie* case by the observation of other witnesses at or near the same period of time, it will bring into the case new facts, exceedingly diversified in their character, relating to periods of time widely apart, and which could not possibly be anticipated in all their particulars by the proponent when he gave his testimony. The contestant's evidence, instead of assuming the ordinary features of rebutting evidence, which is generally directed to the same point of time as that which it rebuts, now brings before the court the whole life of the decedent for a long period of time, and a long array of circumstances not in the least connected with those stated by the witnesses in chief, except as inferentially they may tend to show that the decedent's condition could not have been what was stated by those witnesses, inasmuch as it appeared to be different at other periods. How wide shall be the range of inquiry by the defence, is a question addressed to the judgment and discretion of counsel, and not at all dependent upon the evidence put in by the proponent. It covers facts, observations, and opinions, and in cases of difficulty, not even the contestant himself could anticipate before entering upon his case, the precise bounds it would be proper to set to his inquiries, or how far the minute facts and apparently trivial circumstances testified to by one witness might make it important to put others upon the stand. The defence, therefore, are seeking to disprove the main fact shown by the proponent by proving a vast number of new facts relating to other times and conditions; the testimony being affirmative in its character, though directed in its inferences to the establishment of the negative fact of mental incompetency. All rules of evidence are designed to elicit truth; and it is obvious that to require the proponent to anticipate, at his peril, the case that would be shown by the defence, would, in many cases, be equivalent to a denial of justice. For although there would still be a right to give rebutting evidence, this, in the sense in which rebutting evidence must then be understood, would be of little value, since it must be confined to disproving the facts and circumstances shown by the defence. But the facts in such a case are only important for the inference to be drawn from them; and the inference must generally be rebutted, not by disproving those facts, but by showing others from which the contrary inference is drawn. And what other facts, or even what class of facts, it shall be important to show, cannot be known until the defence is in, so that if the proponent should be required to go forward with all his proofs, he would often be found to have occupied the time of the court with evidence made immaterial by the course subsequently taken by contestant's proofs, and which entirely failed to anticipate the defence. In point of fact, the evidence which the proponent puts in at the outset, only answers to that inference which the law draws in favor of sanity when any other act is in question; and the course which the case assumes is not different from what it would be if the proponent could rest upon a presumption of competency until it was overthrown by the contestant's proofs. Where a party claims through a deed, which is assailed for incompetency in the grantor, the burden is upon him to establish the deed; but his *primâ facie* case is made out when he has put in the formal proofs of execution,

trary to the common law, yet no *mandamus* or prohibition should issue. (*x*) And if there were an appeal to the court of delegates (*i. e.* by stat. 2 & 3 W. 4, c. 92, to the queen in council), the common law judges, who were appointed members of such court, were bound, in such matters, by the rules of the civilians. (*y*)

But it must not be supposed that, by the ecclesiastical law, two witnesses were required to each particular fact, nor to every part of a transaction; for it often happened, that to the contents of a will, or to instructions, there was only one witness, — the confidential solicitor, or other drawer; but there were, and must have been, adminicular circumstances to the transaction; such as the expressed wishes of the testator to make his will, the sending for the drawer of it, his being left alone with the deceased for that known purpose, some previous declarations or subsequent recognitions, some extrinsic circumstances, in short, showing that a testamentary act was in progress, and tending to corroborate the act itself. (*z*)

* In Moore *v.* Paine, (*a*) the testatrix was entirely blind; there were three subscribing witnesses to the will, but only one of them (viz, the writer, who was of entire credit, and wholly unconcerned as to the event of the suit) could account for the instructions, for

these being supplemented by the legal inference of competency. If the defence then gives evidence tending to show mental unsoundness, the plaintiff cannot be precluded from going fully into the question with his proofs, by the fact that at the outset a case was made in his behalf which covered that point." See *ante*, 21, note (*x*[3]); *post*, 360, note (*u*); Kempsey *v.* McGinniss, 21 Mich. 123, 148, 149; Beaubien *v.* Cicotte, 12 Mich. 459, and numerous cases there cited; Aiken *v.* Weckerly, 19 Mich. 482.]

(*x*) Shatter *v.* Friend, 1 Show. 172; S. C. Carth. 142; Anon. 1 Freem. 290; Breeden *v.* Gill, 1 Ld. Raym. 221. But if a matter cognizable at common law arises incidentally in an ecclesiastical suit, as where the construction of an act of parliament comes in question, a release is pleaded, &c. the ecclesiastical court shall be prohibited, if they proceed to try contrary to the rules and customs of the common law; as if they refuse one witness, or construe the act of parliament otherwise than the common law requires. Juxon *v.* Byron, 2 Lev. 64; 1 Show. 172; Carth. 142; Full *v.* Hutchins, Cowp. 424; Breeden *v.* Gill, 1 Ld. Raym. 221; Gould *v.* Gapper, 5 East, 345; Com. Dig. Prohibition, G. 23; B. N. P. 219; 1 Robert. 174.

(*y*) Twaites *v.* Smith, 1 P. Wms. 10. [In Hastings *v.* Rider, 99 Mass. 625, Gray J. said: "Evidence in probate cases in this commonwealth is regulated by the common law, which has not adopted the looser practice, derived from the civil law, of the ecclesiastical courts upon this subject. Eveleth *v.* Eveleth, 15 Mass. 307; Wright *v.* Tatham, 5 Cl. & Fin. 670." See Peebles *v.* Case, 2 Bradf. Sur. 226.]

(*z*) Theakston *v.* Marson, 4 Hagg. 314; 1 Robert. 173. See Mackenzie *v.* Yeo, 3 Curt. 125; In the Goods of Winter, 4 Notes of Cas. 147; Farmer *v.* Brock, Dea. & Sw. 187; [In the Matter of the Will of John Kellum, 52 N. Y. 517.]

(*a*) 2 Cas. temp. Lee, 595.

the reading of the will to the testatrix, and her approbation of it, and for the identity of the paper; the other two only deposing to the publication of it by her as her will, but they did not hear it read to her, nor did they know the contents of it. The capacity of the testatrix was fully proved, and that she had made a former will, which differed from this chiefly in the *quantum* of the legacies, which were smaller in that than in this. And Sir George Lee was clearly of opinion that this will was sufficiently proved; and the learned judge observed, that the proof of wills with us is by the *jus gentium*, and by that law one witness is sufficient. There should be, indeed, some adminicular proof to corroborate the witness, which, in the present case, arose from the conformity of the former to the present will, and from a declaration which it appeared in evidence the deceased had made, that she believed some of her relations did not approve of her will, which was some sort of recognition of this will. This cause was appealed to the delegates, where the sentence was confirmed.

Court of probate act, 1857, s. 33. Rules of evidence in common law courts to be observed.

And now, by court of probate act, 1857 (21 & 22 Vict. c. 77, s. 33), "The rules of evidence observed in the superior court of common law at Westminster shall be applicable to and observed in the trial of all questions of fact in the court of probate." (a^1)

Competency of witnesses.

Upon the principle above stated, it was held that the question of the competency of witnesses was to be decided according to the rules of the ecclesiastical, and not of the common law. Thus, in the case of Twaites *v.* Smith, (b) there was an appeal to the delegates from the prerogative court of York; and the ground of appealing was, that the testimony of the children of the residuary legatee had been *admitted, who, by the ecclesiastical law, are incompetent, and the judges delegate, being of opinion that the rule of that law, and not of the common law, must prevail, reversed the sentence given at York.

Competency of executor.

By stat. 1 Vict. c. 26, s. 17, it is enacted, "That no person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of

(a^1) [See the remarks of the judges, upon the authority of the rules of the ecclesiastical court in the courts of common law, in Wright *v.* Tatham, 5 Cl. & Fin. 670, 692, 701, 702, 719, 726, 729, 748, 749, 768, 769.]

(b) 1 P. Wms. 10.

1 Vict. c. 26.

such will, or a witness to prove the validity or invalidity thereof." (b^1)

This section rendered an executor, who was also entitled to a legacy in that character, a competent witness to support the will, if he had released his legacy. (c)

Competency of witnesses and parties under 6 & 7 Vict. c. 85, 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83.

And now, by stat. 6 & 7 Vict. c. 85 (which was held to apply to proceedings in the ecclesiastical court), (d) competency is conferred on interested witnesses generally; and by stat. 14 & 15 Vict. c. 99, s. 2, on parties to suits; and by stat. 16 & 17 Vict. c. 83, s. 4, on husband and wives of parties. (d^1)

(b^1) [Harper *v.* Harper, 1 N. Y. Sup. Ct. 351. An executor named in a will is in Massachusetts not only a competent subscribing witness thereto, but he may also testify in support thereof, under recent statutes, although he has not declined the trust. Wyman *v.* Symmes, 10 Allen, 153; Sears *v.* Dillingham, 12 Mass. 358. See Dieterich's Estate, 1 Tuck. (N. Y.) Sur. 129; Levy's Estate, 1 Tuck. (N. Y.) Sur. 87; McDonough *v.* Loughlin, 20 Barb. 238; Pruyn *v.* Brinkerhoff, 7 Abb. Pr. (N. S.) 400; S. C. 57 Barb. 176; Haus *v.* Palmer, 21 Penn. St. 298; Post *v.* Avery, 5 Watts & S. 510; Filson *v.* Filson, 3 Strobh. 288; Workman *v.* Dominick, 3 Strobh. 589; Morton *v.* Ingram, 11 Ired. 368; Moore *v.* Allen, 5 Ind. 521.]

(c) Munday *v.* Slaughter, Prerog. 1839, 2 Curt. 72. [See Harleston *v.* Corbett, 12 Rich. Law (S. Car.), 604.]

(d) Burder *v.* Hodgson, 4 Notes of Cas. 491; Sanders *v.* Wigston, 5 Notes of Cas. 78, 83, 84; S. C. 1 Robert. 460; Cullum *v.* Seymour, 1 Robert. 772, by Sir H. J. Fust.

(d^1) [See Lawyer *v.* Smith, 8 Mich. 411; Montgomery *v.* Perkins, 2 Met. (Ky.) 448; Harper *v.* Harper, 1 N. Y. Sup. Ct. 351. By a late statute of Massachusetts, no person of sufficient understanding shall be excluded from giving evidence as a witness in any civil proceeding, in court, or before a person having authority to receive evidence; subject to the qualification that neither husband nor wife shall be allowed to testify as to private conversations with each other; and the conviction of a witness of any crime may be shown to affect his credibility. A party to a cause who shall call the adverse party as a witness, shall be allowed the same liberty in the examination of such witness as is now allowed upon cross-examination. St. Mass. 1870, c. 393, §§ 1, 3, 4. See Metler *v.* Metler, 3 C. E. Green (N. J.), 270, 276; S. C. 4 C. E. Green (N. J.), 457; Harrison *v.* Johnson, 3 C. E. Green (N. J.), 420; Bird *v.* Davis, 1 McCarter (N. J.), 467; Marlott *v.* Warwick, 3 C. E. Green (N. J.), 108; Doody *v.* Pierce, 9 Allen, 141; Bailey *v.* Myrick, 52 Maine, 132; Woburn *v.* Henshaw, 101 Mass. 193; Wyman *v.* Symmes, 10 Allen, 153; 1 Dan. Ch. Pr. (4th Am. ed.) 886, and notes; Commonwealth *v.* Hall, 4 Allen, 305; Commonwealth *v.* Gorham, 99 Mass. 420. As to what are to be considered private conversations between husband and wife, within the exclusion of the above statute, see French *v.* French, 14 Gray, 186, 188; Robinson *v.* Talmadge, 97 Mass. 171. The above statute of Massachusetts (§ 2) provides that nothing in the act shall apply to the attesting witnesses to a will or codicil; but it seems that the exception is restrained in its operation to cases where the attesting witnesses are acting strictly in that capacity. Wyman *v.* Symmes, 10 Allen, 153. See Cornwell *v.* Wooley, 47 Barb. 327. By recent legislation in many other states, interest no longer disqualifies a person to testify as a witness. But in states where there has been no such legis-

By stat. 17 & 18 Vict. c. 47, "In any suit or proceeding depending in any ecclesiastical court in England or Wales, the court (if it shall think fit) may summon before it and examine, or cause to be examined, witnesses by word of mouth, and either before or after examination by deposition or affidavit; and notes of such evidence shall be taken down in writing by the judge or registrar, or by such other person or persons, and in such manner, as the judge of the court shall direct."

17 & 18 Vict. c. 47. Witnesses may be summoned and examined *vivâ voce*.

And now, by stat. 20 & 21 Vict. c. 77, s. 31, "Subject to the regulations to be established by such rules and orders as aforesaid, the witnesses, and where necessary, the parties, in all contentious matters, where their attendance can be had, shall be examined orally by or before the judge in open court; (d^2) provided always, that, subject to any such regulations *as aforesaid, the parties shall be at liberty to verify their respective cases, in whole or in part, by affidavit, but so that the deponent in every such affidavit shall, on the application of the opposite party, be subject to be cross-examined by or on behalf of such opposite party, orally in open court as aforesaid; and after such cross-examination may be re-examined, orally in open court as aforesaid, by or on behalf of the party by whom such affidavit was filed."

Mode of taking evidence in matters under court of probate act, 1857, s. 31.

And by sect. 32, it is provided "That where a witness in any such matter is out of the jurisdiction of the court, or where, by reason of his illness or otherwise, the court shall not think fit to enforce the attendance of the witness in open court, it shall be lawful for the court to order a commission to issue for the examination of such witness on oath, upon interrogatories or otherwise, or if the witness be within the jurisdiction of the court to order the examination of such witness on oath, upon interrogatories or otherwise, before any officer of the said court, or other person to be named in such order for the purpose; and all the powers given to the courts of law at Westminster by the acts of the thirteenth year of King George the Third, chapter sixty-three, and of the first year of King William the Fourth, chapter twenty-

Sect. 32. Court may issue commissions or give orders for examination of witnesses abroad or who are unable to attend.

lation, the same rule as to the incompetency of witnesses from interest, governs, in the probate of wills, as in other cases.]

(d^2) [This is generally the mode of examining the witnesses and parties in all cases in the American States.]

two, for enabling the courts of law at Westminster to issue commissions and give orders for the examination of witnesses in actions depending in such courts, and to enforce such examination, and all the provisions of the said acts, and of any other acts for enforcing or otherwise, applicable to such examination, and the witnesses examined, shall extend and be applicable to the said court of probate, and to the examination of witnesses under the commissions and orders of the said court, and to the witnesses examined, as if such courts were one of the courts of law at Westminster, and the matter before it were an action pending in such court."

Attesting witnesses:

The general rule is, that if a party be put to proof of a will, he must examine the attesting witnesses. (d^3)

(d^3) [These witnesses are placed around the testator to ascertain and judge of his capacity, and to see that no fraud is practised upon him in the execution of his will; and the heir or other person interested has a right to insist on the testimony of all the witnesses if they are alive and within reach of the process of the court. Chase *v.* Lincoln, 3 Mass. 236, 237; 2 Greenl. Ev. §§ 691, 692; Brown *v.* Wood, 17 Mass. 72, 73; Sears *v.* Dillingham, 12 Mass. 358; McKeen *v.* Frost, 46 Maine, 239, 244, 245; Patten *v.* Tallman, 27 Maine, 29; Bailey *v.* Stiles, 1 Green Ch. 231, 232; Rush *v.* Parnell, 2 Harring. 448; Jones *v.* Arterburn, 11 Humph. 97; Apperson *v.* Cottrell, 3 Porter, 51; Nalle *v.* Fenwick, 4 Rand. 585; Jackson *v.* Vickory, 1 Wend. 406; Fetherly *v.* Waggoner, 11 Wend. 599; Smith *v.* Jones, 6 Rand. 32; Lord Carrington *v.* Payne, 5 Ves. (Perkins's ed.) 404, and cases in note (*a*); Poole *v.* Richardson, 3 Mass. 330; Dufield *v.* Morris, 2 Harring. 375; Scribner *v.* Crane, 2 Paige, 147; Heyward *v.* Hazard, 1 Bay, 335; Brown *v.* Luckett, 4 How. (Miss.) 482; Harrison *v.* Rowan, 3 Wash. C. C. 482; Field's Appeal, 36 Conn. 278. But it is not necessary that each witness should be able to testify that all the formalities required for the attestation of the will were complied with. Jauncey *v.* Thorne, 2 Barb. Ch. 40; Newhouse *v.* Godwin, 17 Barb. 236; Weir *v.* Fitzgerald, 2 Bradf. Sur. 42; *ante*, 103, note (*w*). See, however, as to the rule in Pennsylvania, Weigel *v.* Weigel, 5 Watts, 486; Mullen *v.* M'Kelvy, 5 Watts, 399. Although the testimony of the subscribing witnesses is entitled to great weight, it is by no means conclusive, but may be rebutted by other evidence. Orser *v.* Orser, 24 N. Y. 51; Cilley *v.* Cilley, 34 Maine, 163, 164; Harper *v.* Harper, 1 N. Y. Sup. Ct. 351, 356. It is universally conceded that the subscribing witnesses to a will may testify to their opinion respecting the soundness of the testator's mind at the time of executing his will. Robinson *v.* Adams, 62 Maine, 369, 409; Gerrish *v.* Nason, 22 Maine, 441; Cilley *v.* Cilley, 34 Maine, 162, 163; Brooks *v.* Barrett, 7 Pick. 94; Poole *v.* Richardson, 3 Mass. 330; Duffield *v.* Morris, 2 Harring. 375; Potts *v.* House, 6 Geo. 324; Logan *v.* McGinnis, 12 Penn. St. 27; Dewitt *v.* Barley, 17 N. Y. 340; Campbell J. in Beaubien *v.* Cicotte, 12 Mich. 459, 495; Clapp *v.* Fullerton, 34 N. Y. 190, 194. The reason why subscribing witnesses are allowed to testify to their opinion of the testator's sanity, as given by Gray J. in Hastings *v.* Rider, 99 Mass. 624, is "because that is one of the facts necessary to the validity of the will, which the law places them around the testator to attest and testify to." See Field's Appeal, 36 Conn. 279, 280. It is not, however, necessary to the establishment of the will that the subscribing witnesses

But since the passing of the court of probate act, 1857, * sec-

should give their opinions upon that point. Cilley *v.* Cilley, 34 Maine, 162. In Massachusetts the opinions of none others, except experts and subscribing witnesses, concerning the sanity of the testator, are admissible in evidence. In Commonwealth *v.* Wilson, 1 Gray, 339, Shaw C. J. said: "Subscribing witnesses to a will, being the witnesses chosen by the testator, are allowed to state their opinion as to his sanity. But other witnesses, not experts, are not permitted to state their opinion, even if they first state the facts and circumstances on which it is founded. This distinction has been long established in this commonwealth and uniformly adhered to." See Poole *v.* Richardson, 3 Mass. 330; Needham *v.* Ide, 5 Pick. 510; Commonwealth *v.* Fairbanks, 2 Allen, 511; Hastings *v.* Rider, 99 Mass. 624, 625; Boardman *v.* Woodman, 47 N. H. 133, 134; State *v.* Pike, 49 N. H. 399; Gehrke *v.* State, 13 Texas, 568. In Hastings *v.* Rider, 99 Mass. 624, 625, Gray J. said: "But other witnesses [than attesting witnesses], having no peculiar skill or professional experience, can testify only to facts within their own knowledge, from which the condition of mind may be inferred, and are not permitted to state whether in their opinion, though derived from personal observation, a certain person was sane or insane at a particular time. Townsend *v.* Pepperell, 99 Mass. 40. The reasons upon which these statements are excluded are, that they are not of facts, but opinions, of those having no peculiar duty or capacity to form them, upon a matter requiring special knowledge and skill to judge of intelligently, as to which every unskilled witness has a different standard, and which can be quite as well understood by the court or jury from proof of the details of the acts and conduct of the person whose mental capacity is in question. Evidence in probate cases in this commonwealth is regulated by the common law, which has not adopted the looser practice, derived from the civil law, of the English ecclesiastical courts upon this subject. Eveleth *v.* Eveleth, 15 Mass. 307; Wright *v.* Tatham, 5 Cl. & Fin. 675." In New Hampshire the opinions of witnesses, not experts, and who are not subscribing witnesses, concerning the sanity of the testator, are not admissible in evidence. Boardman *v.* Woodman, 47 N. H. 120; State *v.* Pike, 49 N. H. 399. In Robinson *v.* Adams, 62 Maine, 369, 409, it having been insisted that to lay the foundation for allowing the subscribing witnesses to a will to testify as to their belief and opinion regarding the soundness of the mind of the testator at the time of executing the will, all the facts transpiring at the time, all that was said and done, and all the premises from which the conclusion was drawn, must be stated, Kent J. said: "We do not so understand the rule or the practice. It is the fact of being a witness to the will, that gives this right to ask his opinion of the soundness of mind of the testator. It may be given, although the witness was suddenly called in, and heard only the request to sign and the declaration of its being his last will. It is undoubtedly true that all the facts seen or known by the witness at the time are proper subjects of inquiry by either party, and it is proper that they should be. But it is not legally necessary that all should be detailed by the witness, if not asked by either party, before he can give his opinion." See Cilley *v.* Cilley, 34 Maine, 162. The weight and force to be given to the opinion of a subscribing witness will depend upon his opportunities of observation and his intelligence, the same as in the case of any other witness. See Turner *v.* Cheesman, 15 N. J. 243, remarks of Green Ch.; Stevens *v.* Vancleve, 4 Wash. C. C. 262; Scribner *v.* Crane, 2 Paige, 147; Harper *v.* Harper, 1 N. Y. Sup. Ct. 351, 355, 356. In many of the states the opinions of persons, speaking from personal knowledge and observation of the conduct, manners, and conversation and appearance of the testator whose sanity is in question,

not necessary to call both.

tion 33, (*e*) it is not necessary to call both the attesting witnesses to prove the execution; for in the courts of

though not subscribing witnesses, are held admissible on the question of the sanity of the testator; but such witnesses must state the facts on which their opinions are founded. Beaubien *v.* Cicotte, 12 Mich. 459, 501, 502. In this case Campbell J. said: "This rule does not require the witnesses to describe what is not susceptible of description, nor to narrate facts enough to enable a jury to form an opinion from these alone. This would be impossible; and if it could be done there would be no occasion for any opinion from the witnesses. It is a matter of daily experience that the opinion of an intelligent and familiar eye-witness is the only satisfactory means of ascertaining mental condition, or disposition, or expression, or any other of those impalpable but important facts upon which men rest in dealing with each other. There is no substitute for personal observation. But if witnesses were not compellable to state such facts as are tangible, there would be no means of testing their truthfulness. When they state visible and intelligible appearances and acts, others who had the same means of observation may contradict them, or show significant and explanatory facts in addition, and if their story is fabricated, or if they describe facts having a medical explanation, medical experts may detect falsehood in inconsistent symptoms, or determine how far the symptoms truly given have a scientific bearing. In the United States, the authorities all require the witness to state such facts as he can, in order that the jury may be better enabled to determine the value of his opinions, — stress being of course laid upon his opportunities of judging. In many cases the facts which can be described will be very significant to a jury, while there are many facts susceptible of a different interpretation, from which a jury could obtain no light whatever without the aid of the witness's judgment. The strongest indications of mental weakness or observation often exist in expressions and appearances incapable of reproduction, even by an accomplished mimic, and yet decisive to any intelligent eye-witness." See per Coleridge J. in Wright *v.* Tatham, 5 Cl. & Fin. 690, 691; per Alderson B. in S. C. pp. 720, 721. See, also, the remarks of Sargent J. upon this point in Boardman *v.* Woodman, 47 N. H. 120, 133. The authorities are very numerous which sustain or countenance the admissibility of the opinions of the witnesses in such cases. See Clary *v.* Clary, 2 Ired. 78; Clark *v.* State, 12 Ohio, 483; Potts *v.* House, 6 Geo. 324; Dicken *v.* Johnson, 7 Geo. 484; Dunham's Appeal, 27 Conn. 192; Norris *v.* State, 16 Ala. 776; Powell *v.* State, 25 Ala. 21; Roberts *v.* Trawick, 13 Ala. 68; Watson *v.* Anderson, 13 Ala. 302; Florey *v.* Florey, 24 Ala. 241; Wilkinson *v.* Moseley, 30 Ala. 562; Hughes *v.* Hughes, 31 Ala. 519; Grant *v.* Thompson, 4 Conn. 203; Kinne *v.* Kinne, 9 Conn. 102; Comstock *v.* Hadlyme, 8 Conn. 265; Porter *v.* Pequonnoc Manuf. Co. 17 Conn. 249; Townshend *v.* Townshend, 7 Gill, 10; Dorsey *v.* Warfield, 7 Md. 65; People *v.* Sandford, 43 Cal. 29; Eyerman *v.* Sheehan, 52 Missou. 221; Lester *v.* Pittsford, 7 Vt. 158; Morse *v.* Crawford, 17 Vt. 499; Denio J. dissenting, in Dewitt *v.* Barley, 17 N. Y. 340; S. C. 9 N. Y. 371; Culver *v.* Haslam, 7 Barb. 314; Delafield *v.* Parish, 25 N. Y. 9; Clapp *v.* Fullerton, 34 N. Y. 190; Gardiner *v.* Gardiner, 34 N. Y. 155; Hewlett *v.* Wood, 55 N. Y. 634, 636; Real *v.* People, 42 N. Y. 270; Doe *v.* Reagan, 5 Blackf. 217; Kenworthy *v.* Williams, 5 Ind. 375; Leach *v.* Prebster, 39 Ind. 492; Indianapolis *v.* Huffer, 30 Ind. 235; Kempsey *v.* McGinniss, 21 Mich. 137; Rogers *v.* Walker, 6 Penn. St. 371; Wilkinson *v.* Pearson, 23 Penn. St. 117; Blocker *v.* Hosteller, 2 Grant (Penn.) Cas. 288; Rambler *v.* Tryon, 7 Serg. & R. 90; Baldwin *v.* State, 12 Minn. 223; McDougall *v.* McLean, 1

(*e*) See *ante*, 344.

law the execution of a will may be proved by calling one only of the attesting witnesses. (*f*)

Wins. (N. Car.) 120; Gibson *v.* Gibson, 9 Yerger, 329. The above rule of admissibility is ably supported by the earnest and vigorous reasoning of Mr. Justice Doe in his exhaustive dissenting opinion in the case of State *v.* Pike, 49 N. H. 399, 408, where numerous additional cases will be found cited. And so in Massachusetts, in the recent case of Commonwealth *v.* Sturtivant, 117 Mass. 122, will be found a learned and exhaustive opinion by Mr. Justice Endicott, in which it is maintained with great force of reasoning and illustration that "the exception to the general rule, that witnesses cannot give opinions, is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill, or learning; but includes the evidence of common observers, testifying to the results of their observation made at the time in regard to common appearances or facts, and a condition of things which cannot be reproduced and made palpable to a jury. Such evidence has been said to be competent from necessity, on the same ground as the testimony of experts, as the only method of proving certain facts essential to the proper administration of justice. Nor is it a mere opinion which is thus given by a witness, but a conclusion of fact to which his judgment, observation, and common knowledge has led him in regard to a subject-matter which requires no special learning or experiment, but which is within the knowledge of men in general." Many illustrative cases are cited in the opinion. Taylor *v.* Grand Trunk R. R. Co. 48 N. H. 304; Hackett *v.* Boston &c. R. R. Co. 35 N. H. 390; Commonwealth *v.* Dorsey, 103 Mass. 412. In Baxter *v.* Abbott, 7 Gray, 71, 79, Thomas J., speaking in regard to the trial of an issue of sanity, said: "If it were a new question, I should be disposed to allow every witness to give his opinion, subject to cross-examination upon the reasons upon which it is based, his degree of intelligence, and his means of observation. It is at least unwise to increase the existing restrictions." In this case it was decided that, upon the trial of an issue of the sanity of a testator, a physician who had practised for many years in his neighborhood, and had at times been his medical adviser, and who saw and conversed with him a short time before the making of his will, is competent to state his opinion of the testator's sanity, though he is not an expert on the subject of insanity. But see Commonwealth *v.* Rich, 14 Gray, 335; and Commonwealth *v.* Fairbanks, 2 Allen, 511. In the recent case of Hastings *v.* Rider, 99 Mass. 622, this point was again before the court and it was decided that the opinions of physicians who attended the testator professionally during a sickness in which he executed his will, are admissible in evidence as to his mental capacity to make a will immediately before and after its actual execution, accompanied by statements of the symptoms and appearances on which such opinions were based; although they were not family physicians of the testator, nor had made

(*f*) Belbin *v.* Skeats, 1 Sw. & Tr. 148; Forster *v.* Forster, 33 L. J., P. M. & A. 113; [Crusoe *v.* Butler, 36 Miss. (7 Geo.) 150; 1 Greenl. Ev. § 694; McKeen *v.* Frost, 46 Maine, 247; Cornwell *v.* Wooley, 1 Abbott Ct. App. Dec. 441; S. C. 43 How. Pr. 475; Overall *v.* Overall, Litt. Sel. Cas. 503; Hall *v.* Sims, 2 J. J. Marsh. 511; Walker *v.* Hunter, 17 Geo. 364; Jackson *v.* Le Grange, 19 John. 336; Denn *v.* Milton, 7 Halst. 70; Dan *v.* Brown, 4 Cowen, 483; Jackson *v.* Betts, 6 Cowen, 377; Field's Appeal, 36 Conn. 277, 278.] But where the party propounding a will, in a contested suit called one of the attesting witnesses who gave evidence against the due execution, Sir C. Cresswell held that he was bound to call the other attesting witness. Owen *v.* Williams, 32 L. J., P. M. & A. 159.

On affidavit that an attesting witness has been diligently sought, and cannot be found, (f^1) an executor may pray publication; but

special study of mental disease. In this last case the court noticed the former decisions of Hathorn *v.* King, 8 Mass. 371; Dickinson *v.* Barber, 9 Mass. 225; Commonwealth *v.* Rich, and Commonwealth *v.* Fairbanks, *supra*. See Fairchild *v.* Bascomb, 35 Vt. 398; Christiancy J. in Kempsey *v.* McGinniss, 21 Mich. 137, 138. The courts have generally refused to distinguish between different members, and also between different schools, of the medical profession; but they allow all practising physicians to testify as experts on questions of medical science, and leave it to the good sense of the jury to make such discriminations as the circumstances require. Mendum *v.* Commonwealth, 4 Rand. 704; Livingston *v.* Commonwealth, 14 Grattan, 592; Bowman *v.* Woods, 1 Green (Ia.), 441; Tullis *v.* Kidd, 12 Ala. 650; Washington *v.* Cole, 6 Ala. 212. See the remarks of Christiancy J. in Kempsey *v.* McGinniss, 21 Mich. 123, 137, 138, upon the testimony of mere medical men as to mental manifestations. In Halley *v.* Webster, 21 Maine, 461, persons not experts, nor subscribing witnesses, were allowed to state in evidence that the testator appeared unconscious of what was going on around him and much prostrated by his sickness; that he did not appear to know a certain individual, one of his neighbors; and that an endeavor to converse with him proved unsuccessful because he was insensible. "These," the court say, "were not mere matters of opinion, but facts, somewhat of a general cast, and combining many particulars." The case of Irish *v.* Smith, 8 Serg. & R. 573, is similar. So upon the issue of the testator's sanity, persons acquainted with him, although neither attesting witnesses, nor medical experts, may testify whether they noticed any change in his intelligence or any want of coherence in his remarks. Barker *v.* Comins, 110 Mass. 477. The testimony of opinions and impressions obtained from personal knowledge and actual observation in such cases "are declared by many of the authorities to be no more nor less than statements of fact, differing from ordinary statements only because of peculiarity of the subject." Campbell J. in Beaubien *v.* Cicotte, 12 Mich. 459, 507. See Potts *v.* House, 6 Geo. 324; Duffield *v.* Morris, 2 Harring. 375; Grant *v.* Thompson, 4 Conn. 203, 208, 209; Harrison *v.* Rowan, 3 Wash. C. C. 580; Rambler *v.* Tryon, 7 Serg. & R. 90; Townshend *v.* Townshend, 7 Gill, 10; Dunham's Appeal, 27 Conn. 192, 197; Commonwealth *v.* Sturtivant, 117 Mass. 122. Whether a witness, not an expert, is qualified to express an opinion as a conclusion of fact, is a question to be decided by the judge presiding at the trial. Commonwealth *v.* Surtivant, 117 Mass. 122. The mere naked opinions of other persons than the subscribing witnesses to a will, not being experts, are inadmissible to show the mental capacity of the deceased whose will is propounded for probate. Townshend *v.* Townshend, 7 Gill, 10, 29; Poole *v.* Richardson, 3 Mass. 330; Needham *v.* Ide, 5 Pick. 510; Duncan J. in Rambler *v.* Tryon, 7 Serg. & R. 92; Morse *v.* Crawford, 17 Vt. 502; Stackhouse *v.* Houton, 15 N. J. 202; Gibson *v.* Gibson, 9 Yerger, 329; Dorsey *v.* Warfield, 7 Md. 65; Martin *v.* Teague, 2 Spears, 266; Harrison *v.* Rowan, 3 Wash. C. C. 587; Duffield *v.* Morris, 2 Harring. 375; Dewitt *v.* Barley, 17 N. Y. 340; S. C. 9 N. Y. 371; Hubbell *v.* Bissell, 2 Allen, 199, 200; Gehrke *v.* State, 13 Texas, 568; Boardman *v.* Woodman, 47 N. H. 120, 134.]

(f^1) [Mr. Greenleaf says (1 Greenl. Ev. § 574): "The degree of diligence in the search for the subscribing witnesses, is the same which is required in the search for a lost paper, the principle being the same in both cases. It must be a strict diligence, and honest inquiry and search, satisfactory to the court, under the circumstances of the case. It should be at the residence of the witness, if known,

the other party has a right to a monition against the witness to attend for cross-examination, if they can discover him. (*g*)

In a case where a married woman made a will, under a power enabling her to dispose of certain property by a will attested by two witnesses, the will was pronounced for, though

and at all other places where he may be expected to be found; and inquiry should be made of his relatives, and others who may be supposed to be able to afford information. And the answers to such inquiries may be given in evidence, they not being hearsay, but parts of the *res gestæ*. If there is more than one attesting witness, the absence of them all must be satisfactorily accounted for, in order to let in the secondary evidence." See Hodnett *v.* Smith, 2 Sweeny (N. Y.), 401; 10 Abb. Pr. N. S. 86.]

(*g*) Mynn *v.* Robinson, 1 Hagg. 68. See Cartwright *v.* Cartwright, 1 Phillim. 94, [and *ante*, 346, note (*d*³),] as to the necessity of producing an attesting witness. See, also, Millar *v.* Sheppard, 2 Cas. temp. Lee, 520, as to proving his handwriting, when resident in an enemy's country; [or in any country out of the jurisdiction of the court. Lord Carrington *v.* Payne, 5 Ves. 404; Miller *v.* Miller, 2 Bing. N. C. 76; Smith *v.* Jones, 6 Rand. 33; Ela *v.* Edwards, 16 Gray, 91; McKeen *v.* Frost, 46 Maine, 239; Sears *v.* Dillingham, 12 Mass. 358, 361, 362; Chase *v.* Lincoln, 3 Mass. 236; In re Stow, 5 Bradf. Sur. 305. If it be impossible upon legal principles to present the testimony of one of the witnesses to a will, the will may be proved without his testimony. Patten *v.* Tallman, 27 Maine, 17, 29. The death of an attesting witness, or of all the attesting witnesses, will not defeat the validity of a will, if, in fact, duly executed. Where an attesting witness dies after attestation and before probate of the will, proof of his handwriting is *primâ facie* evidence that he duly and properly attested it. Nickerson *v.* Buck, 12 Cush. 332; Sears *v.* Dillingham, 12 Mass. 361, 362; Adams *v.* Norris, 23 How. (U. S.) 353; Perkins *v.* Perkins, 39 N. H. 169. Particularly where the attestation clause is full. Butler *v.* Benson, 1 Barb. 526. But the want of an attestation clause, in the case of the death or absence from the jurisdiction of the court of one or of all of the witnesses, does not defeat the probate of the will, but only changes the nature of the proof. Instead of its being shown by the attestation clause that there was a compliance with the statute, the court, or the jury, if the case is tried by a jury, are to be reasonably satisfied of the fact of a proper attestation from other sources and the circumstances of the case. Ela *v.* Edwards, 16 Gray, 91, 97. In this case, 16 Gray, 98, 99, Dewey J. said: "The obvious policy of the law, as heretofore declared in this commonwealth, has been that no man's will should be defeated through the want of memory on the part of the attesting witnesses to the facts essential to a good attestation; and in furtherance of the same object, every fair and reasonable intendment should be made to prevent a will from being defeated by the want of direct evidence as to the attestation, occasioned by the death or removal of the witnesses beyond the jurisdiction of this court." It was said by Wilde J. in Hawes *v.* Humphrey, 9 Pick. 357: "I take it to be well settled, that, if the witnesses after the attestation and before the probate, should become insane, infamous, or otherwise disqualified, the handwriting of the witnesses may be proved, and the will be thereupon allowed." See Genl. Sts. Mass. c. 92, § 6; Sears *v.* Dillingham, 12 Mass. 361. The law is settled that a will cannot be proved on the evidence of part of the attesting witnesses without accounting for the absence of the other or others. Jackson J. in Brown *v.* Wood, 17 Mass. 73.]

both the attesting witnesses deposed to the deceased's incapacity. (*h*)

So, after publication, the evidence of an attesting witness may be excepted to by the party who produces him. (*i*)

There has already been occasion to show, (*k*) that a will * may be admitted to probate, as duly executed under the new statute, notwithstanding the attesting witnesses may have no recollection at all as to the circumstances attending the execution, or notwithstanding one only should affirm and the other negative, or even both should negative a compliance with the statute. (*k*[1])

With respect to the necessary proof, in ordinary cases, of the instrument in question having been intended by the deceased to be his will, it is not thought necessary to add much to those observations, which there has already been occasion to make on the

(*h*) Le Breton *v.* Fletcher, 2 Hagg. 558; S. P. in K. B. Lowe *v.* Joliffe, 1 W. Bl. 365. See, also, Landon *v.* Nettleship, 2 Add. 245; Mackenzie *v.* Handaside, 2 Hagg. 219; [*ante*, 37, and cases in note (*n*); Bell *v.* Clark, 9 Ired. 239; Perkins *v.* Perkins, 39 N. H. 168, 169; Otterson *v.* Hofford, 7 Vroom, 129; Hall *v.* Hall, 18 Geo. 40; Jauncey *v.* Thorne, 2 Barb. Ch. 40.] So, in the common law courts, if a subscribing witness should deny the execution of the will, he may be contradicted, as to the fact, by another subscribing witness; and even where all three witnesses were called and denied their hands, the court admitted the plaintiff to contradict that evidence, and he supported the will against that testimony. Austin *v.* Willes, Bull. N. P. 264; Pike *v.* Badmering, cited 2 Stra. 1096, in Rice *v.* Oatfield; [Humphrey's Estate, 1 Tuck. (N. Y.) Sur. 142; Orser *v.* Orser, 24 N. Y. 51; Peebles *v.* Case, 2 Bradf. Sur. 226; Higgins *v.* Carlton, 28 Md. 118; Whitaker *v.* Salisbury, 15 Pick. 544; Howard's Will, 5 Monr. 199; Harper *v.* Harper, 1 N. Y. Sup. Ct. 351, 356. But the evidence to sustain the will must in such cases be clear and decisive. Hardy *v.* The State, 7 Harr. & J. 42; Vernon *v.* Kirk, 30 Penn. St. 218; Pearson *v.* Wightman, 1 Const. Ct. R. 336. In Perkins *v.* Perkins, 39 N. H. 168, 169, Bell C. J. said: "The attesting witnesses being produced and examined, it is not essential that they should sustain the legal presumption of sanity. They may all deny the sanity of the testator, and yet, if the proof of a sound condition of mind is shown by the whole evidence, the will must be established." *Ante*, 102, and cases in note (*s*); 103, and note (*w*); Dean *v.* Dean, 27 Vt. 746, 748; 1 Phil. Ev. 502; Matter of Forman, 54 Barb. 274; Hopper's Estate, 1 Tuck. (N. Y.) Sur. 378; Newlon's Estate, 1 Tuck. (N. Y.) Sur. 349; Jauncey *v.* Thorne, 2 Barb. Ch. 40; Harper *v.* Harper, 1 N. Y. Sup. Ct. 351, 356. If one of the subscribing witnesses impeach the validity of the will on the ground of fraud, and accuse other witnesses, who are dead, of being accomplices in the fraud, the devisee may give evidence of their general good character. 1 Phil. Ev. 308, 502.] But a will may be pronounced against upon the evidence of the attesting witness thereto. Starnes *v.* Marten, 1 Curt. 294.

(*i*) Mynn *v.* Robinson, 2 Hagg. 169. See Friedlander *v.* The London Assurance Company, 4 B. & Ad. 193.

(*k*) *Ante*, 101 *et seq.*

(*k*[1]) [See *ante*, 103, note (*w*), 347, note (*g*); Tilden *v.* Tilden, 13 Gray, 110.]

subject, in considering the manner and form of making wills. (*l*) It may, however, be expedient in this place to call the attention to the doctrine of the ecclesiastical court, respecting handwriting, with regard both to the mode of proof, and the effect when proved. Besides the evidence of persons who have seen the party write, or who have corresponded with him, as to their belief that the writing in dispute was or was not written by him, the ecclesiastical court always allowed witnesses skilled in the examination of handwriting and detection of forgeries (as inspectors of franks, clerks at the post office, &c.) to depose to their opinion, *upon comparison* of the writing in question with other documents admitted to be in the handwriting of the party, or proved to be so by persons who saw them written; (*m*) whereas, in the common law courts, this mode of evidence was rejected until the passing of the *stat. 17 & 18 Vict. c. 125. (*n*) Moreover, the evidence of such skilful person was, in the ecclesiastical court, admissible to prove that, in their judgment, the instrument in dispute is written in a fabricated hand, and not in the natural hand of any person. (*o*) And in the common law courts, this species of evidence has been received in several cases. (*p*)

Doctrine of the ecclesiastical court, as to the mode of proving handwriting.

(*l*) *Ante*, 66 *et seq.*

(*m*) 1 Oughton, tit. 225, ss. 1, 2, 3, 4; Beaumont *v.* Perkins, 1 Phillim. 78; Saph *v.* Atkinson, 1 Add. 215, 216; Machin *v.* Grindon, 2 Cas. temp. Lee, 335; S. C. 2 Add. 91, note (*a*). See the judgment of Coleridge J. in Doe *v.* Suckermore, 5 Ad. & El. 708–710. The more ancient mode was to refer it to the officers of the court. In White *v.* Terry & Longmore, before Sir Geo. Hay, in 1774, the court referred to the deputy registrars of the admiralty and the consistory of London, for their opinion as to handwriting. 1 Phillim. 80, note (*a*), by Sir Wm. Wynne. So in Heath *v.* Watts, Prerog. June 27, 1798, the court directed the deputy registrars of the admiralty, the arches, and the prerogative courts, to inspect several signatures of the deceased, and also two exhibits in his handwriting, and to compare them with the signature of the will, and to report their opinion after such comparison; which they accordingly did, to the effect that neither the signatures nor the exhibits were written by the same person who had signed the will. 1 Phillim. 82, note (*b*).

(*n*) By sect. 27, "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; and such writings, and the evidence of the witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

(*o*) Reilly *v.* Rivett, 1 Phillim. 80, note (*a*); Saph *v.* Atkinson, 1 Add. 216.

(*p*) Goodtitle *v.* Braham, 4 T. R. 497; Rex *v.* Cator, 4 Esp. 117, 145; Stranger *v.* Searle, 1 Esp. 14. But see *contra*, Gurney *v.* Langlands, 5 B. & Ald. 330; Doe *v.* Suckermore, 5 Ad. & El. 751, by Lord Denman.

Effect of evidence as to handwriting:

But although the ecclesiastical courts thus admitted of a greater latitude of proof with regard to handwriting, it is by no means true that greater weight was attached to evidence as to handwriting than in any other courts. On the contrary, the eminent judge who lately presided in the prerogative court of Canterbury (Sir J. Nicholl), has on several occasions expressed himself strongly on the subject of the inconclusive nature of such evidence, whether affirmative or negative; the former from the exactness with which hands may be imitated; the latter from the dissimilarity which is often discoverable in the handwriting of the same person, under different circumstances. (*q*)

proof of handwriting alone not sufficient to establish a disputed will.

Again, although it has been laid down, that where a will, or its signature, is in the handwriting of the testator, it may be established, provided there is sufficient proof of the * handwriting; (*r*) yet it was a clearly established rule, in the ecclesiastical courts, that similitude of handwriting, even with a probable disposition, is not sufficient to establish a testamentary paper, without some concomitant circumstance, as the place of finding or the like, to connect it with the party whose will it is suggested to be. (*s*) What will be a sufficient connection must depend upon all the circumstances of the particular case. (*t*)

Rule that on proof of signing, instruc-

Generally speaking, where there is proof of signature, everything else is implied till the contrary is proved; and evidence of the will having been read over to the testator, or of instructions having been given, is not necessary; (*u*)

(*q*) Saph *v.* Atkinson, 1 Add. 213; Robson *v.* Rocke, 2 Add. 79; Constable *v.* Steibel, 1 Hagg. 60; Young *v.* Brown, 1 Hagg. 569; Rutherford *v.* Maule, 4 Hagg. 224, 225.

(*r*) *Ante*, 68; [Sharp *v.* Sharp, 2 Leigh, 249; Hannah *v.* Peake, 2 A. K. Marsh. 133.]

(*s*) Machin *v.* Grindon, 2 Cas. temp. Lee, 406; Saph *v.* Atkinson, 1 Add. 213; Robson *v.* Rocke, 2 Add. 98; Constable *v.* Steibel, 1 Hagg. 60; Crisp *v.* Walpole, 2 Hagg. 531; Headington *v.* Holloway, 3 Hagg. 280; Rutherford *v.* Maule, 4 Hagg. 224; Bussell *v.* Marriott, 1 Curt. 9; Wood *v.* Goodlake, 2 Curt. 82, 176, 180; Hitchings *v.* Wood, 2 Moore P. C. C. 355, 443, 444; [Mowry *v.* Silber, 2 Bradf. Sur. 133.] Probability of disposition is of very little weight as proof that the instrument is not a forgery, however material it may be, if the question turns on capacity, volition, or fraudulent imposition. 4 Hagg. 226.

(*t*) 3 Hagg. 280; 4 Hagg. 224, 226. [See Marr *v.* Marr, 2 Head (Tenn.), 303.]

(*u*) Billinghurst *v.* Vickers, 1 Phillim. 191; Rodd *v.* Lewis, 2 Cas. temp. Lee, 176; Goose *v.* Brown, 1 Curt. 707; [Harrison *v.* Rowan, 3 Wash. C. C. 580, 584, 585; Pettes *v.* Bingham, 10 N. H. 514; Downey *v.* Murphey, 1 Dev. & Bat. 87; Carr *v.* M'Camm, 1 Dev. & Bat. 276; Smith *v.* Dolby, 4 Harr. (Del.) 350; Dorsheimer *v.* Rorbach, 8 C. E. Green (N. J.), 46.]

for when an instrument has been executed by a competent person, it must be presumed that the party so executing knew the contents and the effect of the instrument, and that he intended to give that effect to it. (x) But there are some * cases of peculiar circumstance, where a more rigid mode of proof is enforced.

tions and knowledge of the contents shall be presumed:

exceptions:

(x) Fawcett *v.* Jones, 3 Phillim. 476; Wheeler *v.* Alderson, 3 Hagg. 587; Browning *v.* Budd, 6 Moore P. C. 435. [See Loy *v.* Kennedy, 1 Watts & S. 396; Weigel *v.* Weigel, 5 Watts, 486; Beall *v.* Mann, 5 Geo. 456; Smith *v.* Dolby, 4 Harring. 350.] Approbation will have the effect of prior instructions. Forfar *v.* Heastie, 2 Cas. temp. Lee, 310; Durnell *v.* Corfield, 1 Robert. 56. Moreover, a testator may, if he likes, authorize another person to make a will for him, and may say, "I do not know what you have put down, but I am quite ready to execute it," and such a will would be admitted to probate. Per Sir C. Cresswell, 3 Sw. & Tr. 38. Accordingly, that learned judge held a plea that the alleged codicil was not prepared in conformity with the intentions of the deceased, and the deceased, at the time of the execution of the alleged codicil, was ignorant of the contents thereof, to be bad on demurrer. Cunliffe *v.* Cross, 3 Sw. & Tr. 37. See, also, Middlehurst *v.* Johnson, 30 L. J., P. M. & A. 14. But see, *contra*, Hastelow *v.* Stobie, 35 L. J., P. M. & A. 18; S. C. 11 Jur. N. S. 1039, where Sir J. P. Wilde held a plea "that the deceased did not know and approve of the contents of the will" to be good. See, also, Cleare *v.* Cleare, L. R. 1 P. & D. 655; Atter *v.* Atkinson, L. R. 1 P. & D. 665; Goodacre *v.* Smith, L. R. 1 P. & D. 359; [Barry *v.* Boyle, 1 N. Y. Sup. Ct. 422.] But it may be doubted whether the view taken by Sir C. Cresswell is not more correct. It is surely a somewhat harsh construction of the law that a man shall not be allowed to confide in his friend or solicitor and depute him to draw up his will, and adopt it when so drawn up, without ascertaining what the contents of it are; particularly in wills containing complicated limitations it would seem to be unjust to require that the testator should understand each limitation, which the solicitor in whom he has confided has thought proper to insert. [In Pettes *v.* Bingham, 10 N. H. 514, issue was taken on the question whether a testator knew the contents of a paper propounded for probate as his will, at the time when he executed it. On one side it was alleged that he did not, on the other that he did. The jury found that they had no evidence that he did not know the contents. On this finding the court sustained the will; upon the ground that the party alleging that the testator did not know the contents of his will had the burden of proof; which on the finding had not been discharged. Parker C. J. said, "The executor was not bound to offer direct evidence on this point in the first instance, farther than the production of the will and the proof of its execution. In order to prove the will in the probate court, he was bound to show that the testator executed and published it, in the presence of the witnesses. He was not bound to make inquiry of the subscribing witnesses, or of other witnesses, to show that the testator knew the contents of it. That would be presumed from the due execution and publication." Harrison *v.* Rowan, 3 Wash. C. C. 580, 584, 585; Day *v.* Day, 2 Green Ch. (N. J.) 549; Downey *v.* Murphey, 1 Dev. & Bat. 87; Carr *v.* M'Camon, 1 Dev. & Bat. 276; Smith *v.* Dolby, 4 Harring. 350; McNinch *v.* Charles, 2 Rich. (S. Car.) 229; In re Maxwell's Will, 4 Halst. Ch. (N. J.) 251; Hoshauer *v.* Hoshauer, 26 Penn. St. 404; Vernon *v.* Kirk, 30 Penn. St. 218; Stewart *v.* Lispenard, 26 Wend. 287, 288.]

where the legatee is the writer of his legacy:

Thus, although the rule of the Roman law that "*Qui se scripsit hæredem*" could take no benefit under a will, does not prevail in the law in England, yet, where the person who prepares the instrument, or conducts its execution, is himself benefited by its dispositions, that is a circumstance which ought generally to excite the suspicion of the court, and calls on it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased. (*y*)

where the testator is blind, or cannot read:

Where the testator is blind, it must be proved that the contents of the will were known to the deceased; for his execution, or other acknowledgment of the will, is not sufficient. (*z*) And the same where, from want of education, or from bodily affliction, he is unable to read. (*a*)

(*y*) See *ante*, 111, 112; Croft *v.* Day, 1 Curt. 784; S. C. *nomine* Dufaur *v.* Croft, 2 Moore P. C. C. 136; Durnell *v.* Corfield, 1 Robert. 51; [Duffield *v.* Morris, 2 Harring. (Del.) 384; Downey *v.* Murphey, 1 Dev. & Bat. 82; Crispell *v.* Dubois, 4 Barb. 393.]

(*z*) *Ante*, 18, 19; Barton *v.* Robins, 3 Phillim. 455, note (*b*); Fincham *v.* Edmonds, 3 Curt. 63, affirmed on appeal, 4 Moore P. C. 198; rule 71, P. R.; [Boyd *v.* Cook, 3 Leigh, 32; Washington J. in Harrison *v.* Rowan, 3 Wash. C. C. 585; Lewis *v.* Lewis, 6 Serg. & R. 496; Clifton *v.* Murray, 7 Geo. 564; Wampler *v.* Wampler, 9 Md. 540. But a blind man's will need not be read to him in the presence of the witnesses. Martin *v.* Mitchell, 28 Geo. 382.] But see Longchamp *v.* Fish, 2 New R. 415.

(*a*) 4 Burn E. L. 61, 8th ed.; Barton *v.* Robins, 3 Phillim. 455, note (*l*); rule 71, P. R. [If the testator be incapable of reading the will, whether the incapacity arises from blindness, sickness, or any other cause, the rule is the same, and the burden of proving his knowledge of its contents is thence cast upon the person offering the will. Day *v.* Day, 2 Green Ch. (N. J.) 549. So if a reasonable ground be laid for believing that the will was not read to the testator, or that there was fraud or imposition of any kind practised upon him, it is incumbent on those who would support the will, to meet such proof by evidence, and to satisfy the jury either that the will was read, or that the contents were known to the testator. See Day *v.* Day, 2 Green Ch. (N. J.) 549; Gerrish *v.* Nason, 22 Maine, 438; Harding *v.* Harding, 18 Penn. St. 340; Clifton *v.* Murray, 7 Geo. 564; Vernon *v.* Kirk, 30 Penn. St. 218; McNinch *v.* Charles, 2 Rich. (S. Car.) 229; Tomkins *v.* Tomkins, 1 Bailey, 92, 96. In Day *v.* Day, *supra*, it was held that if it appear that the will in question was truly copied from a previous will with the contents of which the testator was acquainted, the instrument will be admitted to probate although it was neither read by him nor in his hearing. So if it can be shown that the will is substantially in accordance with the instructions of the testator, it may be considered as sufficient evidence that he was acquainted with its contents. But if in drawing out a will from instructions, they are materially departed from, the testator must be made acquainted with the deviations and alterations — if the testator did not know — if the will was not read over to him — or its contents and va-

So it is an established rule in the spiritual court, that, where the capacity of the testator is doubtful at the time * of execution, there must be proof of instruction, or of reading over, or other satisfactory evidence of some kind, that he knew and approved of the contents of the will. (*b*) But this rule only applies, or at least only applies with any stringency, where the instrument is inofficious, *i. e.* not consonant to the testator's natural affections and moral duties, or where it is obtained by a party materially benefited. (*c*) In a modern case, (*d*) a will had been propounded in a *condidit*, and the three attesting witnesses only had been examined. The testatrix was upwards of eighty years of age and very infirm; she was deaf and almost blind; and the instrument had been drawn up from directions given by the executor, who was partially the residuary legatee, and no instructions were proved to have been given by the deceased. Sir H. Jenner Fust pronounced against the validity of the will, not on the supposition of any fraud having been practised, but on the ground of failure of proof. (*e*)

where the capacity of the testator is doubtful:

Where the alleged will of a seaman is in favor of his agent, there must be clear proof, not only of the subscription of the deceased to the instrument, but also of his knowledge of its nature and effect. (*f*)

seaman's will in favor of his agent.

Under certain circumstances, the validity of a will may be established by proving the handwriting of the attesting witnesses, though no evidence can be given, either of instructions or of the handwriting of the deceased. (*g*)

Proof of will by mere evidence of handwriting of attesting witnesses.

riations otherwise made known to him, the will cannot be sustained. Chandler *v.* Ferris, 1 Harring. 454, 464. In regard to instruments not testamentary, it is held that where a party who cannot read is sought to be bound by a writing under seal, it must appear that he had it read to him or knew its contents. Dorsheimer *v.* Rorback, 8 C. E. Green (N. J.) 46. It is otherwise where the party can read. 8 C. E. Green (N. J.) 46, 50; Androscoggin Bank *v.* Kimball, 10 Cush. 373, 374.]

(*b*) *Ante*, 113; Billinghurst *v.* Vickers, 1 Phillim. 193; Ingram *v.* Wyatt, 1 Hagg. 382; Dodge *v.* Meech, 1 Hagg. 620; Barry *v.* Butlin, *ante*, 111; Durnell *v.* Corfield, 1 Robert. 51; Jones *v.* Goodrich, 5 Moore P. C. 16; Mitchell *v.* Thomas, 6 Moore P. C. 137; S. C. 5 Notes of Cas. 600; Browning *v.* Budd, 6 Moore P. C. 430; Greville *v.* Tylee, 7 Moore P. C. 320; [Burger *v.* Hill, 1 Bradf. Sur. 360; Creeley *v.* Ostrander, 3 Bradf. Sur. 107.]

(*c*) Brogden *v.* Brown, 2 Add. 449.

(*d*) Sankey *v.* Lilley, 1 Curt. 402.

(*e*) See, also, Harwood *v.* Baker, 3 Moore P. C. C. 282; Croft *v.* Day, 1 Curt. 784; S. C. *nomine* Dufaur *v.* Croft, 3 Moore P. C. C. 136.

(*f*) Zacharias *v.* Collis, 3 Phillim. 202.

(*g*) Anderson *v.* Welch, 1 Cas. temp. Lee, 577. [Where, from the death of the

In a court of construction, when the *factum* of the *instrument has been previously established in the court of probate, the in-

attesting witnesses to a will, or from their absence from the jurisdiction, they cannot be produced, or where, from loss of recollection, they are unable to testify, and where they have become incompetent to give evidence since their attestation, it is held that proof of their handwriting, and, in some jurisdictions, of the handwriting of the testator, is competent evidence to be submitted to the jury of the due execution of the will. Bell C. J. in Perkins *v.* Perkins, 39 N. H. 169, and cases cited; Dean *v.* Dean, 27 Vt. 746; Patten *v.* Tallman, 27 Maine, 17, 29; Hopkins *v.* Graffenreid, 2 Bay, 187; Chase C. J. in Collins *v.* Elliott, 1 Harr. & J. 2; Engles *v.* Bruington, 4 Yeates, 345; Sears *v.* Dillingham, 12 Mass. 358; Jauncey *v.* Thorne, 2 Barb. Ch. 40; McKean *v.* Frost, 46 Maine, 239, 245; Verdier *v.* Verdier, 8 Rich. (S. Car.) 135; Barker *v.* McFerran, 26 Penn. St. 211; Vernon *v.* Kirk, 30 Penn. St. 218; Hays *v.* Harden, 6 Penn. St. 409; Greenough *v.* Greenough, 11 Penn. St. 489; Loomis *v.* Kellogg, 17 Penn. St. 60; Jackson *v.* Le Grange, 19 John. 288, 289; Ela *v.* Edwards, 16 Gray, 95; Nickerson *v.* Buck, 12 Cush. 341, 342; Stow *v.* Stow, 1 Redf. Sur. 305. The handwriting of all the witnesses should be proved. Crowell *v.* Kirk, 3 Dev. 355; Hopkins *v.* Albertson, 2 Bay, 484; Sampson *v.* Bradley, 1 McCord, 74; Jackson *v.* Luquere, 5 Cowen, 221. Where the witnesses have attested by their marks, they must be proved to be the marks of the witnesses. Collins *v.* Nichols, 1 Harr. & J. 399; Jackson *v.* Van Deusen, 5 John. 144. When all the subscribing witnesses are dead, and no proof of their handwriting can be obtained, as must frequently happen in the case of old wills, it will be sufficient to prove the signature of the testator alone. 1 Phil. Ev. 503; Duncan *v.* Beard, 2 Nott & McC. 400. As to the proof in case of wills which are more than thirty years old, see 1 Greenl. Ev. §§ 21, 570; Shaller *v.* Brand, 6 Binn. 435; Staring *v.* Bowen, 6 Barb. 109; Hewlett *v.* Cook, 7 Wend. 374; Fetherly *v.* Waggoner, 11 Wend. 599; Jackson *v.* Thompson, 6 Cowen, 178; Jackson *v.* Luquere, 5 Cowen, 225; Stephens *v.* French, 3 Jones (N. Car.) Law, 359; Hall *v.* Gittings, 2 Harr. & J. 112. As to the necessity for proving the signature of the testator, see, further, Davies *v.* Davies, 9 Q. B. 648, in which it appeared that a will dated before stat. 7 W. 4, and 1 Vict. c. 26, was produced on a trial in ejectment. It was signed in the name of the alleged devisor; but there was no proof that the signature was in his handwriting, or made by his authority. It was attested by two witnesses, deceased, whose handwriting was proved; and between their names was that of another witness, J. P., who appeared to sign by his mark. A man in extreme old age, named J. P., was called, who was supposed to be the witness, but he had no memory on the subject. The will had not been disputed for sixteen years after the death of the devisor. It was held that, upon this evidence, a jury might infer a due execution of the will under stat. 29 Car. 2, c. 3, § 5. Denman C. J. said: "If the jury may infer the presence of the testator without direct evidence, we see no reason why they may not infer that an apparent signature was real, and not forged, also without direct evidence." See Dean *v.* Dean, 27 Vt. 746. In Rider *v.* Legg, 51 Barb. 260, it appeared that the three subscribing witnesses to a will, executed since the revised statutes of New York took effect, were dead. The signatures of two of them were proved, with a perfect attestation clause, and there were circumstances which made it seem probable that the will was genuine. It was held that these facts were sufficient, after a long time had elapsed, to justify the reception of the will as evidence, without proving the signatures of the testatrix and the other of the subscribing witnesses. See M'Kenire *v.* Fraser, 9 Ves. (Perkins's ed.) 5, and note (*a*). But

quiry is almost closely restricted to the contents of the instrument itself, in order to ascertain the intentions of the testator. But in the court of probate, the inquiry is not so limited; for there the intentions of the deceased, as to what shall operate as, and compose his will, are to be collected from all the circumstances of the case taken together. (*h*) They must, however, be circumstances existing at the time the will is made. (*i*)

Parol evidence respecting the intention of the testator, as to what shall operate as and compose his will:

Therefore, if there is an ambiguity upon the *factum* of the instrument, parol evidence may be admitted, under some circumstances, in the court of probate, to explain the intention of the testator. (*i*[1]) By ambiguity upon the *factum* is meant, not an ambiguity upon the construction, as whether a particular clause shall have a particular effect, but an ambiguity as to the foundation itself of the instrument, or a

receivable if there is an ambiguity on the *factum*:

it was said by Sargent J. in Boardman *v.* Woodman, 47 N. H. 135, that "there is no legal presumption, because the name of a person appears on a will as attesting witness, that the person actually attested it. The fact must be proved by evidence of handwriting or the production of the witness, or in some other way. Where the witness has deceased or is beyond the jurisdiction of the court, there is no presumption as to what he would say if living and present." No inference as to the opinion of a deceased subscribing witness in favor of the sanity of the testator can be drawn from the mere fact of his signing; and, therefore, evidence of a contrary opinion expressed by him is inadmissible. Baxter *v.* Abbott, 7 Gray, 71; Boardman *v.* Woodman, 47 N. H. 120, 135; Flanders *v.* Davis, 19 N. H. 139; Thompson *v.* Kyner, 65 Penn. St. 368; Stobart *v.* Dryden, 1 M. & W. 615; *ante*, 20, note (*x*[1]); Van Dyke J. in Boylan *v.* Meeker, 4 Dutcher (N. J.), 274. But see McElwee *v.* Sutton, 2 Bailey (S. Car.), 128; Walworth Ch. in Scribner *v.* Crane, 2 Paige, 147; Townshend *v.* Townshend, 9 Gill, 506; Harden *v.* Hays, 9 Penn. St. 151. Nor can declarations of a deceased attesting witness to a will, tending to impeach the will or himself as a witness, be admitted in favor of those opposing the proof of the will. Boylan *v.* Meeker, 4 Dutcher (N. J.), 274. As to the admissibility of evidence to impeach the general character of deceased attesting witnesses, whose handwriting has been proved to substantiate an instrument, see Losee *v.* Losee, 2 Hill, 609; Crouse *v.* Miller, 10 Serg. & R. 155; Stobart *v.* Dryden, 1 M. & W. 615; Boylan *v.* Meeker, 4 Dutcher (N. J.), 274. The proof of the actual attestation of the witness is not the proof of a declaration, but of a fact, to be met by proof of other facts, to show he did not attest the instrument, but not by proof of his own declarations. Stobart *v.* Dryden, 1 M. & W. 615, 623, 624, Parke B.; Boylan *v.* Meeker, 4 Dutcher (N. J.), 274.]

(*h*) Greenough *v.* Martin, 2 Add. 243; Methuen *v.* Methuen, 2 Phillim. 426; In the Goods of English, 3 Sw. & Tr. 586; Robertson *v.* Smith, L. R. 2 P. & D. 43. See, also, the cases collected, *ante*, 106, note (*q*).

(*i*) Stockwell *v.* Ritherdon, 1 Robert. 661, 668; 6 Notes of Cas. 415, per Sir H. J. Fust.

(*i*[1]) [See Witherspoon *v.* Witherspoon, 2 McCord, 520.]

particular part of it. As, whether the testator meant a particular clause to be part of the instrument, or whether it was introduced without his knowledge; whether a codicil was meant to republish a former or a subsequent will; (*k*) whether the residuary clause or any other passage was accidentally omitted; (*l*) whether an instrument was subscribed *to authenticate it, as memoranda for a future will, or to execute it as a final will: (*m*) these are all matters of ambiguity upon the *factum* of the instrument. (*n*)

what is such an ambiguity:

But it was considered as a rule in the prerogative court, that, in order to justify the admission of parol evidence to explain an ambiguity upon the *factum* of an instrument, *the ambiguity must be upon the face of the paper;* and further, the facts alleged and to be proved must *completely* remove that ambiguity. (*o*) When no ambiguity whatever appears upon the face of the instrument, the court will not admit parol evidence. Thus, in the case of Fawcett *v.* Jones, (*p*) the allegation stated in substance that the residuary clause of the will was not coextensive with the instructions given by the party deceased, and the allegation also contained an averment (which it was proposed to support by parol evidence only), suggesting that such variation was not made by any directions received from the deceased, nor with his privity or knowledge, but through mere error and oversight of the drawer, and of the testatrix herself; and the court was prayed to pro-

the ambiguity must be on the face of the instrument:

and be completely removed by the proposed proof:

(*k*) Lord St. Helens *v.* Lady Exeter, 3 Phillim. 461, note (*g*). There the testator left a will, dated 13th Dec. 1800, and a codicil all in his own handwriting, beginning, "This is a codicil to my last will and testament of the 10th Jan. 1798, and I do hereby ratify and confirm my said will." On the part of the executors it was alleged that at the time of the execution of the codicil the deceased was at Burghley, and copied this from a form which he had procured from his solicitor, and inadvertently copied the date from a former will, which it was to be presumed had been destroyed, as it could not be found. Parol evidence was admitted to prove this allegation, and show the mistake; and the codicil was pronounced a codicil to the will of December, 1800.

(*l*) Blackwood *v.* Damer, 3 Phillim. 458, note (*d*); *post*, 356; Travors *v.* Miller, 3 Add. 226; Balydon *v.* Balydon, 3 Add. 239; Shadholt *v.* Waugh, 3 Hagg. 570; but see Castell *v.* Tagg, *post*, 357; and see, also, p. 359, as to wills made after January 1, 1838.

(*m*) Matthews *v.* Warner, 4 Ves. 186; 5 Ves. 23; Mitchell *v.* Mitchell, 2 Hagg. 74; Castle *v.* Torre, 2 Moore P. C. C. 133, 154; *ante*, 110.

(*n*) 3 Phillim. 479.

(*o*) Fawcett *v.* Jones, 3 Phillim. 434; Draper *v.* Hitch, 1 Hagg. 678; Harrison *v.* Stone, 2 Hagg. 550; Shadholt *v.* Waugh, 3 Hagg. 570; and see Sandford *v.* Vaughan, 1 Phillim. 128.

(*p*) 3 Phillim. 434.

nounce for the part of the instructions so alleged to have been omitted as part of the will. But Sir John Nicholl, in a very elaborate judgment, in which all the previous cases upon the subject are collected and commented upon, refused to admit the allegation, on the ground that the will had been regularly executed, and there was no ambiguity apparent upon the face of it.

what is an ambiguity apparent on the face of the instrument.

With respect to what shall be an apparent ambiguity, *such as to satisfy this rule, it has been held, that the indorsement "Heads of will," on a paper fairly written, signed, and dated, (*q*) or a commencement "This is a memorandum of my intended will,"(*r*) will let in parol evidence of intention. In Mathews *v.* Warner, (*s*) the concluding part of the instrument was very strong to show that the testator meant that very instrument to operate: "I appoint my good friend, Mr. Edward Lapine, and my good friend, Mr. Edward Johnson, my executors, to see this my last will and testament complied with." Dated at Deptford, 2d October, 1785, and signed "William Mathews." But the paper commenced thus: "2d November, 1785. A plan of a will proposed to be drawn out as the last testament of William Mathews, storekeeper of his majesty's yard, at Deptford." The prerogative court (in deference to the decision of the supreme court in a former case) and the court of delegates held, that affixing his signature was a permanent execution, and that that was conclusively established on the face of the paper. The commission of review, however, held that this description "a plan to be afterwards drawn out," opened the case to the admission of evidence as to the intention with which the signature was affixed, and the continuance thereof to his death; and the paper was ultimately pronounced, by the commission of review, not to be his will. In Coppin *v.* Dillon, (*t*) the deceased, John Plura, died on the 19th of October, 1831, having made a will in 1820, and three codicils, all formally executed and attested to carry realty. He destroyed the will, but on each of the codicils were written, "June 18, 1830, my will, John Plura," and other indorsements at a subsequent date, leading to the inference that he considered that at such time he had no will. In 1830 he executed a new will and a codicil, the latter subsequent to June, 1830, which will and codicil were *not forthcoming; and in 1831, he executed

(*q*) Mitchell *v.* Mitchell, 2 Hagg. 74.
(*r*) Barwick *v.* Mullings, 2 Hagg. 225.
(*s*) 4 Ves. 186.
(*t*) 4 Hagg. 361.

a settlement. The three codicils, the settlement, and its envelope, were propounded as together containing the will; and the court held that the words written on the codicils were not conclusive of an intention that they should operate as substantive papers, and that evidence, *dehors* the papers, was therefore admissible; and on such evidence, coupled with all the circumstances of the case, pronounced for an intestacy.

In Blackwood *v.* Damer, (*u*) the testator wrote with his own hand instructions for a will, in which he left the *residuum* to his youngest daughter. The attorney, in writing over the will, omitted the residuary clause. The draft was read over to the testator, and left in his custody two days, and the will was executed in due form. The court (Dr. Calvert) admitted evidence as to the omission, and of the testator's expressing himself as having left the *residuum* to his youngest daughter, and pronounced for the instructions as part of the will. There was an appeal to the delegates, who confirmed the decision below (except inasmuch as they decreed that the residuary clause only, and no other part of the instructions should stand as part of the will). Sir John Nicholl, in commenting on this case in Fawcett *v.* Jones, (*x*) stated that there was an ambiguity on the face of the will, inasmuch as there was a total omission of any disposal of the residue, and a total omission of a provision for one of the testator's daughters. (*y*)

In Upfill *v.* Marshall, (*z*) a will, dated February, 1837, disposed of real and personal estate. A codicil, dated June, 1837, partly revoked the disposition of the personalty. A memorandum, dated July, 1838, formally republished the will as "this writing." The question was, whether the * codicil of June, 1837, was revoked. In fact, the testator had purchased a real estate in the interval between the date of the codicil and the republication; and Sir H. Jenner Fust was of opinion that this was a circumstance which, of itself, introduced an ambiguity on the face of the will; because, but for this circumstance, there seemed no necessity for a republication of it; and that this ambiguity laid a ground for the admission of parol evidence in order to ascertain the *quo animo* of

(*u*) 3 Phillim. 458, note (*d*); S. C. 3 Add. 239, note.

(*x*) 3 Phillim. 485.

(*y*) See, also, Draper *v.* Hitch, 1 Hagg. 677, for another instance of an apparent ambiguity. See, also, In the Goods of Thompson, 11 Jur. N. S. 960; S. C. 35 L. J., P. M. & A. 17.

(*z*) 3 Curt. 636; S. C. 2 Notes of Cas. 400.

the act of republication; and that as it appeared on such evidence that the sole motive was to pass the after purchased estate, the codicil was not revoked by the republication of the will.

As to undue omissions or insertions in wills, the result of the authorities connected with this subject is, that where these two conditions are satisfied, viz, 1. Some absurdity or ambiguity on the face of the will ascribable to something either omitted or inserted; and 2. Clear and satisfactory proof that the insertion or omission was contrary to the intention of the testator; the court is at liberty, and even bound, to pronounce for the will, not in its actual state, but with such error first reformed or corrected, either by the insertion of the passage omitted, or by the omission of that inserted. (*a*)

Rule that the ambiguity must appear on the face of the instrument confirmed.

It must here be observed, that the authority of some of the cases on which the first of the two conditions above mentioned was introduced, and the foundation of the rule itself, so far as it prescribes that, unless there is an ambiguity, on the face of the instrument, the court can in no case admit parol evidence in order to supply an omission, appeared to be somewhat shaken by the modern case of Castel *v.* Tagg. (*b*) There Sir H. Jenner Fust admitted an allegation, pleading the omission of a legacy by mistake in a will perfect on the face of it, and decreed administration * with the will annexed, the legacy in question being first inserted and forming part thereof. And the learned judge, after observing that he agreed with the counsel in support of the allegation, that the term ambiguity was not properly applied to the present case, proceeded thus: "In Blackwood *v.* Damer, (*c*) there was no ambiguity; the omission of the residue must be considered a deficiency but no ambiguity. The court looked to other documents and discovered the omission. That case, then, is a precedent for the present, which is stronger in its circumstances. In Bayldon *v.* Bayldon, (*d*) the

(*a*) Bayldon *v.* Bayldon, 3 Add. 232, 238; Travers *v.* Miller, 3 Add. 226. See, also, Mitchell *v.* Gard, 3 Sw. & Tr. 75; [Burger *v.* Hill, 1 Bradf. Sur. 360; Creeley *v.* Ostrander, 3 Bradf. Sur. 107. The fact that a testator meant to divide his property equally among his children, but that by a mistake on his part as to the value of the property, his will failed to have that effect, is not a sufficient ground for setting aside the will, if the mistake was caused not by his insanity or incapacity, but by his voluntary omission to ascertain the value correctly. Barker *v.* Comins, 110 Mass. 477, 488, 489; Boell *v.* Schwartz, 4 Bradf. Sur. 12.]

(*b*) 1 Curt. 298.

(*c*) *Supra*, 156.

(*d*) 3 Add. 239.

will purported to dispose of 50,000*l.*, and 5,000*l.* were omitted. Still that was an omission, not an ambiguity; and the court admitted evidence from written documents, which showed clearly what was intended." However, in the subsequent case of Thorne *v.* Rooke, (*e*) where the question was whether two codicils were intended to operate together, or whether the latter was a substitute for, and revocatory of, the former, the same learned judge, after an elaborate review of the principal decisions on the subject, was of opinion that "the court is bound not to admit parol evidence until it is first satisfied that there is that doubt and ambiguity *on the face of the papers* which requires the aid of extrinsic evidence to explain it." (*f*)

Omissions in wills cannot be supplied from the instructions unless in writing:

Although it appears from the above cases, that, under certain circumstances, casual omissions in a will may be supplied by the instructions given for such will, yet it is clearly necessary that those instructions should have been reduced into writing in the lifetime of the testator; otherwise they cannot, by reason of the statute of frauds, under any circumstances, even of the plainest mistake, be admitted to probate as part of the will. (*g*)

nor in any case in wills made after Jan. 1, 1838.

1 Vict. c. 26.

* And with respect to wills made on and after January 1, 1838, it is plain that, by reason of the provisions of the stat. 1 Vict. c. 26, the whole of every testamentary disposition must be in writing, and signed and attested pursuant to the act. Whence it follows that the court has no power to correct omissions or mistakes by reference to the instructions in any case to which that statute extends. (*h*)

(*e*) 2 Curt. 799.

(*f*) See, also, Bailey *v.* Parkes, 5 Notes of Cas. 392; Mitchell *v.* Gard, 3 Sw. & Tr. 75. See, also, In the Goods of Davy, 1 Sw. & Tr. 262; Guardhouse *v.* Blackburn, L. R. 1 P. & D. 109; Reffell *v.* Reffell, Ib. 139.

(*g*) Rockell *v.* Youde, 3 Phillim. 141. See *ante*, 71; [Gifford *v.* Dyer, 2 R. I. 99.]

(*h*) In the Goods of Wilson, 2 Curt. 853; Stanley *v.* Stanley, 2 Johns. & H. 491. See, also, Birks *v.* Birks, 34 L. J., P. M. & A. 92, per Sir J. P. Wilde; Guardhouse *v.* Blackburn, L. R. 1 P. & D. 109, where that learned judge stated the general rules which, since the wills act, ought to govern questions of this nature. [See Avery *v.* Chappel, 6 Conn. 270, 275; Comstock *v.* Hadlyme, 8 Conn. 254; Andress *v.* Weller, 2 Green. Ch. (N. J.) 604, 608, 609; Cæsar *v.* Chew, 7 Gill & J. 127; Earl of Newbury *v.* Countess o Newbury, 5 Madd. 364; 1 M. & Scott, 352; Barker *v.* Comins, 110 Mass. 477; Harter *v.* Harter, L. R. 3 P. & D. 11, 12; Gifford *v.* Dyer, 2 R. I. 99; Iddings *v.* Iddings, 7 Serg. & R. 111.]

Verdict in ejectment: inadmissible in a testamentary cause.

A verdict in an action of ejectment, brought for the purpose of trying the validity of a will as to realty, is not admissible in an allegation in a testamentary cause, respecting the same will, in the ecclesiastical court. (*i*)

In what cases the declarations of the testator are admissible in evidence.

Not only when the competency of the testator is in dispute, but in all cases where there is any imputation of fraud in the making of the will, the declarations of the testator are admissible in evidence respecting his dislike or affection for his relations, or those who appear in the will to be the objects of his bounty, and respecting his intentions either to benefit them or to pass them by in the disposition of his property. (*j*) So it was held by the court of Q. B. in Doe *v.* Palmer, (*k*) that, in order to rebut the presumption which, as there has already been occasion to mention, (*l*) exists that unattested alterations appearing on the face of a will were made *after* the execution, it is allowable to give evidence of declarations of the testator, made before the execution, of his intention to provide by his will for a person who would be unprovided for without the alterations in question. But that court further held his declarations inadmissible, which were made after the execution, to the effect that the alterations * had been made previously. And Lord Campbell, in giving the judgment, said the court could not be guided alone by the consideration that both parties claimed under the testator; for his declarations, made after a time when a con-

(*i*) Grindall *v.* Grindall, 3 Hagg. 259.

(*j*) Lord Campbell C. J. in Shallcross *v.* Palmer, 16 Q. B. 759; [Allen *v.* Allen, 12 Ad. & El. 451; Beaubien *v.* Cicotte, 12 Mich. 459; Robinson *v.* Adams, 62 Maine, 369; Howell *v.* Barden, 3 Dev. 442; Reel *v.* Reel, 1 Hawks, 248; Cawthorn *v.* Haynes, 24 Missou. 236; Roberts *v.* Trawick, 13 Ala. 68; Shailer *v.* Bumstead, 99 Mass. 112; Rambler *v.* Tryon, 7 Serg. & R. 90; Waterman *v.* Whitney, 1 Kernan, 157. Where there is an imputation of undue influence upon the testator in making his will, his declarations, made at different times and at distant intervals for many years, before and down to the period of making the will, disclosing a long cherished purpose of disposing of his property in a manner wholly at variance with the provisions of the will, are admissible in evidence in connection with other testimony tending to show such influence. Neel *v.* Potter, 40 Penn. St. 483; Starrett *v.* Douglass, 2 Yeates, 46; Irish *v.* Smith, 8 Serg. & R. 573; Stevens *v.* Vancleve, 4 Wash. C. C. 266; Denison's Appeal, 29 Conn. 399; Wooton *v.* Redd, 12 Grattan, 196; Colt J. in Shailer *v.* Bumstead, 99 Mass. 122. But declarations of the testator cannot be admitted to prove that the will was forged, or that he was fraudulently induced to execute it under the belief that it was some other paper. Boylan *v.* Meeker, 4 Dutcher (N. J.), 274; *post*, 360, note (*m*).]

(*k*) 16 Q. B. 747.

(*l*) *Ante*, 130, 131.

troverted will is supposed to have been executed, would not be admissible to prove that it had been duly signed and executed as the law requires. (*m*) In the ecclesiastical court the declarations

(*m*) See accord. In the Goods of Ripley, 1 Sw. & Tr. 68; In the Goods of Hardy, 30 L. J., P. M. & A. 142. So on an issue as to the revocation of a duly executed will, evidence of declarations of the deceased (to the effect that he had made a will, but destroyed it), made subsequently to the date of the alleged revocation, was held inadmissible, as falling within the principle laid down in Doe *v.* Palmer. Staines *v.* Stewart, 2 Sw. & Tr. 320. Again, evidence of the declarations of an alleged testator as to the contents of his will not forthcoming, made after its execution, were held not admissible to prove its contents. Quick *v.* Quick, 3 Sw. & Tr. 442. [This case of Quick *v.* Quick was overruled in Sugden *v.* Lord St. Leonards, L. R. 1 P. Div. 154, where it was held that declarations, written or oral, made by a testator, both before and after the execution of his will, are, in the event of its loss, admissible as secondary evidence of its contents.] But upon a question between heir and devisee as to the competency of the testator at the time of making his will, it was held to be no misdirection to tell the jury that they might take into consideration statements made by the testator as to the dispositions contained in his will, and which, in fact, corresponded therewith, as throwing back light on the period at which the will was executed (a year before), and as affording means of inferring what was the state of his competency at that period. Sutton *v.* Sadler, 3 C. B. N. S. 99. See, also, Whitelcy *v.* King, 17 C. B. N. S. 756; [Harring *v.* Allen, 25 Mich. 505. In Shailer *v.* Bumstead, 99 Mass. 122, Colt J., speaking with reference to the statements and declarations of a testator subsequent to the execution of his will, said: "They are not, by the better reason and the most authoritative decisions, admissible to establish the fact of fraud and undue influence as one of the constituent elements of the issue. When used for such purpose, they are mere hearsay, which, by reason of the death of the party whose statements are so offered, can never be explained or contradicted by him. Obtained, it may be, by deception or persuasion, and always liable to the infirmities of human recollection, their admission would go far to destroy the security which it is essential to preserve. The declaration is not to be wholly rejected, however, if admissible on other grounds; and it must be left to the judge carefully to point out how far it is to be rejected or received as evidence by the jury. Ordinarily we should expect more or less evidence of the prior existence of those peculiarities which the subsequent declarations give evidence of; and in the reported cases this will generally be found to be so. It is not necessary to decide whether, in the entire absence of such evidence, subsequent declarations would ever be competent. Where a foundation is laid by evidence tending to show a previous state of mind, and its continued existence past the time of the execution of the will is attempted to be proved by subsequent conduct and declarations, such declarations are admissible, provided they are significant of a condition sufficiently permanent, and are made so near the time as to afford a reasonable inference that such was the state at the time in question." The learned judge then cites and comments on the following English and American authorities bearing upon the point: Provis *v.* Reed, 5 Bing. 435; Marston *v.* Roe, 8 Ad. & El. 14; Jackson *v.* Kniffen, 2 John. 31; Waterman *v.* Whitney, 1 Kernan, 157; Comstock *v.* Hadlyme, 8 Conn. 254; Robinson *v.* Hutchinson, 26 Vt. 47; Moritz *v.* Brough, 16 Serg. & R. 402; M'Taggart *v.* Thompson, 14 Penn. St. 149, 154; Boylan *v.* Meeker, 4 Dutcher, 274; and adds: "A will made where fraud or compulsion is used may nevertheless be shown to be the free act of the

of the testator have been deemed admissible to prove the fact of

party, by proof of statements in which the will and its provisions are approved, made when relieved of any improper influence or coercion. It is always open to inquiry, whether undue influence in any case operated to produce the will; and, as the will is ambulatory during life, the conduct and declarations of the testator upon that point are entitled to some weight. Indeed, the fact alone, that the will, executed with due solemnity by a competent person, is suffered to remain unrevoked for any considerable time after the alleged causes have ceased to operate, is evidence that it was fairly executed; to meet which, to some extent at least, statements of dissatisfaction with or want of knowledge of its contents are worthy of consideration and clearly competent, however slight their influence in overcoming the fact that there is no revocation. All this evidence, under whatever view it is admitted, is competent only and always to establish the influence and effect of the external acts upon the testator himself; never to prove the actual fact of fraud or improper influence in another." And in the same case, the learned judge said that the declarations, being "offered to show either ignorance of the contents of the will, or, that they were contrary to the real intentions of the testatrix, and that the will was improperly obtained by the fraud and undue influence of the executors named," though "not competent as a declaration or narrative to show the fact of fraud or undue influence at a previous period," were "admissible, not only to show retention of memory, tenacity, or vacillation of purpose existing at the date of the will, but also in proof of long cherished purposes, settled convictions, deeply rooted feelings, opinions, affections, or prejudices, or other intrinsic or enduring peculiarities of mind, inconsistent with the dispositions made in the instrument attempted to be set up as the formal and deliberate expression of the testatrix's will; as well as to rebut any inference arising from the non-revocation of the instrument." 99 Mass. 125, 126. See Boylan *v.* Meeker, 4 Dutcher (N. J.), 274. And see Johnson *v.* Lyford, L. R. 1 P. & D. 546, where it was held that the verbal and written declarations or statements made by the testator in or about the making of his will, when accompanying acts done by him in relation to the same subject, are admissible as evidence of the contents of the same will. As to proof of declarations which in the lifetime of the testator were privileged communications between him and the witness, see Allen *v.* The Public Administrator, 1 Bradf. Sur. 221; Britton *v.* Lorenz, 45 N. Y. 51; Sanford *v.* Sanford, 61 Barb. 293; Rogers *v.* Lyon, 64 Barb. 373; Carnes *v.* Platt, 15 Abbott Pr. (N. S.) 337; Taylor's Will case, 10 Abbott Pr. (N. S.) 300; Brand *v.* Brand, 39 How. Pr. (N. Y.) 193; Daniel *v.* Daniel, 39 Penn. St. 191, Woodward J.; or between husband and wife. Brewer *v.* Ferguson, 11 Humph. 565. As to the declarations and acts of devisees or legatees being parties to a suit touching the validity of a will, it was held in Shailer *v.* Bumstead, 99 Mass. 112, that evidence of such declarations and acts, subsequent to the execution of the will, whether before or after the death of the testatrix, is inadmissible to prove that the will "was contrary to her intentions, or that she was ignorant of its contents, and that it was procured by fraud and undue influence of" such parties, if there are other parties to be affected thereby who are not jointly interested nor in privity with them. In the above case, 99 Mass. 127, Colt J. said: "Devisees or legatees have not that joint interest in the will which will make the admissions of one, though he be a party appellant or appellee from the decree of the probate court allowing the will, admissible against the other legatees." So in Morris *v.* Stokes, 21 Geo. 552, it was decided that the declarations of a single legatee, although the principal one, in regard to the mode of obtaining a will, are not admissible to defeat the entire

the destruction of a will, even in cases where no fraud or misconduct is imputed. (*n*)

will, unless a combination among all the legatees to obtain the will by unlawful means be first shown. But such testimony is admissible to defeat the particular legacy of that party, on the ground that it was procured by fraudulent means. And the jury may, by the same verdict, establish the remainder of the will. See, also, Lightner *v.* Wike, 4 Serg. & R. 203; Bovard *v.* Wallace, 4 Serg. & W. 409; Boyd *v.* Eby, 8 Watts, 66; Dotts *v.* Fetzer, 9 Penn. St. 88; Roberts *v.* Trawick, 13 Ala. 68; Blakey *v.* Blakey, 33 Ala. 611; Shailer *v.* Bumstead, 99 Mass. 129, and cases cited; Brown *v.* Moore, 6 Yerger, 272. But the admissions and declarations of a sole devisee or legatee would be admissible. Nussear *v.* Arnold, 13 Serg. & R. 323, 328, 329; Shailer *v.* Bumstead, 99 Mass. 128, 129; Ware *v.* Ware, 8 Greenl. 42.]

(*n*) See Hale *v.* Tokelove, 2 Robert. 328, by Dr. Lushington. [So the declarations of a testator, to the effect that he was leaving a valid will, have been held admissible for the purpose of proving that a lost will had not been revoked. In re Johnson's Will, 40 Conn. 587; *post*, 379, note (p^2). So his expressions of dissatisfaction with his will, to show it has been revoked. Harring *v.* Allen, 25 Mich. 505. In cases where the mental capacity of the deceased is in issue, the range of inquiry into the history of his life, conduct, feelings, affections, declarations, and conversations, seems to be bounded only by the discretion of the court applied to the circumstances of each particular case. Colt J. in Shailer *v.* Bumstead, 99 Mass. 119, said, "The will is always liable to be impeached by any competent evidence that it was never executed with the required formality, was not the act of one possessed of testamentary capacity, or was obtained by such fraud and undue influence as to subvert the real intentions and will of the maker. The declarations of the testator accompanying the act must always be resorted to as the most satisfactory evidence to sustain or defend the will whenever this issue is presented. So it is uniformly held that the previous declarations of the testator, offered to prove the mental facts involved, are competent. Intention, purpose, mental peculiarity, and condition, are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the condition of the mind is the fact to be shown, are therefore received as mental acts or conduct. The truth or falsity of the statements is of no consequence. As a narration it is not received as evidence of the facts stated. It is only to be used as showing what manner of man he is who makes it. If therefore the statement or declaration offered has a tendency to prove a condition not in its nature temporary and transient, then, by the aid of the recognized rule that what is once proved to exist must be presumed to continue till the contrary be shown, the declaration, though prior in time to the act the validity of which is questioned, is admissible. Its weight will depend upon its significance and proximity. It may be so remote in point of time, or so altered in its import by subsequent changes in the circumstances of the maker, as to be wholly immaterial, and wisely to be rejected by the judge. Upon the question of capacity to make a will, evidence of this description is constantly received. The inquiry is of course directed to the condition at the date of the execution of the will; but the entire moral and intellectual development of the testator at that time is more or less involved; not alone those substantive and inherent qualities which enter into the constitution of the man, but those less permanent features which may be said to belong to and spring from the affections and emotions, as well as those morbid developments which have their origin in some physical disturbance. All that is peculiar in temperament or modes of

SECTION VI.

Of the Probate of Wills of Foreigners, &c. and of British Subjects domiciled out of the Jurisdiction of the Court.

If the deceased left no personalty in this

If the testator died without leaving any personal property in this country, generally speaking, his will need not be proved in any court of probate here; and, therefore, where the plaintiff as administrator of I. S., who died

thought, the idiosyncrasies of the man, so far as susceptibility is thereby shown, present proper considerations for the jury." Boylan *v.* Meeker, 4 Dutcher (N. J.), 274; Harrison *v.* Rowan, 3 Wash. C. C. 586; Rambler *v.* Tryon, 7 Serg. & R. 90; Robinson *v.* Adams, 62 Maine, 369, 411–413; Potts *v.* House, 6 Geo. 324; Davis *v.* Calvert, 5 Gill & J. 269; Van Alst *v.* Hunter, 5 John. Ch. 148; Lucas *v.* Parsons, 27 Geo. 593; Whitenach *v.* Stryker, 1 Green Ch. 11; Robinson *v.* Hutchinson, 26 Vt. 38; Kinne *v.* Kinne, 9 Conn. 102; Seamen's Friend Society *v.* Hopper, 33 N. Y. 619; Boyd *v.* Eby, 8 Watts, 66; Grant *v.* Thompson, 4 Conn. 203; Irish *v.* Smith, 8 Serg. & R. 573; Brock *v.* Luckett, 4 How. (Miss.) 459; Clapp *v.* Fullerton, 34 N. Y. 190; Stackhouse *v.* Horton, 15 N. J. 202; Beaubien *v.* Cicotte, 12 Mich. 495; 1 Greenl. Ev. § 108; Moritz *v.* Brough, 16 Serg. & R. 405; Norwood *v.* Marrow, 4 Dev. & Bat. 442; Comstock *v.* Hadlyme, 8 Conn. 254. In a case where the mental capacity of a party to make a will was in controversy (Wright *v.* Tatham, 5 Cl. & Fin. 670, 715), Mr. Justice Patteson said: "Every act of the party's life is relevant to the issue." Mr. Baron Alderson, in the same case, p. 720, said: "The object of laying this testimony before the jury, is to place the whole life and conduct of the testator, if possible, before them, so that they may judge of his capacity; for this purpose, you call persons who have known him for years, who have seen him frequently, who have conversed with him or corresponded with him." "Every act of the testator is evidence." Mr. Baron Bolland, in the same case, pp. 728, 729, said: "I take it to be settled, that, in order to show the state of mind and understanding of a person whose competency, as in the present case, is brought in question, whatever is said, written, or done by the friends of the party, and others who may have had transactions with him, is evidence to be submitted to the jury, who are to decide upon such competency, provided what has been so said, written, or done, can be proved to have been known to and acted upon by such party." But it was decided in the above case that letters written to the party whose competency to make a will was in question, by third persons since deceased, and found many years after their date among his papers, are not admissible in evidence, without proof that he himself acted upon them. S. C. 1 Ad. & El. 3; 7 Ad. & El. 313; 2 Russ. & My. 1. General reputation as to sanity of the testator is not admissible. Mr. Baron Parke, Wright *v.* Tatham, 5 Cl. & Fin. 670, 735; Townsend *v.* Peppercll, 99 Mass. 40. As to the testimony of subscribing witnesses, see *ante*, 346, note (d^3). As to the opinions of persons not experts, nor subscribing witnesses, *ante*, 346, note (d^3). — *Experts.* The testimony of experts generally forms a prominent feature in the evidence upon the trial of an issue respecting the mental capacity of a testator. In Commonwealth *v.* Rogers, 7 Met. 500, 504, 505, Shaw C. J. said: "Some questions lie beyond the scope of the observation and experience of men in general, but are quite within the observation and experience of those whose peculiar pur-

country, his will need not be proved here:

at Naples, * brought his bill to have a discovery of the intestate's personal effects, the defendant pleaded that the deceased had by his will made him, the defendant,

suits and profession have brought the class of facts, laid before the jury, frequently and habitually under their consideration. It is upon this ground that the opinions of witnesses who have long been conversant with insanity in its various forms, and who have had the care and superintendence of insane persons, are received as competent evidence, even though they have not had opportunity to examine the particular patient, and observe the symptoms and indications of disease, at the time of its supposed existence. It is designed to aid the judgment of the jury in regard to the influence and effect of certain facts which lie out of the observation and experience of persons in general. The value of such testimony will depend mainly upon the experience, fidelity, and impartiality of the witness who gives it." The question of the competency of the expert is for the court. Boardman *v.* Woodman, 47 N. H. 120; Rice J. in Heald *v.* Thing, 45 Maine, 397; Commonwealth *v.* Sturtivant, 117 Mass. 122, 137. The opinion of an expert may be admitted upon the question of the capacity of the testator, founded either upon his own personal acquaintance with the testator and his observation and examination of him, or upon a hypothetical case involving the same facts, or facts similar to those, supposed to be proved by the evidence. Boardman *v.* Woodman, 47 N. H. 120; Heald *v.* Thing, 45 Maine, 392; Jackson *v.* N. Y. Central R. R. Co. 2 N. Y. Sup. Ct. 653; Bonard's Will, 16 Abb. Pr. N. S. 128; People *v.* Montgomery, 13 Abb. Pr. N. S. 207; Macfarland's Trial, 8 Abb. Pr. N. S. 57; McAllister *v.* State, 17 Ala. 434; Clark *v.* State, 12 Ohio, 483; Kempsey *v.* McGinniss, 21 Mich. 123. In either case, the facts or symptoms on which his opinion is founded must be distinctly stated. Heald *v.* Thing, 45 Maine, 392, 396, 397; Hathorn *v.* King, 8 Mass. 371; Dickinson *v.* Barber, 9 Mass. 225; Clark *v.* State, 12 Ohio, 483; Gibson *v.* Gibson, 9 Yerger, 329. And the jury must be satisfied that the facts and symptoms did exist in the particular case. Harrison *v.* Rowan, 3 Wash. C. C. 587; Duffield *v.* Morris, 2 Harring. 375; Gibson *v.* Gibson, 9 Yerger, 329; Potts *v.* House, 6 Geo. 324; Kempsey *v.* McGinniss, 21 Mich. 123. It must appear that the witness has reliable information or knowledge of the facts involved, and upon which his opinion is to be founded, before he can testify as an expert. Rice J. in Heald *v.* Thing, 45 Maine, 397; Gaston J. in Clary *v.* Clary, 2 Ired. 78. But an expert cannot be allowed to give his opinion based partly upon the representations made to him by others not under oath, and partly upon his own observation and examination of his patient's symptoms and condition. Heald *v.* Thing, 45 Maine, 392; Wetherbee *v.* Wetherbee, 38 Vt. 454. Nor can a witness who is an expert, in a case where the evidence is complicated and conflicting, although he has heard all the testimony, be asked, "Supposing all the facts stated by the witnesses to be true, was the testator laboring under an insane delusion, or was he of an unsound mind?" But the facts upon which his opinion is asked should be put to him hypothetically. Woodbury *v.* Obear, 7 Gray, 476; Fairchild *v.* Bascomb, 35 Vt. 398; Regina *v.* Frances, 4 Cox C. C. 57; Bainbrigge *v.* Bainbrigge, 4 Cox, 454; United States *v.* McGlue, 1 Curtis C. C. 1; Commonwealth *v.* Rogers, 7 Met. 500; M'Naghten's case, 10 Cl. & Fin. 200; People *v.* M'Cann, 3 Parker Cr. (N. Y.) 272. There is, however, no established formula for questions to experts in Massachusetts, and any question may be proper which, upon the circumstances developed, will elicit their opinions as to the matters of science or skill which are in controversy, and at the same time exclude their opinion as to the effect of the evidence in establishing controverted facts. Hunt *v.* Lowell Gas Light Co. 8 Allen,

his executor, and he had proved the will according to the law of

169. In this last cited case the expert witnesses had heard the whole of the evidence, which was not conflicting, and they were permitted to answer this question: "Having heard the evidence, and assuming the statements made by the plaintiff to be true, what in your opinion was the sickness, and do you see any adequate cause for the same?" although it was objected to. See Crowell *v.* Kirk, 3 Dev. (Law) 355; Kempsey *v.* McGinniss, 21 Mich. 123. A question under like circumstances and in similar form, it was held, would be proper, by the learned judges in M'Naghten's case, 10 Cl. & Fin. 200. See Negro Jerry *v.* Townshend, 9 Md. 145; State *v.* Windsor, 5 Harring. 512. The proper questions to be asked of a witness testifying as an expert on a question of mental capacity were suggested and well considered by Christiancy J. in Kempsey *v.* McGinniss, 21 Mich. 123, 137 *et seq.* An expert is allowed to state, on his examination in chief, the grounds of the opinion expressed by him, and the reasons for it. Heald *v.* Thing, 45 Maine, 397; Metcalf J. in Keith *v.* Lothrop, 10 Cush. 453, 457; Commonwealth *v.* Webster, 5 Cush. 301; Collier *v.* Simpson, 5 C. & P. 73. See, as to the value of the evidence of experts, Christiancy J. in Kempsey *v.* McGinniss, 21 Mich. 142, 143; Grier J. in Winans *v.* New York & Erie Ry. 21 How. (U. S.) 100. *Medical Books.* It has been decided in some states that medical books, even of received authority, cannot be read to the court or jury, if objection is made. Ashworth *v.* Kittridge, 12 Cush. 193; Washburn *v.* Cuddihy, 8 Gray, 430; Commonwealth *v.* Wilson, 1 Gray, 337; Carter *v.* State, 2 Ind. 617; Harris *v.* Panama R. R. Co. 3 Bosw. (N. Y.) 7; Fowler *v.* Lewis, 25 Texas, 380; Davis *v.* State, 38 Md. 15; Commonwealth *v.* Sturtivant, 117 Mass. 122. But in other states such books have been allowed to be read, subject to the discretion of the court, with proper explanations of technicalities or phrases not generally understood. Standenmeier *v.* Williamson, 29 Ala. 558; Meckle *v.* State, 37 Ala. 139; Bowman *v.* Woods, 1 Green (Ia.), 441; Lunning *v.* State, 1 Chand. (Wis.) 178; Wale *v.* Dewitt, 20 Texas, 398; Melvin *v.* Easley, 1 Jones (Law), 386. Books of science or art are made admissible by statute in Iowa. Brodhead *v.* Wiltse, 35 Iowa, 429. It seems to be no objection to an opinion of a medical expert that it is based partly on his observation and experience and partly on information derived from books. State *v.* Terrell, 12 Rich. (Law) 321. See Parker *v.* Johnson, 25 Geo. 576. — *Contents of Will, &c.* A will cannot be avoided merely because it appears to be imprudent, unreasonable, or unaccountable. Higgins *v.* Carlton, 28 Md 118; Munday *v.* Taylor, 7 Bush (Ky.), 491; Davis *v.* Calvert, 5 Gill & J. 269, 300; Ross *v.* Christman, 1 Ired. (Law) 209. So, on the other hand, though the will bear the impress of being dictated by wisdom and by the exercise of a sound mind; yet, if in fact it be true that its maker did not at the time possess a sound mind, if he was insane, if by reason of weakness or imbecility he was what in law is known as *non compos mentis*, the will would be without legal effect. Potter J. in Harper *v.* Harper, 1 N. Y. Sup. Ct. 351, 354. But the character and contents of the will itself, considered either by themselves or in connection with the property and estate disposed of by the testator, with his family and relatives and their claims upon him, and with his own situation and the circumstances under which the will was made, are important matters of observation, and sometimes furnish controlling proof respecting the soundness of the testator's mind at the time of making his will. Harper *v.* Harper, 1 N. Y. Sup. Ct. 351; Kempsey *v.* McGinniss, 21 Mich. 123; Wells J. in Howe *v.* Howe, 99 Mass. 90; Van Alst *v.* Hunter, 5 John. Ch. 148; Clark *v.* Fisher, 1 Paige, 171; Harrel *v.* Harrel, 1 Duvall (Ky.), 203; Ross *v.* Christman, 1 Ired. (Law) 209; Munday *v.* Taylor, 7 Bush (Ky.), 491; Peck *v.* Carey, 27 N. Y. 9; Gambault *v.* Public Adminis-

the country; and he denied that the deceased had left any estate but what was at Naples; and this plea was held good. (*o*)

unless his executor institute a suit:

But if a foreign executor should find it necessary to institute a suit here, to recover a debt due to his testator, he must prove the will here also, or a personal representative must be constituted by the court of probate here to administer *ad litem*. (*p*) So an executor having obtained probate in Ireland cannot bring an action here as executor, even to recover Irish assets, without having obtained probate in England also. (*q*) For

trator, 4 Bradf. Sur. 226; Davis *v.* Calvert, 5 Gill & J. 269; Kevill *v.* Kevill, 6 Amer. Law Reg. (N. S.) 79; Roberts *v.* Trawick, 13 Ala. 68; Couch *v.* Couch, 7 Ala. 519; Tomkins *v.* Tomkins, 1 Bailey, 92; Patterson *v.* Patterson, 6 Serg. & R. 56; Duffield *v.* Morris, 2 Harring. 381; Weir's case, 9 Dana, 443; Addington *v.* Wilson, 5 Ind. 137; Kenworthy *v.* Williams, 5 Ind. 375; Goble *v.* Grant, 2 Green Ch. 629, 635, 636. Other wills of the testator, not offered for probate, have been admitted in evidence upon questions of capacity and undue influence. Love *v.* Johnston, 12 Ired. 355.]

(*o*) Jauncey *v.* Sealey, 1 Vern. 397. See, also, Currie *v.* Bircham, 1 Dowl. & Ryl. 35; Hervey *v.* Fitzpatrick, Kay, 421; *post*, pt. 1. bk. v. ch. II. § 1.

(*p*) Attorney General *v.* Cockerell, 1 Price, 179, by Richards, Baron; Mitf. Pl. 177, 4th ed.; Tyler *v.* Bell, 2 My. & Cr. 89; Attorney General *v.* Bouwens, 4 M. & W. 193; [Dixon *v.* Ramsay, 3 Cranch, 319; Lord Romilly M. R. in Hood *v.* Lord Barrington, L. R. 6 Eq. 222; Naylor *v.* Moffatt, 29 Misson. 126; Gilman *v.* Gilman, 54 Maine, 453; Trecothick *v.* Austin, 4 Mason, 16; Reynold *v.* Torrance, 2 Brev. (S. Car.) 59; Caldwell *v.* Harding, 5 Blatch. 501; Kerr *v.* Moon, 9 Wheat. 565; Sanders *v.* Jones, 8 Ired. Eq. 246; Graeme *v.* Harris, 1 Dallas, 456; Glenn *v.* Smith, 2 Gill & J. 493; Kraft *v.* Wickey, 4 Gill & J. 332; Fenwick *v.* Sears, 1 Cranch, 259; Dickinson *v.* M'Craw, 4 Rand. 158; Stevens *v.* Gaylord, 11 Mass. 256; Riley *v.* Riley, 3 Day, 74; Hobart *v.* Conn. Turnp. Co. 15 Conn. 145; Doolittle *v.* Lewis, 7 John. Ch. 47; Smith *v.* Webb, 1 Barb. 230; Taylor *v.* Barron, 35 N. H. 495, and cases cited; Clark *v.* Clement, 33 N. H. 567; Dangerfield *v.* Thurston, 2 Martin (La.), 232; Clark *v.* Blackington, 110 Mass. 373. The executor is bound to take foreign probate for the purpose of collecting debts in other states, if the interests of the estate require it. If he does not take such probate and the estate suffers loss in consequence, it is a *devastavit*. Henderson J. in Helme *v.* Sanders, 3 Hawks, 566. But in some states, a foreign executor or administrator has a right to sue for assets belonging to the testator's or intestate's estate without qualifying as executor or administrator therein. Bells *v.* Nichols, 38 Ala. 678; Cloud *v.* Golightly, 5 Ala. 64; Glassell *v.* Wilson, 4 Wash. 591; Moore *v.* Fields, 42 Penn. St. 467; Stephens *v.* Smart, 1 Law Rep. 471; Morgan *v.* Gaines, 3 A. K. Marsh. 613; Gray *v.* Patton, 2 B. Mon. 12; Price *v.* Morris, 5 McLean, 4; Rockham *v.* Wittkowski, 64 N. Car. 464. See Keefer *v.* Mason, 36 Ill. 406; Colbert *v.* Daniel, 32 Ala. 314. And so the statute of limitations runs against a claim by the foreign executor or administrator in those states just as though he had been appointed there. Manly *v.* Turnipseed, 37 Ala. 522; Bell *v.* Nichols, 38 Ala. 678. In such cases the executor or administrator must be qualified to sue according to the laws of the state under which he claims to have been appointed. Newton *v.* Cooke, 10 Ark. 169.]

(*q*) Carter *v.* Crofts, Godb. 33; Whyte *v.* Rose, 3 Q. B. 508, per Tindal C. J.

the courts here will not recognize any will of personalty except such as the court of probate of this country has by the probate adjudged to be the last will. (*r*) Therefore if a testator die in India, and his personal estate be wholly there, and his executor be resident there, and the will be proved there, yet if a part of the assets remain in the hands of the executor unappropriated, and come to be administered in England, and a legatee in England institute a suit here for the payment of his legacy out of such unappropriated assets, administration to the testator ought to be taken out in this country, and the administrator made a party to the suit. (*s*) So to a bill which seeks an account of the assets of an intestate, who died in India, possessed by a personal representative there, a personal representative of the * intestate, constituted in England, is a necessary party, though it does not appear that the intestate, at the time of his death, had any assets in England. (*t*) And it may be stated, as a fully established rule, that in order to sue in any court of this country, whether of law or equity, in respect of the personal rights or property of a deceased person, the plaintiff must appear to have obtained probate or letters of administration in the court of probate of this country. (*u*)

[Administration may be granted in Massachusetts upon the estate, situated there, of a person who died while residing in another state, although the deceased left a will which has not been proved and allowed in the state of his domicil. Bowdoin *v.* Holland, 10 Cush. 17, 21; Stevens *v.* Gaylord, 11 Mass. 256, 263.]

(*r*) Price *v.* Dewhurst, 4 My. & Cr. 80, 81; Bond *v.* Graham, 1 Hare, 484; Lasseur *v.* Tyrconnel, 10 Beav. 28; [Henderson J. in Helme *v.* Sanders, 3 Hawks, 566.]

(*s*) Logan *v.* Fairlie, 2 Sim. & Stu. 284; 1 My. & Cr. 59. See, also, Lowe *v.* Fairlie, 2 Madd. 101.

(*t*) Tyler *v.* Bell, 2 My. & Cr. 89; Bond *v.* Graham, 1 Hare, 482. See *post*, pt. v. bk. II. ch. II.

(*u*) 3 Q. B. 507. See, also, M'Mahon, *v.* Rawlings, 16 Sim. 429; Enohin *v.* Wylie, 10 H. L. Cas. 19, per Lord Cranworth; [Chapman *v.* Fish, 6 Hill, 555; McClure *v.* Bates, 12 Iowa, 77; Cockleton *v.* Davidson, 1 Brev. (S. Car.) 15; *post*, 1929, and note; Riley *v.* Moseley, 44 Miss. 37; Anderson *v.* Gregg, 44 Miss. 17; Noonan *v.* Bradley, 9 Wallace, 394; Parsons *v.* Lyman, 20 N. Y. 103. But see McNamara *v.* Dwyer, 7 Paige, 239; Tunstall *v.* Pollard, 11 Leigh, 1.] It appears from an able note to the American edition of the present treatise (which Mr. Francis I. Troubat has done the author the honor of publishing at Philadelphia), that it has been established as a rule, by repeated decisions in many of the states, that the executor or administrator of a person who dies domiciled in Great Britain, or any other foreign country, cannot maintain an action in the United States, by virtue of letters testamentary or administration granted to him in the country where the deceased died; [Davis *v.* Phillips, 32 Texas, 564; Mansfield *v.* Turpin, 32 Geo. 260; Karrick *v.* Pratt, 4 Greene (Iowa), 144; Wood *v.* Gold, 4 McLean, 577; and that such letters do not impose on him any liability to be sued there. Norton *v.* Pal-

but a will made abroad of

Likewise, if a will be made in a foreign country, and proved there, disposing of personal property in this country, the executor must prove the will here also. (*x*) And gen-

mer, 7 Cush. 523; Goodwin *v.* Jones, 3 Mass. 514; Dangerfield *v.* Thurston, 20 Martin (La.), 232; Vaughan *v.* Northup, 15 Peters, 1; Kerr *v.* Moon, 9 Wheat. 565; Caldwell *v.* Harding, 5 Blatch. 501; Mellus *v.* Thompson, 1 Cliff. 125; Pond *v.* Makepeace, 2 Met. 114; Riley *v.* Riley, 3 Day, 74; Noonan *v.* Bradley, 9 Wallace, 394; Swatzel *v.* Arnold, 1 Woolw. 383; Davis *v.* Phillips, 32 Texas, 564; Carmichael *v.* Ray, 5 Ired. Eq. 365; Riley *v.* Moseley, 44 Miss. 37; Anderson *v.* Gregg, 44 Miss. 170; Brookshire *v.* Dubose, 2 Jones Eq. 276; Sayre *v.* Helme, 61 Penn. St. 299; Middlebrook *v.* Merchants' Bank, 4 Barb. 481; Fay *v.* Haven, 3 Met. 109; Beaman *v.* Elliot, 10 Cush. 172; Clark *v.* Clement, 33 N. H. 567; Willard *v.* Hammond, 21 N. H. 382; Goodall *v.* Marshall, 11 N. H. 88, 89; Trecothick *v.* Austin, 4 Mason, 32, 33; Boyd *v.* Lambeth, 24 Miss. 433; Holcomb *v.* Phelps, 16 Conn. 127; Rand *v.* Hubbard, 4 Met. 255; Vaughn *v.* Barret, 5 Vt. 333; Langdon *v.* Potter, 11 Mass. 313; Pinney *v.* McGregory, 102 Mass. 186, 192; Picquet *v.* Swan, 3 Mason, 469; Taylor *v.* Barron, 35 N. H. 484, 495; Smith *v.* Webb, 1 Barb. 230; Gayle *v.* Blackburn, 1 Stewart, 429; *post*, 1929, note (*b*); Brown *v.* Brown, 4 Edw. Ch. 343; Allsup *v.* Allsup, 10 Yerger, 283; Goodall *v.* Marshall, 14 N. H. 161; Jackson *v.* Johnson, 34 Geo. 511; Gordon *v.* Clarke, 10 Florida, 179; Vickery *v.* Beir, 16 Mich. 50. But some of the American courts have gone the length of holding that a foreign executor or administrator coming here, having received assets in the foreign country, is liable to be sued here, and to account for such assets, notwithstanding he has taken out no new letters of administration here, nor has the estate been positively settled in the foreign state. Swearingen *v.* Pendleton, 4 Serg. & R. 389, 392; Evans *v.* Tatem, 9 Serg. & R. 252, 259; Bryan *v.* McGee, 2 Wash. C. C. 337; Gulick *v.* Gulick, 33 Barb. 92; Campbell *v.* Tousey, 7 Cowen, 64. "The doctrine asserted in these courts is," says Judge Story, "that such a foreign executor or administrator is chargeable here, as executor, for all the assets which he still retains in his hands, or which he has expended or disposed of here, unless expended or disposed of here in the due course of administration, whether they were received here or in a foreign country, although he has not taken out any new letters of administration here. There is very great difficulty in supporting these decisions to the extent of making the foreign executor or administrator liable here for assets received by him abroad in his representative character, and brought here by him." Having commented on the cases above cited, the learned author adds: "On the other hand, there are other American authorities which indicate a very different doctrine. The modern English authorities are to the same effect. They fully establish the doctrine that, if a foreign executor or administrator brings or transmits property here, which he has received under the administration abroad, or if he is personally present, he is not, either personally or in his representative capacity, liable to a suit here; nor is such property liable here to creditors; but they must resort for satisfaction to the forum of the original administration. So, where property is remitted by a foreign executor to this country to pay legacies, no suit can be maintained for it, if there is no specific appropriation of it, without an administration taken out here." Story Confl. Laws, § 514 *b*, and notes, in which the

(*x*) Lee *v.* Moore, Palm. 163; Tourton *v.* Flower, 3 P. Wms. 369; Vanthienen *v.* Vanthienen, Fitzgib. 204. [See Campbell *v.* Wallace, 10 Gray, 162; Campbell *v.* Sheldon, 13 Pick. 8.]

erally speaking, the court of probate in this country will adopt the decision of the court of probate in the foreign country in which the testator died domiciled. (*y*) So

property in this country must be proved here:

cases are cited. Fay *v.* Haven, 3 Met. 109. For the rule in some other states, see Lancaster *v.* McBryde, 5 Ired. 421; McNamara *v.* Dwyer, 7 Paige, 239; Tunstall *v.* Pollard, 11 Leigh, 1, 36; M'Cullough *v.* Young, 1 Binney, 63; Smith *v.* Mabry, 7 Yerger, 26; Allsup *v.* Allsup, 10 Yerger, 283; Baker *v.* Smith, 3 Metc. (Ky.) 264. In Kilpatrick *v.* Bush, 23 Miss. 199, it was held that the right of an administrator to sue for personalty of his intestate in a foreign jurisdiction, is confined to cases in which he had reduced the property into his own possession in the country of his domicil, so that he acquired the legal title thereto, according to the laws of that country, and the property is afterwards found in another country, or converted there against his will. By statute in Ohio, executors and administrators may sue as such, in like manner as non-residents, and a duly certified grant of letters is sufficient authority to bring suit. Price *v.* Morris, 5 McLean, 4. Ancillary probate authority or administration will be granted in one state on the ground of letters testamentary or administration granted in another. But it is not necessary that the will of a non-resident testator should be proved in the state of his domicil before granting administration upon estate left by him in another state. *Post*, 430, note (*g*). Nor is it necessary that administration should be taken in the place of the domicil of the deceased before an administrator is appointed in another state or country where administration is necessary. *Post*, 430, note (*g*).] The rule stated in the text does not apply, except where the party sues in right of the deceased: If he sues in his own right, although that right be derived under a foreign will, no administration need be taken out in the United States. See, also, Story Confl. Laws, ch. viii. §§ 513, 516, 517. And see accord. Vanquelin *v.* Bouard, 15 C. B. N. S. 341; [Trecothick *v.* Austin, 4 Mason, 16; Talmage *v.* Chapel, 16 Mass. 71, 73; Lawrence *v.* Lawrence, 3 Barb. Ch. 71; Trotter *v.* White, 10 Sm. & M. 607; Taylor *v.* Barron, 35 N. H. 497; Kilpatrick *v.* Bush, 1 Cush. (Miss.) 199; Barrett *v.* Barrett, 8 Greenl. 353; Morton *v.* Hatch, 54 Missou. 408; *post*, 1663, notes (g^1) and (h^1). It has been held that the assignee of an executor appointed in one state may maintain an action in another state on a chose in action transferred to him by such executor, although the executor could not himself bring suit on it in the latter state in his representative capacity. Petersen *v.* Chemical Bank, 32 N. Y. 21; Riddick *v.* Moore, 65 N. Car. 382. See Story Confl. Laws, §§ 258, 259; Robinson *v.* Crandall, 9 Wend. 426; Leake *v.* Gilchrist, 2 Dev. 73. The case was one in which the assignee could sue at law as plaintiff in his own name. See McBride *v.* Farmers' Bank, 26 N. Y. 450; Hutchins *v.* State Bank, 12 Met. 421, 426; Middlebrook *v.* The Merchants' Bank, 27 How. Pr. 474; Harper *v.* Butler, 2 Peters, 239; Bullock *v.* Rogers, 16 Vt. 294; *post*, 432, note (o^1). Where an executor or administrator in virtue of an administration abroad, becomes there possessed of negotiable notes belonging to the deceased, which are payable to bearer, he becomes the legal owner and bearer thereof by force of his administration, and may sue thereon in his own name, without taking out letters of administration in the state where the debtor resides, in order to maintain a suit against him. See Barrett *v.* Barrett, 8 Greenl. 353; Robinson *v.* Crandall, 9 Wend, 425; Story Confl. Laws, § 517. But it was held in Stearns *v.* Burnham, 5 Greenl. 261, that an executor appointed under the laws of another state cannot indorse a promissory note, payable to his testator by a citizen of Maine, so as to

(*y*) See *post*, 366.

according to the old practice of the prerogative court, if the testator was domiciled in Scotland, and left effects there and in England, the will was proved in the first instance

the court of probate here will

give the indorsee a right of action in his own name in the latter state. Thompson *v.* Wilson, 2 N. H. 291, was a like decision in New Hampshire. Taylor *v.* Barron, 35 N. H. 496. But see the *quære* as to this by Shaw C. J. in Rand *v.* Hubbard, 4 Met. 251, 258 *et seq.* There are cases in which it has been held that a voluntary payment to an executor or administrator under letters granted abroad, and before ancillary administration has been taken in the place of the residence of the debtor making the payment, will discharge the debtor. See Parsons *v.* Lyman, 20 N. Y. 103; Stone *v.* Scripture, 4 Lansing, 186; Wilkins *v.* Ellett, 9 Wallace, 740; Riley *v.* Moseley, 44 Miss. 37; Stevens *v.* Gaylord, 11 Mass. 256; Trecothick *v.* Austin, 4 Mason, 16, 33; Doolittle *v.* Lewis, 7 John. Ch. 45; Nisbet *v.* Stewart, 2 Dev. & Bat. 24; Campbell *v.* Tousey, 7 Cowen, 64; Hooker *v.* Olmstead, 6 Pick. 481; Story Confl. Laws, § 515. But see Story Confl. Laws, §§ 514, 515 *a*; Dewey J. in Fay *v.* Haven, 3 Met. 115; Taylor *v.* Barron, 35 N. H. 496. In Rand *v.* Hubbard, 4 Met. 252, 255, Shaw C. J., having referred to "a class of American cases, which hold that an administrator appointed in one state cannot collect simple contract debts due in another, Goodwin *v.* Barret, 5 Vt. 333; Pond *v.* Makepeace, 2 Met. 114," added, by way of comment: "These are all cases of intestacy, and turn on the authority of an administrator, as contradistinguished from that of an executor appointed by the will of the testator. In such case, it is held, that as an administrator derives his whole authority from the law of the state in which he is appointed, his authority cannot be extended beyond its jurisdiction, though, were it a new question, there would be great convenience and perhaps some legal ground to decide, as between the states of this Union, that where a principal administration is granted, that is, an administration in the state where the intestate had his domicil, and by whose laws his personal property must be distributed and his estate settled (Dawes *v.* Head, 3 Pick. 128), the principal administrator should so far have authority over assets due in other states, by negotiable securities or otherwise, that a payment to him, by the citizen of another state, before administration granted in the latter, should be a good discharge." This view is still more strongly urged in Hutchins *v.* State Bank, 12 Met. 425, 426, by the same great judge. See *ante*, 362, note (c^2). As to ancillary administrations, they are regarded as independent of the principal administration and of each other; so much so, that property received under one cannot be sued for under another, though it may at any time be within the jurisdiction of the latter. Nor can a judgment against one furnish a right of action against another; for in contemplation of law there is no privity between them. 2 Kent, 434, note (*a*); Low *v.* Bartlett, 8 Allen, 259, 263–266; Brodie *v.* Bickley, 2 Rawle, 431; Aspden *v.* Nixon, 4 How. (U. S.) 467; Hill *v.* Tucker, 13 How. (U. S.) 458, 466; McLean *v.* Meek, 18 How. (U. S.) 16; Stacy *v.* Thrasher, 6 How. (U. S.) 44; Norton *v.* Palmer, 7 Cush. 523; Wheelock *v.* Pierce, 6 Cush. 288; Boston *v.* Boylston, 2 Mass. 384; Talmage *v.* Chapel, 16 Mass. 71; Stevens *v.* Gaylord, 11 Mass. 256; Fay *v.* Haven, 3 Met. 109; Harney *v.* Richards, 1 Mason, 423; Mothland *v.* Wireman, 3 Penn. 185; Goodall *v.* Marshall, 11 N. H. 88; Porter *v.* Heydock, 6 Vt. 374; Abbot *v.* Coburn, 28 Vt. 663; Bullock *v.* Rogers, 16 Vt. 294; Gravillon *v.* Richards, 13 La. 293; Merrill *v.* New England Ins. Co. 103 Mass. 249; Taylor *v.* Barron, 35 N. H. 484; Slauter *v.* Chenowith, 7 Ind. 211; Jones *v.* Jones, 15 Texas, 463. Thus, it was held in Ela *v.* Edwards, 13 Allen, 48, that, if ancillary administration is taken out in another state upon the estate there of a deceased

in the court of great sessions, in Scotland, and a copy duly *authenticated being transmitted here, it was proved in the ecclesiastical court; and deposited as if

follow the grant of the court of domicil:

citizen of Massachusetts, a decree of the judge of probate there, allowing a claim of the administrator against the estate, and finding a balance due him over and above the assets there coming to his hands, is not conclusive evidence in Massachusetts, and will not entitle the administrator, who is also executor under the will of the deceased, to charge for such balance in settling his account as executor in Massachusetts. See Clark *v.* Blackington, 110 Mass. 369, 374; in which it appeared that an executor, appointed in Massachusetts, included in his inventory a note due to his testator from the estate of a deceased debtor who was domiciled in Rhode Island, secured by a mortgage on land in Rhode Island; and he took out administration in Rhode Island, sold the note and mortgage, and rendered a final account to the probate court of that state, which was there allowed; it was held that such allowance of the disposition made by him of the proceeds of the note was conclusive in the settlement of his account in the probate court, as executor, in Massachusetts; but that the probate court in Massachusetts could inquire into the good faith of the sale, and, if it should find that the sale was fraudulent, and the executor the real purchaser of the note, could compel him to account for the excess of the value of the note above what he paid for it. Wells J. said: "The forum of original administration is the one in which the final account is to be made. As executor in this state his trust embraced this note. Its sale in Rhode Island does not discharge him of that trust, because he is himself the purchaser, and the party interested elects to treat him as purchaser in trust. The account in Rhode Island can discharge him only to the extent of the sale and its proceeds returned there." See, also, Jennison *v.* Hapgood, 10 Pick. 77, 100. Where a testator had by his will appointed executors in different states, it was held that a judgment against the executors in one state was evidence against those in another state on account of the privity between them. Hill *v.* Tucker, 13 How. (U. S.) 458. But Mr. Justice Wayne, in this case (pp. 466, 467) says, "Between administrators deriving their commissions to act from different political jurisdictions, there is no such privity." See Low *v.* Bartlett, 8 Allen, 264; Aspden *v.* Nixon, 4 How. (U. S.) 467; Stacy *v.* Thrasher, 6 How. (U. S.) 44; McLean *v.* Meek, 18 How. (U. S.) 16; Brodie *v.* Bickley, 2 Rawle, 431. The assets received by a foreign executor or administrator in the state where the testator or intestate resided, are to be administered in that state; and though such executor or administrator takes administration in another state on the testator's or intestate's estate within the latter, yet he is not held, by reason of such assets, to pay debts due to his testator's or intestate's creditors in the latter state, although he has paid all the debts which the testator or intestate owed elsewhere, and has sufficient balance in his hands to pay the debts due in the latter state. Fay *v.* Haven, 3 Met. 109, 114, 116. In this case Dewey J. said: "The administration granted in Massachusetts was merely ancillary, and the only duty devolved upon such administrator would be to collect the assets here, and appropriate so much of the avails of the same to the payment of debts due to our citizens as would be authorized by the general solvency or insolvency of the estate of the deceased, and remit the balance to the place of principal administration. Davis *v.* Estey, 8 Pick. 475; [*post*, pt. IV. bk. I. ch. I.] It has been, I apprehend, the uniform doctrine of this court, that any other administration than that granted where the deceased had his domicil must be considered as an ancillary administration. Stevens *v.* Gaylord, 11 Mass. 256. Such ancillary administrator

it were an original will. (*z*) Again, if the testator was domiciled in Ireland, the will was proved in the spiritual court of that country; or if in the East or West Indies, in the probate court there;

would not be obliged to account here for assets received in the place of principal administration, although he had filed a copy of the will and taken letters of administration in this commonwealth. Boston *v.* Boylston, 2 Mass. 384; Campbell *v.* Sheldon, 13 Pick. 23. . . . . It seems to be highly reasonable and proper that the accountability of the administrator for all the assets received under an appointment in one state should be exclusively under the laws and judicial decisions of the state conferring upon him the power and authority to act in this behalf, and that all questions as to faithful or unfaithful discharge of his duties as such administrator should be limited to the same local jurisdiction." See Burbank *v.* Payne, 17 La. Ann. 15; Atkinson *v.* Rogers, 14 La. Ann. 633; Churchill *v.* Boyden, 17 Vt. 319; Richards *v.* Dutch, 8 Mass. 506; Dawes *v.* Boylston, 9 Mass. 337; Kennedy *v.* Kennedy, 8 Ala. 391; McGehee *v.* Polk, 24 Geo. 406; Marrion *v.* Titsworth, 18 B. Mon. 582; Lawrence *v.* Elmendorf, 5 Barb. 73. It was said by Judge Story in Harvey *v.* Richards, 1 Mason, 415, that "each of these administrations may be properly considered as a principal one, with reference to the limits of its exclusive authority; and each might, under circumstances, justly be deemed an auxiliary administration." It is in consequence of the above rule of disability to sue, and immunity from suits, in another state or country, of executors or administrators appointed in the country of the domicil of the deceased, that it becomes necessary, in order to the due collection and disposition of the personal property which may be left in any other government than that of the domicil, that an administration should be granted in pursuance of the laws of that government; and this is called an ancillary or auxiliary administration. Goodall *v.* Marshall, 11 N. H. 90; Stevens *v.* Gaylord, 11 Mass. 256, 263; Low *v.* Bartlett, 8 Allen, 263; Lord Westbury in Partington *v.* Attorney General, L. R. 8 H. L. 100, 119. Such must be any other administration than that granted where the deceased had his domicil. Stevens *v.* Gaylord, *supra;* Fay *v.* Haven, *supra;* Williams *v.* Williams, 5 Md. 467; *post,* 430, note (*g*), 1663. It is generally admitted that the proper office of an ancillary administration is to collect the debts due the deceased in the state or country where it is granted, convert the personal property into money, pay creditors and other claimants in that state or country, and, upon the settlement of the administration account, to transmit the balance found in the hands of the administrator, if so directed, to the place of the domicil. Goodall *v.* Marshall, 11 N. H. 88, 90; Low *v.* Bartlett, 8 Allen, 259, 263, 266; Fay *v.* Haven, 3 Met. 109, 114; Davis *v.* Estey, 8 Pick. 475; Jennison *v.* Hapgood, 10 Pick. 77, 100; Clark *v.* Blackington, 110 Mass. 369. The laws of the state in which an administrator is appointed govern his accountability for all assets received by him in that state, and all questions as to the faithful or unfaithful discharge of his duties must be decided solely by the laws of that state. Fay *v.* Haven, 3 Met. 109; Kennedy *v.* Kennedy, 8 Ala. 391; McGehee *v.* Polk, 24 Geo. 406; Marrion *v.* Titsworth, 18 B. Mon. 582; Lawrence *v.* Elmendorf, 5 Barb. 73.]

(*z*) Toller, 70. [The object of taking out letters testamentary, in order to collect a debt due to the testator, in another state, after probate of the will in the state of his domicil, is to furnish the court with the documentary proof, which it can recognize as genuine, of the original probate. The will is not to be proved anew, but the fact of the former probate is to be made matter of record in the probate court of the state where the suit is to be brought. Henderson J. in Helme *v.* Sanders, 3 Hawks, 566.]

and a copy transmitted, proved, and deposited in the same manner. (*a*)

And now by stat. 21 & 22 Vict. c. 56, s. 12, "When any confirmation (which is the Scotch term for probate) of the executor of a person who shall in manner aforesaid be found to have died domiciled in Scotland, which includes besides the personal estate situated in Scotland also personal estate situated in England, shall be produced in the principal court of probate, in England, and a copy thereof deposited with the registrar, together with a certified copy of the interlocutor of the commissary, finding that such deceased person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said court and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, (*b*) had been granted by the said court of probate." (*c*)

Stat. 21 & 22 Vict. c. 56, s. 12. Scotch confirmation produced in probate court of England, and sealed there, to have the effect of probate or administration.

*And as to Irish probates it is provided by 20 & 21 Vict. c. 79, s. 95, "From and after the period at which this act shall come into operation, when any probate or letters of administration to be granted by the court of probate

20 & 21 Vict. c. 79, s. 95. Probates granted in

(*a*) Ib. See Raymond *v.* De Watteville, 2 Cas temp. Lee, 358, as to the proper authentication of the copy of a will proved and deposited in a court of a foreign state.

(*b*) Where confirmation of the executor of a person who has died domiciled in Scotland has been sealed with the seal of the court of probate, in manner provided by this section, the executor has all the powers of an ordinary English executor, and may sell and dispose of leaseholds in England, although they are specifically bequeathed, and although, by the law of Scotland, an executor cannot deal with leasehold property in that country. Hood *v.* Barrington, L. R. 6 Eq. Cas. 218. See, also, In the Goods of Ryde, L. R. 2 P. & D. 86.

(*c*) See Hawarden *v.* Dunlop, 2 Sw. & Tr. 340; In the Goods of Hutcheson, 3 Sw. & Tr. 165; Booth's Trusts, 1 Giff. 46, for cases on the construction of this section. By stat. 22 Vict. c. 30, s. 1, payments made in reliance on any instrument sealed under this act, are protected notwithstanding any defect affecting the validity of the confirmation. [The right to have a will allowed and recorded in Massachusetts, which has been proved and allowed in another state, exists only when there is estate in Massachusetts, on which the will may operate. Genl. Sts. c. 92, § 21; Colt J. in Ripley *v.* Bates, 110 Mass. 161, 162. On the question whether, when a person having a foreign domicil leaves two instruments each purporting to be his last will, and one of them is proved and allowed, and the other is disallowed in the probate court of his domicil, the latter affecting lands in another state can be admitted to probate in such other state, see Loring *v.* Oakey, 98 Mass. 267. It has been held in Virginia, that it is no objection to the proof of a will devising land in that state, that it had been declared void in the state where the testator resided. Rice *v.* Jones, 4 Call, 89, and see the case of Ives *v.* Allen, 12 Vt. 589.]

Ireland to be of like force as probates granted in England on being re-sealed.

in *Ireland* shall be produced to, and a copy thereof deposited with, the registrars of the court of probate in *England*, such probate or letters of administration shall be sealed with the seal of the last mentioned court, and being duly stamped, shall be of the like force and effect, and have the same operation in *England* as if it had been originally granted by the court of probate in *England*." (c^1)

The rights of the representative constituted here of a person

All personal property follows the person, and the rights of a person constituted in England, representative of a party deceased, *domiciled in England*, are not limited to the personal property in England, but extend to such property, wherever locally situate. (c^2) Accordingly, where

(c^1) [*Ante*, note (c).]

(c^2) [Henderson J. in Helme *v.* Sanders, 3 Hawks, 566. In Hutchins *v.* State Bank, 12 Met. 425, Shaw C. J. said: "We think the general rule of law is, that where a will has been proved, and an executor has received letters testamentary in the state of the testator's domicil, the goods, chattels, choses in action, and generally the personal property of the testate, vest in the executor. He holds them *in auter droit* certainly, and is bound to inventory them and account for them; but still he has the legal interest in them, and the custody and control of them. If, therefore, such an executor can take possession of goods or effects, in the hands of a bailee of his testator in another state, by the voluntary act of such bailee, or if he can collect a debt due from a debtor in another state, without the necessity, in either case, of commencing a suit, he has authority to do so, and may give a good acquittance and discharge. This proposition is to be taken with the qualification, that such property is received, or such debt paid before the will is filed, or letters of administration are issued in the state where the bailee or debtor lived." See Merrill *v.* New England Mut. Life Ins. Co. 103 Mass. 248; *post*, 365, note (*k*); Andrews *v.* Carr, 26 Miss. 577; Parsons *v.* Lyman, 20 N. Y. 103, 112; Petersen *v.* Chemical Bank, 32 N. Y. 21, 44; Stone *v.* Scripture, 4 Lansing, 186; Wilkins *v.* Ellett, 9 Wallace, 740; Riley *v.* Moseley, 44 Miss. 37; Brown *v.* Brown, 1 Barb. Ch. 189; Middlebrook *v.* Merchants' Bank, 41 Barb. 481; S. C. 3 Abb. (N. Y.) App. Dec. 295; Vroom *v.* Van Horne, 10 Paige, 549; Gayle *v.* Blackburn, 1 Stew. 429; Smith *v.* Webb, 1 Barb. 230; Trotter *v.* White, 10 Sm. & M. 607; Barrett *v.* Barrett, 8 Greenl. 353; Vroom *v.* Van Horne, 10 Paige, 549 Goodall *v.* Marshall, 14 N. H. 161; Trecothick *v.* Austin, 4 Mason, 33; Doolittle *v.* Lewis, 7 John. Ch. 48. An administrator, appointed in another state, holding as part of the assets of the intestate, a bond secured by mortgage upon land in the state of New York, may sell the mortgaged premises under a power contained in the mortgage, without taking out letters of administration in New York. Doolittle *v.* Lewis, 7 John. Ch. 45. And, in the same state, it has been decided that an executor or administrator appointed in a foreign state, has a right, in the absence of any grant of letters testamentary or of administration, in New York, to receive the amount due on a bond and mortgage, from a debtor of the deceased in New York; but where there is an executor or administrator appointed in New York, his authority is paramount and controlling, and he has a right to collect the demand to the exclusion of the foreign representative; a voluntary payment of the bond and mortgage to the for-

domiciled here extend to personal property abroad:

a person resident, but not domiciled, in France, made a testamentary paper relating to personalty in France, and to personalty and realty in England, and a second paper solely relating to personalty in France, and disposing of the whole of it to a woman with whom he cohabited, but appointed no executor in either paper, nor residuary legatee, nor devisee of his property in England; his widow was held entitled to administration with both papers annexed. (*d*)

but the grant of probate here does not extend to it:

It must not be understood, however, that where a testator dies domiciled in England, leaving assets abroad, the grant of probate here can extend to them. For the probate was never granted except for goods which at the time of the death were within the jurisdiction of the ordinary who made the grant. (*e*) Though if it should become necessary * that the courts of the foreign country where the assets were situate should grant probate or administration for the purpose of giving a legal right to recover and deal with them, such courts, by the comity of nations, would probably follow the decision of the court of probate in this country, as being the country of domicil. (*f*)

Will made here of property in the colonies, &c.

Again, if a will be made here and proved in the court of probate here, the probate will not extend to property in the colonies; (*g*) though, if the testator was domiciled in this country, the judge of probate in the plantations is

eign representative after appointment of a domestic representative, is no defence to an action by the domestic representative to foreclose the mortgage. Stone *v.* Scripture, 4 Lansing, 186; Vroom *v.* Van Horne, 10 Paige, 549. See Wilkins *v.* Ellett, 9 Wallace, 740.]

(*d*) Spratt *v.* Harris, 4 Hagg. 405; In the Goods of Winter, 30 L. J., P. M. & A. 56.

(*e*) Attorney General *v.* Dimond, 1 Cr. & J. 356; S. C. 1 Tyrwh. 243; Attorney General *v.* Hope, 1 Cr., M. & R. 530; S. C. 4 Tyrwh. 878; 8 Bligh, 44; 2 Cl. & Fin. 84; Raymond *v.* Von Watteville, 2 Cas. temp. Lee, 551; Story Confl. Laws, ch. xiii. § 514; *post*, pt. I. bk. VII.; [Attorney General *v.* Bonwens, 4 M. & W. 191, 192; Boston *v.* Boylston, 2 Mass. 384; Brodie *v.* Bickley, 2 Rawle, 431; Embry *v.* Millar, 1 A. K. Marsh. 300; Schultz *v.* Pulver, 11 Wend. 361, 363, 372; *post*, 1929, note (*b*); Willard *v.* Hammond, 21 N. H. 382.]

(*f*) See Story Confl. Laws, ch. xiii. §§ 512, 513, 518; Burton *v.* Fisher, Prerog. Dublin, 1 Milward's (Irish) Rep. 188.

(*g*) Burn *v.* Cole, Ambl. 416; Atkins *v.* Smith, 2 Atk. 63. So a defendant who had been arrested in Ireland by writ of *ne exeat regno* issued out of chancery there for a debt due to an intestate, was discharged, on the ground that the plaintiff had not obtained administration in that country. Swift *v.* Swift, 1 Ball & Beat. 326. See stat. 23 Vict. c. 5, s. 1, by which probate here is to extend to India government notes, &c.

bound by the probate here, and ought to grant it to the same person. (*h*)

An executor may sue here in respect of foreign assets without a foreign probate.

But though the executor of a man who has died domiciled in England be not able to sue in a foreign court by virtue of an English probate (any more than he can sue in an English court by virtue of a foreign probate), yet for the purpose of suing in an English court, a probate obtained in the proper court here extends to all the personal property of the deceased wherever situate at the time of his death, whether in Great Britain, or the colonies, or in any country abroad. (*i*) And assets in any diocese in Ireland are, with reference to this doctrine, subject to the same rule as assets found in any other place out of the realm, as Scotland for instance, or the colonies, or France, or any other foreign country. Therefore an executor having clothed himself with an English probate, might, without having obtained probate in Ireland also, sue in the courts here to recover a debt which was *bona notabilia* in Ireland. (*k*)

The law of the place of domicil regulates the decision as to

* It is now a clearly established rule, that the law of the country in which the deceased was domiciled at the time of the death, not only decides the course of distribution or succession as to personalty, (*l*) but regulates the decision as to what constitutes the last will, (*m*) without regard

(*h*) By Lord Mansfield, Ambl. 416.

(*i*) 3 Q. B. 507.

(*k*) Whyte *v.* Rose, 3 Q. B. 493. It would, however, be a good defence to such an action that the debt had been paid to a personal representative of the deceased duly constituted by the ecclesiastical court in Ireland. 3 Q. B. 510. [See Hutchins *v.* State Bank, 12 Met. 425, 426.]

(*l*) See *post*, pt. III. bk. IV. ch. I. § V. [p. 1515 *et seq.* So as to the proceeds of real estate. Wood *v.* Wood, 5 Paige, 596.]

(*m*) Craigie *v.* Lewin, 3 Curt. 435; De Zichy Ferraris *v.* Lord Hertford, 3 Curt. 468, 486; Bremer *v.* Freeman, 10 Moore P. C. 306; Enohin *v.* Wylie, 10 H. L. Cas. 1; Crispin *v.* Doglioni, 3 Sw. & Tr. 96, 99; [L. R. 1 H. L. 301;] Whicker *v.* Hume, 7 H. L. Cas. 124. [Whether a person died intestate or not, is to be determined by the law of the place where he was domiciled at the time of his death. Moultrie *v.* Hunt, 23 N. Y. 394.] A question is put in Story's Conflict of Laws, ch. xi. § 473, as to what will be the effect of a change of domicil after the will is made, if it is valid by the law of the place where the testator was domiciled when it was made and not valid by the law of his domicil at the time of his death. And that eminent writer expresses his opinion that the will in such a case is void; for that it is the law of the actual domicil of the testator at the time of his death, and not the law of his domicil at the time of making his will, which is to govern. [So held in Dupuy *v.* Wurtz, 53 N. Y. 556; Moultrie *v.* Hunt, 23 N. Y. 394.] *Sed quære.* See, also, as to wills made by persons who die after August 6, 1861, stat. 24 & 25 Vict. c. 114, § 3; *post*, 374.

to the place either of birth or death, or the situation of the property at that time.

the validity of the will:

Accordingly, if the deceased was a foreigner, domiciled abroad, and his will be brought into the court of probate here for the purpose of being admitted to probate, the court, in deciding whether the instrument be a valid will or not, will be guided, not by our own law, but by the law of the country where the deceased was domiciled. (*n*)

with respect to the validity of the will of a foreigner domiciled abroad, the court will

(*n*) Curling *v.* Thornton, 2 Add. 21; [Gilman *v.* Gilman, 52 Maine, 165, 172. A will of personal property must, in order to pass the property, be executed according to the law of the place of the testator's domicil at the time of his death. If void by that law, it is a nullity everywhere, although it is executed with the formalities required by the law of the place where the personal property is locally situated. Desesbats *v.* Berginer, 1 Binney, 336; Grattan *v.* Appleton, 3 Story, 755; Dixon *v.* Ramsay, 3 Cranch, 319; Harrison *v.* Nixon, 9 Peters, 483, 504, 505; De Sobry *v.* De Laistre, 2 Harr. & J. 193, 224; Story Confl. Laws, § 468; Crofton *v.* Ilsley, 4 Greenl. 139; Potter *v.* Titcomb, 22 Maine, 304; 4 Kent, 513, 514; Hyman *v.* Gaskins, 5 Ired. 267; Parsons *v.* Lyman, 20 N. Y. 103; Moultrie *v.* Hunt, 23 N. Y. 394; S. C. 3 Bradf. Sur. 322; Nat *v.* Coons, 10 Missou. 543. "It would seem," says Judge Story, "in regard to wills of personal property made in a foreign country, to be almost a matter of necessity to admit the same evidence to establish their validity and authenticity abroad as would establish them in the domicil of the testator; for otherwise the general rule, that personal property shall pass everywhere by a will made according to the law of the place of the testator's domicil, might be sapped to its very foundation, if the law of evidence in any country where such property was situate was not precisely the same as in the place of his domicil. And, therefore, parol evidence has been admitted in courts of common law to prove the manner in which the will is made and proved in the place of the testator's domicil, in order to lay a suitable foundation to establish the will elsewhere." Story Confl. Laws, § 636. See De Sobry *v.* De Laistre, 2 Harr. & J. 191, 195; 2 Greenl. Ev. § 669; Clark *v.* Cochran, 3 Martin, 353, 361, 362. But it has been held in some cases that courts are not bound to adopt foreign rules of evidence, every court having its own technical rules of procedure. Yates *v.* Thompson, 3 Cl. & Fin. 544; Don *v.* Lippmann, 5 Cl. & Fin. 1, 14, 15; Story Confl. Laws, §§ 260, 634 *a*; Bain *v.* White Haven &c. Railway Co. 3 H. L. Cas. 1, 19.] The French lawyers, it should seem, acknowledge the same principle. See Collectanea Juridica, vol. 1, pp. 323, 331; 2 Add. 22. [But a will of fixed and immovable property is generally governed by the *lex loci rei sitæ*; and hence, the place where such a will happens to be made and the language in which it is written, are wholly unimportant, as affecting both its construction and the ceremonial of its execution; the locality of the devised property is alone to be considered. Thus, a will made in Holland and written in Dutch must, in order to operate on lands in England, contain expressions which being translated into the English language, would comprise and destine the lands in question, and must be executed and attested in precisely the same manner as if the will were made in England. Bovey *v.* Smith, 1 Vern. 85. See, also, Bowaman *v.* Reece, Pre. Ch. 577; Drummond *v.* Drummond, 3 Bro. P. C. Toml. 601; Brodie *v.* Barry, 2 Ves. & B. 131; Story Confl. Laws, § 474, and notes; 4 Kent, 513; Crofton *v.* Ilsley, 4 Greenl

be guided by the law of the place of domicil:

Thus, in a modern case, where the testatrix was a married woman, a native of Spain, domiciled there, and it appeared upon affidavits, that by the law of Spain she had power to bequeath as a *feme sole*, the property which she brought her husband on her marriage, probate was granted of the will, made according to the law of that country. (*o*)

the same with respect to the wills of British subjects domiciled in foreign states, who died before Aug. 6, 1861.

* And it was established by the determination of the delegates in Stanley *v.* Bernes, (*p*) that the same rule, viz, that the question of the validity of a will of a testator domiciled abroad ought to be determined in our courts of probate according to the law of the country where the testator died domiciled, extends to the case of a British subject domiciled in a foreign state, notwithstanding the will disposes of property in England. (*q*) In that case, the delegates, reversing a sentence of the prerogative court, refused probate to two codicils, disposing solely of money in the British funds and made by a British born subject, domiciled in the Portuguese dominions, on the ground that the instruments were not

138; Potter *v.* Titcomb, 22 Maine, 303, 304; Darby *v.* Mayer, 10 Wheat. 468, 469; Kerr *v.* Moon, 9 Wheat. 565; U. States *v.* Crosby, 7 Cranch, 115; 4 Burge Comm. Col. & For. Law, pt. 2, ch. 15, pp. 217, 218; Robertson *v.* Barhom, 6 Monroe, 527; Bailey *v.* Bailey, 8 Ohio, 239; Varner *v.* Bevil, 17 Ala. 286; Calloway *v.* Doe, 1 Blackf. 372, and notes. In Massachusetts, a will made in another state, which might be proved and allowed according to the laws of the state or country in which it was made, may be allowed and admitted to probate in Massachusetts, and will thereupon have the same effect as if it had been executed according to the laws of the latter state. Gen. Sts. c. 92, § 8. A similar law exists in many other states. This statute applies to every kind of testamentary act; as, to an instrument proved as a will revoking a previous will. Bayley *v.* Bailey, 5 Cush. 245. See Manuel *v.* Manuel, 13 Ohio St. 458; State *v.* M'Glynn, 20 Cal. 233. It has been held that a court of equity in Massachusetts, has no jurisdiction to enforce a trust arising under the will of a foreigner, which has been proved and allowed in a foreign country only, and no certified copy of which has been filed in a probate court in Massachusetts. Campbell *v.* Wallace, 10 Gray, 162; Campbell *v.* Sheldon, 13 Pick. 8.]

(*o*) In the Goods of Maraver, 1 Hagg. 498. Before granting probate of a foreign will, the court should be satisfied of one of two things; either that the will is valid by the law of the country where the testator was domiciled, or that a court of the foreign country has acted upon it, and given it efficiency. In the Goods of Des Hais, 34 L. J. N. S., P. M. & A. 58. [See Goods of De Vigny, 4 Sw. & Tr. 13. The testamentary capacity of the testator, including not only his general capacity to make a will but his power to affect the estate intended to be disposed of by it, is governed by the law of his domicil. Schultz *v.* Dambmann, 3 Bradf. Sur. 379.]

(*p*) 3 Hagg. 374.

(*q*) But see now stat. 24 & 25 Vict. c. 114; *post* 374.

executed according to the law of Portugal. This decision has overruled the doubts expressed by Sir John Nicholl in Curling *v.* Thornton, (*r*) whether a British subject is entitled so far "*exuere patriam*" as to select a foreign domicil in derogation of his British, and thereby to make the validity of his will depend on its conformity to the foreign law. (*s*)

And it should seem, according to the old law, that if a British subject, domiciled in a foreign country, by his will appoints an executor, but makes a disposition of his property, which, though valid by the law of England, is invalid by the laws of that foreign country, the court of chancery is at liberty, *notwithstanding probate may have been granted to the executor in this country*, to hold that the will has no operation * beyond the appointing of the executor; (*t*) and, consequently, that he is a trustee for the next of kin, and must distribute the property exactly as if the deceased had died intestate.

meaning of the term "the law of the country of domicil:"

When it is said that the law of the country of domicil must regulate the succession, it is not always meant to speak of the general law, but, in some instances, of the particular law which the country of domicil applies to the case of foreigners dying domiciled there, and which would not be applied to a natural born subject of that country. Thus in Collier *v.* Rivaz, (*u*) the testator, an English born subject, died domiciled in Belgium, leaving a will not executed according to the forms required by the Belgian law. But by that law, the succession in such a case is not to be governed by the law of the country applicable to its natural born subjects, but by the law of the testator's own country. And it was held, that the will, being valid according to the law of England, ought to be admitted to probate. (*v*) So in Maltass *v.* Maltass, (*w*) it appeared that by the law of Turkey no subject of that country can make a will.

(*r*) 2 Add. 17.

(*s*) See, also, Moore *v.* Budd, 4 Hagg. 346; De Bonneval *v.* De Bonneval, 1 Curt. 857, 858; In the Goods of Gayner, 4 Notes of Cas. 696, and the cases cited, Ib. 697, note; Collier *v.* Rivaz, 2 Curt. 855; Lanenville *v.* Anderson, Prerog. 11 March, 1853, 17 Jur. 511, 2 Sw. & Tr. 24; Bremer *v.* Freeman, 10 Moore P. C. 306; In the Goods of Osborne, Dea. & Sw. 4.

(*t*) Thornton *v.* Curling, 8 Sim. 310. See, also, Campell *v.* Beaufoy, Johns. 320; *post*, pt. I. bk. VI. ch. I.

(*u*) 2 Curt. 855.

(*v*) See the observations made on this case by Lord Wensleydale in Bremer *v.* Freeman, 10 Moore P. C. 374.

(*w*) 1 Robert. 67.

By treaty between Great Britain and the Ottoman empire an English domiciled subject may make a will. (*x*) The deceased, John Maltass, was born at Smyrna of English parents, his father having been long settled as a merchant there. The deceased was himself a member of a commercial firm at Smyrna and died there, having been constantly resident there, except that he passed his boyhood in England for the purposes of education; and it was held by Dr. Lushington (sitting for Sir H. Jenner Fust) that a will made by the deceased in 1834, and which was good according to the law of England as it then stood, was entitled to probate. For if the testator was to be regarded as domiciled, in the legal sense, in Turkey, and if the law of domicil did prevail, the law of * Turkey, in conformity with the treaty, says, that in such case the succession to the personal estate shall be governed by the British law; if he was not domiciled in Turkey, but in England, then the law of England prevailed, *proprio vigore*. But in either point of view, the will, in order to be valid, must have been made according to the testamentary law of England. And accordingly Sir H. Jenner Fust refused to admit to probate a will of the same party deceased, which had been made after the year 1837, and had not conformed to the new wills act. (*y*)

the rule is the same with respect to the wills of British subjects domiciled in the British dominions out of England, who died before Aug. 6, 1861:

Again, if the testator was a British subject, and at the time of his death domiciled in some other part of the British dominions, out of England, the court, upon application for probate, has felt itself bound to defer to the law of the place where the deceased was domiciled. (*z*) Thus in the case of Hare *v.* Nasmyth, (*a*) the deceased was domiciled in Scotland, but died in London *in transitu*, leaving large personal property in the province of Canterbury. He left certain testamentary papers, which were propounded by the asserted executors in the prerogative court, and their admission was opposed by the next of kin, on the ground that they were not valid as a will. But the court suspended its proceedings, until a suit, then depending in Scotland, touching the validity of the papers, should be decided. And the judge (Sir John Nicholl) intimated that he should feel it his duty to pronounce for their validity, or that the deceased had

(*x*) See 3 Curt. 231.

(*y*) Maltass *v.* Maltass, 3 Curt. 231.

(*z*) But see now stat. 24 & 25 Vict. c. 114, s. 2; *post*, 374.

(*a*) 2 Add. 25.

died intestate, according as the courts of Scotland should determine that question, either upon general principles, or upon principles applicable to the subject, if any, peculiar to the Scotch jurisprudence.

practice of the court here to follow the grant of the court of domicil:

Upon this ground it has been the practice, upon production of an exemplified copy of the probate granted by the proper court in the country where the deceased died domiciled, for the prerogative court here to follow the * grant upon the application of the executor, in decreeing its own probate. (*b*) However, in Larpent *v.* Sindry, (*c*) Sir J. Nicholl said that the question how far other courts of probate were to be governed by the decision of the court of probate where the deceased was domiciled, had never been expressly determined. And on a subsequent occasion, in a case where the deceased had died domiciled in India, and probate of the will had been granted at Madras to his widow as "universal legatee and constructive executrix," the same learned judge pointed out the inconvenience of the practice, and again expressed his doubt how far the court was bound to follow the Indian probate; and he ultimately refused to grant probate to the widow "as constructive executrix" (in which character she would have been exempted from giving any security), but allowed administration, with the will annexed, to pass to her as "relict and principal legatee," upon her giving security. (*d*)

When the court of probate is satisfied that the testator died domiciled in a foreign country, and that his will, containing a general appointment of executors, has been duly authenticated by those executors in the proper court in the foreign country, it is the duty of the probate court in this country to clothe the foreign executors with ancillary letters of probate to enable them to get possession of that part of the personal estate which was locally situate in England. (*e*) * In Laneuville *v.* Anderson, (*f*) it was held, that

(*b*) *Ante*, 362, 363; Larpent *v.* Sindry, 1 Hagg. 382; In the Goods of Cringan, 1 Hagg. 549. See, also, In the Goods of Rioboo, 2 Add. 461; Viesca *v.* D'Aramburu, 2 Curt. 277; In the Goods of Henderson, 2 Robert. 144; In the Goods of Smith, Ib. 332.

(*c*) 1 Hagg. 382.

(*d*) In the Goods of Read, 1 Hagg. 474. See 4 My. & Cr. 84; 7 Sim. 102; In the Goods of Smith, 2 Robert. 335. See, also, In the Goods of the Duchess of Orleans, 1 Sw. & Tr. 253; [Bloomer *v.* Bloomer, 2 Bradf. Sur. 339.]

(*e*) Enohin *v.* Wylie, 10 H. L. Cas. 14, by Lord Westbury. When this case was

(*f*) 2 Sw. & Tr. 24.

where in the case of a domiciled Frenchman, the French court had decreed that the time limited by the French law for the execution of the executorship thereby created had passed, and that the executor had no more right to intermeddle in the estate of the testator, and that the parties beneficially interested were the only persons who had a right to interfere, the court held itself bound by such decree, and refused to grant probate (with respect to personalty in England) to such an executor. So, in Crispin *v.* Doglioni, (*g*) Sir C. Cresswell held, that the judgment of the court of domicil of the deceased is binding on the court of a foreign country, in all questions as to the succession and title to personal property, whether under testacy or intestacy, where the same questions between the same parties are in issue in the foreign court which have been decided by the court of domicil. (*h*)

When the deceased has left a will, valid by the law of his domicil, and probate, either original or ancillary, has been obtained here, the duty of the court in administering the property, supposing a suit to be instituted for its administration, is to ascertain who by the law of domicil are entitled under the will, and that being ascertained, to distribute the property accordingly. The duty of administration has to be discharged by the courts of this country, though in the performance of that duty they will be guided by the law of the domicil. (*i*)

before Sir C. Cresswell, 1 Sw. & Tr. 118, it was contended, it should seem, that the executors were, according to the Russian law, executors for the property in Russia only, and therefore not entitled to probate in respect of the property in England. But the learned judge appears to have decided that they were entitled to probate, not as following the Russian grant, but because he was of opinion, on the construction of the will, that the English property was given to them. The house of lords, however, decided that he died intestate as to the property, but that the executors were entitled to probate according to the doctrine above stated. [See Henderson J. in Helme *v.* Sanders, 3 Hawks, 566.]

(*g*) 3 Sw. & Tr. 96; [L. R. 1 H. L. 301.]

(*h*) But where a declaration propounding a will depends on the due execution, according to the law of the testator's domicil, it must contain a distinct averment that it was duly executed according to the law of domicil. An averment that the will was admitted to probate by a competent court of the alleged domicil is insufficient. Isherwood *v.* Cheetham, 2 Sw. & Tr. 607. [See Helme *v.* Sanders, 3 Hawks, 563.]

(*i*) 10 H. L. Cas. 19, by Lord Cranworth. It appears to have been laid down by Lord Westbury that the court of the domicil is the *forum concursûs* to which legatees under the will of a testator, or the parties entitled to distribution of the estate, are required to resort. (See, also, Crispin *v.* Doglioni, 3 Sw. & Tr. 99, by Sir C. Cresswell; [Stokely's Estate, 19 Penn. St. 476.]) But unless the point in dispute has been already decided by the court of domicil, it is apprehended that the court of this country in which an administration suit is instituted must decide for itself

* It is clear, however, that the mere *residence* of a British sub-

what, *according to the law of the domicil*, is the true construction of the will, and what are the rights of the parties claiming to be interested in the estate in cases as well of intestacy as of testacy. [See Carpenter *v.* The Commonwealth, 17 How. (U. S.) 456; Williamson *v.* Branch Bank of Mobile, 7 Ala. 906; Treadwell *v.* Rainey, 9 Ala. 590; Holcomb *v.* Phelps, 16 Conn. 127; Embry *v.* Millar, 1 A. K. Marsh. 300; Nat *v.* Coons, 10 Missou. 543. Where the construction of the will is to be regulated by foreign law, the opinion of an advocate versed in such law is obtained for the information and guidance of the English court on which devolves the task of construing it; but if the point in dispute depends upon principles of construction common to both countries, the court will adjudicate upon the question, according to its own view of the case, without having recourse to the assistance of a foreign jurist. Bernal *v.* Bernal, 8 My. & Cr. 559; Collier *v.* Rivas, 2 Curt. 855; Earl Nelson *v.* Earl Bridport, 8 Beav. 527, 547; Yates *v.* Thompson, 3 Cl. & Fin. 586; *ante*, 366, note (*n*). As a will in regard to movable property is construed according to the law of the domicil, there is, it will be observed, nothing on the face of it which gives the perusor the slightest clue as to the nature of the laws by which its construction is regulated. It may have been made in England, be written in the English language, the testator may have described himself as an Englishman, and it may have been proved in an English court; and yet, after all, it may turn out, from the extrinsic fact of the maker being domiciled abroad at his death, that the will is wholly withdrawn from the influence of English jurisprudence. Such questions may arise, and indeed have most frequently arisen in regard to the wills of Englishmen domiciled in Scotland, or of Scotchmen domiciled in England, the law of succession and testamentary disposition being, in some respects, different in these two sections of the United Kingdom. Thus, in the case of Balfour *v.* Scott, stated in Somerville *v.* Lord Somerville, 5 Ves. 750, and cited 2 Ves. & B. 131, where a person domiciled in England died intestate, leaving real estate in Scotland, the heir was one of the next of kin, and claimed a share of the personal estate. To this claim it was objected, that, by the law of Scotland, the heir cannot share in the personal property with the other next of kin, except on condition of collating the real estate; that is, bringing it into mass with the personal estate, to form one common subject of division. Ersk. Inst. Law of Scotland, 701 (5th ed.). It was determined, however, that he was entitled to take his share without complying with that obligation, the case being regulated as to the movable property by the English law. So, in the Case of Drummond, cited, 2 Ves. & B. 132, where a person domiciled in England had real estate in Scotland, upon which he granted a heritable bond to secure a debt contracted in England. He died intestate, and the question was, by which of the estates this debt was to be borne? It was clear that, by the English law, the personal estate was the primary fund for the payment of debts. It was equally clear that, by the law of Scotland, the real estate was the primary fund for the payment of the heritable bond. It was said for the heirs, that the personal estate must be distributed according to the law of England, and must bear all the burdens to which it is by that law subject. On the other hand, it was contended that the real estate must go according to the law of Scotland, and bear all the burdens to which it is by that law subject. It was determined that the law of Scotland should prevail, and the real estate must bear the burden. Speaking of these two cases, Sir Wm. Grant has observed (2 Ves. & B. 132): "In the first case, the disability of the heir did not follow him to England, and the personal estate was distributed as if both the domicil and the real estate had been in England. In the second, the dis-

the validity of the will of a British subject merely resident abroad,

ject in a foreign country, at the time of making his will and his decease, did not, in the case of a testator dying before August 6, 1861, render a will valid because it conformed with the law of the country where he so re-

ability to claim exoneration out of the personalty did follow him into England; and the personal estate was distributed as if both the domicil and the real estate had been in Scotland." 1 Jarman Wills, (3d Eng. ed.) 6–8. Foreign laws are to be proved as facts; and the question of their existence and interpretation must be determined in each cause on the evidence adduced in it. McCormick *v.* Garnett, 5 De G., M. & G. 278; Fowler J. in Ferguson *v.* Clifford, 37 N. H. 98; 1 Greenl. Ev. § 486; Story Confl. Laws, §§ 637, 638; De Sobry *v.* De Laistre, 2 Harr. & J. 193; Trasher *v.* Everhart, 3 Gill & J. 234; Brackett *v.* Norton, 4 Conn. 517; Dyer *v.* Smith, 12 Conn. 384; Andrews *v.* Herriott, 4 Cowen, 515, 516, note; Tyler *v.* Trabue, 8 B. Mon. 306; Territt *v.* Woodruff, 19 Vt. 182; Knapp *v.* Abell, 10 Allen, 488; Palfrey *v.* Portland, Saco & Portsmouth R. R. Co. 4 Allen, 56; Haven *v.* Foster, 9 Pick. 129, 130; Campion *v.* Kille, 1 Beasley (N. J.), 229; Talbot *v.* Seeman, 1 Cranch, 38; Church *v.* Hubbart, 2 Cranch, 187, 236, 237; Ennis *v.* Smith, 14 How. (U. S.) 426; In re Coppin, L. R. 2 Ch. Ap. 53, 54; 1 Dan. Ch. Pr. (4th Am. ed.), 95, 864; Wilson *v.* Smith, 5 Yerger, 398, 399; M'Rea *v.* Mattoon, 13 Pick. 53, 59; Gardner *v.* Lewis, 7 Gill, 377; Baltimore & Ohio R. R. *v.* Glenn, 28 Md. 287. When the evidence consists of the parol testimony of experts as to the existence or prevailing construction of a foreign statute, or as to any point of unwritten foreign law, the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony. Kline *v.* Baker, 99 Mass. 254, 255; Holman *v.* King, 7 Met. 384; Dyer *v.* Smith, 12 Conn. 384; Moore *v.* Gwynn, 5 Ired. 187; Ingraham *v.* Hart, 11 Ohio, 255; Barrows *v.* Downs, 9 R. I. 446. And when the evidence admitted consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court alone. Kline *v.* Baker, 99 Mass. 255; Di Sora *v.* Phillipps, 10 H. L. Cas. 624; Bremer *v.* Freeman, 10 Moore P. C. 306; Church *v.* Hubbart, 2 Cranch, 187; Ennis *v.* Smith, 14 How. (U. S.) 400; Owen *v.* Boyle, 15 Maine, 147; People *v.* Lambert, 5 Mich. 349; State *v.* Jackson, 2 Dev. 563; Trasher *v.* Everhart, 3 Gill & J. 234; Pickard *v.* Bailey, 26 N. H. 169, 170; Hall *v.* Costello, 48 N. H. 179; Delafield *v.* Hand, 3 John. 310; Lincoln *v.* Battelle, 6 Wend. 482; Francis *v.* Ocean Ins. Co. 6 Cowen, 429. In Ferguson *v.* Clifford, 37 N. H. 98, Fowler J. said: "Foreign laws are to be proved as facts, by evidence addressed to the court, and not to the jury." Nesmith J. in Hall *v.* Costello, 48 N. H. 179. See, also, Story Confl. Laws, §§ 638, 638 *a*; Pickard *v.* Bailey, 26 N. H. 152, 169, 170. It is not necessary that the evidence of the foreign law should come from lawyers. It is sufficient, if the court is satisfied that the witness is well informed upon the subject of the law to be proved. Pickard *v.* Bailey, 26 N. H. 152; Hall *v.* Costello, 48 N. H. 176; Brush *v.* Wilkins, 4 John. Ch. 520; Mauri *v.* Heffernan, 13 John. 58; Story Confl. Laws, § 642; Carnegie *v.* Morrison, 2 Met. 404, 505. Courts, in the absence of evidence to the contrary, will presume the foreign law to be the same as their own. Story Confl. Laws, §§ 637, 637 *a*; Russell *v.* Kitchen, 3 Ir. C. L. Rep. 613; Palfrey *v.* Portland, Saco & Portsmouth R. R. Co. 4 Allen, 56; Chase *v.* Alliance Ins. Co. 9 Allen, 311. See Scammell *v.* Sewell, 5 H. & N. 740, per Byles J. Foreign written law may be proved by parol evidence of a witness, learned in the law of a foreign country, without first attempting to obtain a copy of the law itself. Baron De Bode *v.* Reginam, 10 Jur. 217; S. C. 8 Q. B. 208. But see

sided. (*j*) Thus the Duchess of Kingston, who had taken up her residence in France (where she died), under letters patent, registered in the parliament of Paris, made a will at Paris, which (being neither holo-

does not depend here on foreign law, though made abroad.

Genl. Sts. Mass. c. 131, § 65. The witness not only gives the words of the law, but the meaning as applicable to the case in hand. Earl Nelson *v.* Earl Bridport, 10 Jur. 871; 8 Beav. 527, 554. A professional or official witness, giving evidence as to foreign law, may refer to foreign law books to refresh his memory, or to correct or confirm his opinion; but the law itself must be taken from his evidence. The Sussex Peerage, 11 Cl. & Fin. (Am. ed.) 85, and cases cited in note (3); In re Coppin, L. R. 2 Ch. Ap. 53, 54. In the Sussex Peerage 11 Cl. & Fin. 115, Lord Brougham said: "The witness may refer to the sources of his knowledge, but it is perfectly clear that the proper mode of proving a foreign law is not by showing to the house the book of the law; for the house has not the organs to know and to deal with the text of that law, and, therefore, requires the assistance of a lawyer who knows how to interpret it." See Dalrymple *v.* Dalrymple, 2 Hagg. Cons. R. 54; Ennis *v.* Smith, 14 How. (U. S.) 426–430; Cocks *v.* Purday, 2 Car. & K. 269. It is said to appear rather questionable whether the judge has a right to resort to the foreign law itself for information where the evidence of the witness is not satisfactory. Lord Chelmsford in Di Sora *v.* Phillipps, 10 H. L. Cas. 640. In the same case, 10 H. L. Cas. 633, Lord Cranworth said: "Where a written contract is made in a foreign country, and in a foreign language, the court, in order to interpret it, must first obtain a translation of the instrument; secondly, an explanation of the terms of art (if it contains any); thirdly, evidence of any foreign law applicable to the case; and fourthly, evidence of any peculiar rules of construction, if any such rules exist by the foreign law. With this assistance the court must interpret the contract itself on ordinary principles of construction." See per Lord Chelmsford, S. C. p. 639; United States of America *v.* McRae, L. R. 3 Ch. Ap. 85, 86; Shore *v.* Wilson, 9 Cl. & Fin. 511. In United States of America *v.* McRae, L. R. 3 Ch. Ap. 86, where an act of congress was the subject under consideration, Lord Chelmsford, having remarked that the assistance of a translator was not required, and that it was not suggested that there were any words in the act which bore a peculiar meaning different from the ordinary one, nor that the acts of the American legislature have a construction peculiar to themselves, added: "I do not see that there is any impediment to an English judge, with the act of congress before him, construing it for himself without further aid, just as he would an English act of parliament." See Story Confl. Laws, § 638. For a further statement of the modes of proof of foreign laws, see Story Confl. Laws, § 639 *et seq.* English courts may now ascertain what the foreign law is, by sending cases for the opinion of foreign courts; but, unless they are in countries under the government of the queen, a convention must first be entered into with the foreign government. 22 & 23 Vict. c. 63; 24 & 25 Vict. c. 11; 1 Dan. Ch. Pr. (4th Am. ed.) 864, note (2); 2 Ib. 1142–1146. But they are not bound to adopt foreign rules of evidence or procedure, every court as to these being governed by its own technical rules. Yates *v.* Thomson, 3 Cl. & Fin. 544; Bain *v.* Whitehaven &c. Railway Co. 3 H. L. Cas. 1, 18, 19; Don *v.* Lippmann, 5 Cl. & Fin. 1, 14, 15, 16.] As to staying proceedings on the ground that the domicil is not English, see Duprez *v.* Veret, L. R. 1 P. & D. 583.

(*j*) By stat. 24 & 25 Vict. c. 114, s. 1, the distinction between *residence* and *domicil* in the case of a British subject who made a will out of the kingdom, and died after August 6, 1861, has become immaterial. See *post*, 374.

graphic nor executed in the presence of two witnesses and one notary, but in the presence of three witnesses merely) according to the then custom of Paris (1786), was absolutely null and void. But the testatrix being by birth an Englishwoman, and the will being in English, and duly executed according to English forms, it was not only admitted to probate here, but was also deemed valid in France. (*k*) The law on this subject was fully considered in the privy council in the case of Croker *v.* Marquis of Hertford, (*l*) where it was decided that the provisions of the new wills act (1 Vict. c. 26) apply to testamentary papers made in a foreign country by a domiciled Englishman. (*m*)

The wills act applies to such a will.

* The rule above laid down applies, lastly, to the case of the instance of a person not a native of this country, but domiciled here at the time of his death. In this case, the law of England is to regulate the decision as to the validity of a will of personal estate, or what are the rights under it. (*n*) So where a native of Scotland, domiciled in England, executed, during a visit to Scotland, and deposited there, a will of personalty prepared in the Scotch form; it was held that the will must be construed, not according to the Scotch, but the English law. (*o*)

Will of a person not a native, but domiciled here.

The rules of law for ascertaining the domicil are considered in a subsequent part of this work, conjointly with the rules of law as to the distribution of the effects of deceased persons who have died domiciled in a foreign country. (*p*)

Rules for ascertaining domicil.

It must be here observed, that where a will is made disposing of personal property situate in this country, under a power of appointment, and it is duly executed in compliance with the requisites of the power, it has been held that such a will ought to be admitted to probate in this country, notwithstanding it be not properly executed according to the forms prescribed by the testa-

Will made under a power conformably to the terms of the power, but not conformably to the

(*k*) 2 Add. 21.

(*l*) 4 Moore P. C. C. 339. See, also, De Zichy Ferraris *v.* Croker, 3 Curt. 468, 486.

(*m*) See, also, accord. Robins *v.* Dolphin, 1 Sw. & Tr. 37; S. C. *nomine* Dolphin *v.* Robins, 7 H. L. Cas. 390.

(*n*) Price *v.* Dewhurst, 8 Sim. 279; S. C. 4 My. & Cr. 76, 82; Yates *v.* Thompson, 3 Cl. & Fin. 544. See *post*, pt. III. bk. III. ch. II. § I. as to the construction of the will of a testator domiciled abroad.

(*o*) Anstruther *v.* Chalmer, 2 Sim. 1; but see now 24 & 25 Vict. c. 114; *post*, 374.

(*p*) *Post*, pt. III. bk. IV. ch. I. § V.

mentary law of the country in which the testator was domiciled at the time of his death. (*q*)

law of the place of domicil.

But where a *feme covert* who has power to appoint by will, dies domiciled in England, but resident in France, her will, though valid, in respect of formalities by the French law, is not a due execution of the power, unless properly executed according to the English law. (*r*)

* But a power to appoint "by a will duly executed," is well exercised by a will good according to the law of the country of the testator's domicil, though ill executed according to the law of England. (*s*)

With respect to wills made by British subjects dying after August 6, 1861, the doctrines, which there has been occasion to state in the previous part of this section, have become, to a great extent, inapplicable, and the law has been most materially altered, by reason of the stat. 24 & 25 Vict. c. 114.

As to wills made by British subjects dying after August 6, 1861.

By the first section of that act, "every will and other testamentary instrument made out of the United Kingdom by a *British* subject (whatever may be the domicil of such person at the time of making the same or at the time of his or her death) shall, as regards personal estate, be held to be well executed for the purpose of being admitted in *England* and *Ireland* to probate, and in *Scotland* to confirmation, if the same be made according to the forms required, either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her majesty's dominions where he had his domicil of origin." (*s*[1])

Stat. 24 & 25 Vict. c. 114. Wills made by British subjects out of the kingdom to be admitted if made according to the law of the place where made, or where testator was domiciled or had his domicil of origin.

(*q*) Tatnall *v.* Hankey, 2 Moore P. C. C. 342. The opinion to the contrary expressed in Cruttenden *v.* Fuller, 1 Sw. & Tr. 441, 454, is incorrect. In the Goods of Alexander, 29 L. J., P. M. & A. 93; [Wallace *v.* Att. Gen. L. R. 1 Ch. Ap. 1, 9; Re Lovelace, 4 De G. & J. 340; Re Wallop's Trust, 1 De G., J. & S. 656; Re Capdevielle, 2 H. & C. 997; In re Hallyburton, L. R. 1 P. & D. 90.]

(*r*) Re Daly's Settlement, 25 Beav. 456.

(*s*) D'Huart *v.* Harkness, 34 L. J. 311, *coram* M. R.; S. C. 11 Jur. N. S. 633.

(*s*[1]) [It is a frequent provision of statutes that all wills shall be treated as valid which are valid by the laws of the state where they are made and executed. Such is the law of Massachusetts. Genl. Sts. c. 92, § 8. A strong case under this law was Bayley *v.* Bailey, 5 Cush. 245. And in Slocomb *v.* Slocomb, 13 Allen, 38, it was decided that a nuncupative will, made in another state, valid by the laws of that

Sect. 2. "Every will and other testamentary instrument made within the United Kingdom by any *British* subject (whatever may be the domicil of such person at the time of making the same, or at the time of his or her death), shall, as regards personal estate, be held to be well executed, and shall be admitted in *England* and *Ireland* to probate, and in *Scotland* to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made." (s^2)

S. 2. Wills made by British subjects in this kingdom to be admitted if made according to local law.

Sect. 3. "No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered by reason of any * subsequent change of domicil of the person making the same." (s^3)

S. 3. Change of domicil not to invalidate will.

Sect. 4. "Nothing in this act contained shall invalidate any will or other testamentary instrument, as regards personal estate, which would have been valid if this act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this act."

S. 4. Nothing in the act to invalidate wills otherwise made.

Sect. 5. "This act shall extend only to wills and other testa-

other state, but which would have been invalid if it had been made in Massachusetts, may be admitted to probate under the above statute and will have full effect in Massachusetts.]

(s^2) [For a recent case under this act, see In re Reid, L. R. 1 P. & D. 74. In Massachusetts a will of real or personal estate, made and executed in conformity with the law existing at the time of the execution thereof, shall be effectual to pass such estate. Genl. Sts. c. 92, § 7. The provisions of this statute include nuncupative wills, made and valid in another state, though they would not have been valid if made in Massachusetts. Slocomb *v.* Slocomb, 13 Allen, 38.]

(s^3) [In cases where no statute on the subject existed, it has been considered that if, after making a will, valid by the laws of the place where the testator was domiciled, he changes his domicil to a place by the laws of which the will thus made is not valid, and there dies, the will is void. If, however, before his death, he should return and resume his former domicil, where his first will or testament was made, its original validity will revive also. Story Confl. Laws, § 473; 2 Greenl. Ev. § 668; Burge Col. & For. Law, 550, 581. It has been held that the validity and effect of a will is to be determined according to the law in force at the time the will becomes operative, that is, at the decease of the testator. Cushing *v.* Aylwin, 12 Met. 169; Pray *v.* Waterson, 12 Met. 262; De Peyster *v.* Clendining, 9 Paige, 295; Bishop *v.* Bishop, 4 Hill, 138; Lawrence *v.* Hebbard, 1 Bradf. Sur. 252; but see Gable *v.* Daub, 40 Penn. St. 217; Mullen *v.* McKelvy, 5 Watts, 399; Murry *v.* Murry, 6 Watts, 353; Lewis *v.* Lewis, 2 Watts & S. 455; Mullock *v.* Souder, 5 Watts & S. 198; Kurtz *v.* Saylor, 20 Penn. St. 205.]

mentary instruments made by persons who die after the passing of this act" (Aug. 6, 1861). S. 5. Extent of act.

SECTION VII.

Practice of the Court in certain other Particulars as to granting Probate.

In what cases costs decreed out of the estate of the deceased.

It is only under special circumstances that the ecclesiastical court directed costs to be paid out of the estate of the deceased. Indeed, it is only in modern times that the court found itself authorized to do so. (*t*) It did not follow that a party was entitled to his costs out of the estate, because there was "*justa causa litigandi;*" (*u*) but the principle * which guides the court in decreeing such costs is, that the party was led into the contest by the state in which the deceased left his papers. (*x*)

Two rules have recently been laid down by Sir J. P. Wilde for the future guidance of the court of probate: First, if the cause of litigation takes its origin in the fault of the testator, *or*

(*t*) Dean *v.* Russel, 3 Phillim. 334. [See, *ante*, 340, note (*p*).] As to the scale on which the costs in such cases are to be taxed, see Edmunds *v.* Unwin, 2 Curt. 641.

(*u*) Barwick *v.* Mullings, 2 Hagg. 234. In Nicholls *v.* Binns, 1 Sw. & Tr. 239, 241, Sir C. Cresswell said that by the practice of the ecclesiastical courts, where there was a fair case for inquiry, the next of kin might call on the executors to prove the will in solemn form, and, *generally speaking, at the expense of the estate.* But the same judge refused to allow the next of kin their costs out of the estate, where they had chosen to raise a question of domicil, which was likely to put the executors to great expense. Onslow *v.* Cannon, 2 Sw. & Tr. 136. See, also, Seaton *v.* Sturch, 29 L. J., P. M. & A. 195. But where in opposition to a will the defendant relies on difficult points of law, he will, though unsuccessful, be generally entitled to his costs out of the estate. Robins *v.* Dolphin, 1 Sw. & Tr. 518. And the general proposition, that where a party entitled in distribution simply calls for proof of a will, and merely cross-examines the witnesses, without any misconduct in the suit, he is entitled to have his costs out of the estate, is fully supported by the authorities. Prinsep *v.* Dyce Sombre, 10 Moore P. C. 232; Swinfen *v.* Swinfen, 1 Sw. & Tr. 283. But it is otherwise where the proceedings were not taken simply for the purpose of getting the opinion of the court on the will, but were ancillary to another suit pending in respect of the real estate. 1 Sw. & Tr. 283. As to whether interveners are to be allowed costs out of the estate, see Shaw *v.* Marshall, 1 Sw. & Tr. 129. See, further, as to costs, Clearc *v.* Cleare, L. R. 1 P. & D. 655.

(*x*) Hillam *v.* Walker, 1 Hagg. 75. [The common rule in Massachusetts, in probate causes, is not to allow costs to either party. Gray J. in Waters *v.* Stickney, 12 Allen, 17; Woodbury *v.* Obear, 7 Gray, 472; Osgood *v.* Breed, 12 Mass. 536; *ante*, 340, note (*p*).]

those interested in the residue, the costs may be properly paid out of the estate; secondly, if there be a sufficient and probable ground, looking to the knowledge and means of knowledge of the opposing party, to question either the execution of the will or the capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent. (*y*)

A legatee, performing the duty of an executor in proving the will, is entitled to his costs out of the estate. (*z*) But the rule as to a legatee having his costs out of the estate on establishing a codicil, is not so general as in the case of a * will. (*a*) And if they are occasioned by his own delay in producing the paper, he must pay his own costs. (*b*)

Security for costs required from bankrupt.

Where a party propounding a will becomes a bankrupt, the court will direct him to find security for costs. (*c*)

Probate of a will may be in part granted and in part refused:

It is a necessary consequence of some of those rules of the court of probate, which there has already been occasion to notice, that a will may be in part admited to probate, and in part may be refused. (*c*[1]) Thus, if the court shall be satisfied that a particular clause has been inserted in a

(*y*) Mitchell *v.* Gard, 3 Sw. & Tr. 275; [*ante*, 340, note (*p*).] See accord. Williams *v.* Henery, 3 Sw. & Tr. 471; Broadbent *v.* Hughes, 29 L. J., P. M. & A. 134. See, further, Nash *v.* Yelloly, 3 Sw. & Tr. 59, where a plaintiff, who was the executor, was condemned in costs, the will having been refused probate on the ground of undue influence. [As to allowing the executor his expenses of litigation, *bonâ fide* incurred in attempting to support the will, whether probate is granted or not, see Bradford *v.* Boudinot, 3 Wash. C. C. 122; Ammon's Appeal, 31 Penn. St. 311; Perrine *v.* Applegate, 14 N. J. (1 McCarter) 531; Day *v.* Day, 3 N. J. (Law) 549; Sterlin *v.* Gros, 5 La. Ann. 107; Badillo *v.* Tio, 6 La. Ann. 127; Close *v.* Close, 13 La. Ann. 590; *post*, 1860, note (*k*), 2036–2039, and notes; Warren *v.* High, 1 Murph. (N. Car.) 436.] See, also, *ante*, 339, 340, as to the right of the next of kin, &c. to compel proof *per testes* without being liable to costs.

(*z*) Williams *v.* Goude, 1 Hagg. 610; 3 Hagg. 282. See, also, Bewsher *v.* Williams, 3 Sw. & Tr. 62; [Ralston *v.* Telfair, 2 Dev. & Bat. Eq. 414.] So a next of kin, who had successfully opposed a will propounded by the widow of the deceased as sole executrix named therein, the widow not being condemned in costs was held to be entitled to costs out of the estate. Critchell *v.* Critchell, 3 Sw. & Tr. 41.

(*a*) 3 Hagg. 283.

(*b*) Headington *v.* Holloway, 3 Hagg. 280.

(*c*) Goldie *v.* Murray, 2 Curt. 797.

(*c*[1]) [See *ante*, 359, note (*h*); Parker C. J. in Laughton *v.* Atkins, 1 Pick. 548. If a will may take effect in any part, it may properly be admitted to probate, although some bequests be void for uncertainty. George *v.* George, 47 N. H. 27; *ante*, 45, note (*l*). So, in case of a lost will, although some parts of it cannot be proved. Steele *v.* Price, 5 B. Mon. 58.]

will, by fraud, without the knowledge of the testator in his lifetime, (*d*) or by forgery after his death, (*e*) or, it should seem, if he has been induced by fraud to make it a part of his will, (*f*) probate will be granted of the instrument with the reservation of that clause. (*f*[1]) Again, where a clause is introduced in a testamentary paper, *per incuriam*, and the deceased executes the paper, not having given any instructions for such clause, and it not having been read over to him, probate will be granted of the remainder of the paper, omitting such clause. (*g*) So, since part of a will may be established, and part held not entitled to probate, if actual incapacity be shown at the time of the execution of the latter part, the will shall, in such case, be engrossed without it, and so annexed to the probate. (*h*) But the court cannot, even by consent, order a passage of the will to be expunged, which the testator, being of sound mind, intended to form part of it. (*i*) * But though the court cannot expunge any words from the original will, it has, it seems, allowed offensive passages, such as scurrilous imputations on the character of another man, to be excluded from the probate and copy kept in the registry. (*k*)

but the court cannot expunge.

In a case where the executor and universal legatee had been, by a mistake of the solicitor who drew the will, described therein by a wrong name (viz, "my nephew Barton Nicholas *Shuttleworth*" instead of "Barton Nich-

Probate granted in his right name to an

(*d*) Barton *v.* Robins, 3 Phillim. 455, note (*b*).

(*e*) Plume *v.* Beale, 1 P. Wms. 388.

(*f*) Allen *v.* McPherson, 1 H. L. Cas. 191; [Hegarty's Appeal, 75 Penn. St. 514; Meluish *v.* Milton, L. R. 3 Ch. D. 27.]

(*f*[1]) [So where part only of a will has been obtained by undue influence or fraud. In re Welsh, 1 Redf. Sur. 238; Berger *v.* Hill, 1 Bradf. Sur. 360. But a provision in a will which is illegal and void will not prevent its probate. Hegarty's Appeal, 75 Penn. St. 503, 514–516, and cases cited; Baxter's Appeal, 1 Brewster, 46; Coates *v.* Hughes, 3 Binney, 498.]

(*g*) In the Goods of Duane, 2 Sw. & Tr. 590.

(*h*) Billinghurst *v.* Vickers, 1 Phillim. 187; Wood *v.* Wood, Ib. 357; *ante*, 42; [In re Welsh, 1 Redf. Sur. 238.]

(*i*) Curtis *v.* Curtis, 3 Add. 33. The words sought to be expunged in that case were in the will of a husband, reflecting severely on the conduct of his wife. So where a legatee, at the request of the testator, signed her name to the will, and the testator subsequently duly executed the will in the presence of two witnesses, who attested it, a motion to strike out the name of the legatee was rejected. In the Goods of Mitchell, 2 Curt. 916; In the Goods of Forest, 2 Sw. & Tr. 334; In the Goods of Raine, 29 Jurist, 587; 34 L. J. N. S., P. M. & A. 125; In the Goods of Smith, 3 Sw. & Tr. 589; In the Goods of Sharman L. R. 1 P. & D. 661.

(*k*) In the Goods of Wartnaby, 4 Notes of Cas. 476; S. C. 1 Robert. 423; Marsh *v.* Marsb, 1 Sw. & Tr. 528; In the Goods of Honywood, L. R. 2 P. & D. 251.

executor wrongly named in the will.

olas *Bayley*"), probate was granted to him in his right name, the testator's next of kin consenting. (*l*) But the court cannot, even by consent, alter the will by substituting one name for another, however cogent the evidence of mistake may be. (*m*)

but *the will* cannot be altered:

Nor has the court, under any circumstances, power to make any alteration in papers of which probate has been granted. Therefore, where the vice chancellor of England has ordered that two promissory notes, which, with certain testamentary indorsements on them, had been admitted to probate, should be paid in a certain way, and that having been done, he further ordered that the notes should be cancelled, Sir H. Jenner Fust refused to direct that this order should be carried into effect. (*n*)

nor cancelled in part.

It is laid down by Swinburne, that if a testament be made in writing and afterwards lost by some casualty, (*n*[1]) if there be two unexceptionable witnesses who did see and read the testament written, and do remember the contents thereof, these two witnesses, so deposing to the tenor of the will, * are sufficient for the proof thereof in form of law. (*o*) In such cases the court will grant probate of the will "as contained in the depositions of the witnesses." (*p*) And, at this day, it is quite clear that the contents or substance of a testamentary instrument may be thus established, though the instrument itself cannot be produced, upon satisfactory proof being given that the instrument was duly made by the testator, (*p*[1]) and was not revoked by him; (*p*[2]) for ex-

Probate of a lost will:

(*l*) In the Goods of Shuttleworth, 1 Curt. 911.

(*m*) In the Goods of Collins, 7 Notes of Cas. 278.

(*n*) In the Goods of Hughes, 2 Robert. 341.

(*n*[1]) [So, it seems, if a will cannot be produced because it is detained by a foreign court. Foster J. in Loring *v.* Oakey, 98 Mass. 269, 270.]

(*o*) Swinb. pt. 6, s. 14, pl. 4. In a modern case, probate of a lost will was applied for, merely upon the affidavit of the parties interested; but the court preferred granting administration with the will, as contained in the affidavits annexed, limited till the original was produced, the administrator giving security. Vallance *v.* Vallance, 1 Hagg. 693. Where the will has been lost and the contents are unknown, such administration will be granted to the widow on giving justifying securities. In the Goods of Campbell, 2 Hagg. 555.

(*p*) Trevelyan *v.* Trevelyan, 1 Phillim. 154. See, further, as to a lost will, Burls *v.* Burls, L. R. 1 P. & D. 472.

(*p*[1]) [Evidence must be given sufficient to show a compliance with the statute of wills in all its provisions. Grant *v.* Grant, 1 Sandf. Ch. 235, 243; Voorhees *v.* Voorhees, 39 N. Y. 463.]

(*p*[2]) [Declarations of the testator, to the effect that he was leaving a valid will, have been held admissible for the purpose of showing that a lost will had not been revoked. In re Johnson's Will, 40 Conn.

ample, either by showing that the instrument existed after the testator's death, (*q*) or that it was destroyed in his lifetime, without his privity or consent. (*r*) Thus, where the testator had delivered his will to A. to keep for him, and four years afterwards died, when the will was found gnawn to pieces by rats, and in part illegible; on proof of the substance of the will, by the joining of the pieces, and the memory of witnesses, probate was granted. (*s*) So if a will, duly * executed, is destroyed in the lifetime of the testator, without his knowledge, it may be pronounced for, upon satisfactory proof being given of its having been so destroyed, and also of its contents. (*t*) And where, after the death of the testator, his will

or of a will cancelled or destroyed by fraud, or become illegible:

587. So his declarations that he has no will, or that he had destroyed his will, are evidence to show that the will has been revoked. Durant *v.* Ashmore, 2 Rich. 184. See Miller *v.* Phillips, 9 R. I. 141, 144; Grant *v.* Grant, 1 Sandf. Ch. 235, 243; Timon *v.* Claffy, 45 Barb. 438. But a lost will not traced out of testator's possession is presumed to have been revoked by him, by destruction. Idley *v.* Bowen, 11 Wend. 227; S. C. 1 Edw. 148; Bulkley *v.* Redmond, 2 Bradf. 281; Holland *v.* Ferris, 2 Bradf. 334; Clark's Estate, 1 Tuck. 445; *ante*, 162, and cases in note (*a*).]

(*q*) Martin *v.* Laking, 1 Hagg. 244.

(*r*) Davis *v.* Davis, 2 Add. 224; *ante*, 158; In the Goods of Thornton, 2 Curt. 913. As to the necessity of citing the next of kin, see In the Goods of Denston, 3 Curt. 741. [Where a will had been lost or destroyed under circumstances showing that it has not been lost or destroyed with the knowledge of the testator, the fact of its legal existence at the death of the testator may be proved by circumstantial testimony. Schultz *v.* Schultz, 35 N. Y. 653. Thus, where it was proved that the will, at the time of its execution, was placed by the testator in the hands of another person as custodian, who testified that he took charge of it, and locked it up in a trunk, and supposed it was there at the time of the testator's death, but upon search after his death it could not be found, the evidence of its legal existence, at the time of the testator's death, was held sufficient under the statute of New York. Schultz *v.* Schultz, *supra*.]

(*s*) Toller, 70. See, also, In the Goods of Harvey, 1 Hagg. 575, where an engrossed copy of a will having been read over to, and approved by, the deceased, who intended to execute it shortly afterwards, but was prevented by death, probate in common form was granted (with consent of the only person interested under an intestacy) of one of the originally engrossed sheets, and of two fairly copied sheets, substituted for, and (except as to some clerical errors not affecting the disposition) corresponding with the sheets approved by the deceased (one of which was not to be found). As a general rule, the court requires the draft or copy of a lost or destroyed will to be propounded before admitting it to probate. But see In the Goods of Barber, L. R. 1 P. & D. 267. [See, also, Burls *v.* Burls, L. R. 1 P. & D. 472; Goods of Ripley, 1 Sw. & Tr. 68; Goods of Gardner, 1 Sw. & Tr. 109. But a copy is not indispensable. See Jackson *v.* Russell, 4 Wend. 543; Smith *v.* Steele, 1 Harr. & M'H. 419; Happy's Will, 4 Bibb, 553.]

(*t*) Trevelyan *v.* Trevelyan, 1 Phillim. 149; [In re Johnson's Will, 40 Conn. 587; Davis *v.* Sigourney, 8 Met. 487; Dan *v.* Brown, 4 Cowen, 483; Steele *v.* Price, 5 B. Mon. 58; Graham *v.* O'Fallon, 3 Missou. 507; Dickey *v.* Malechi, 6 Missou.

and codicil were wrongfully torn by his eldest son, the court, having by means of some pieces which were saved, and by oral evidence, arrived at the substance of the instruments, pronounced for them. (*u*) But when allegations of this sort are made, they must be supported by the clearest and most stringent evidence. (*x*) In accordance with these decisions, it was held by the court of queen's bench, in Brown *v.* Brown, (*y*) that parol evidence was sufficient to prove the contents of a will and thereby establish it, so as to revoke a will of earlier date. (y^1) And Lord Campbell laid it down generally that parol evidence of the contents of a lost instrument may be received as much when it is a will as if it were any other. (y^2) And this case was acted on on several occasions by

177; Clark *v.* Wright, 3 Pick. 67; Kearns *v.* Kearns, 4 Harr. (Del.) 83; Buchanan *v.* Matlock, 8 Humph. 390; Jackson *v.* Betts, 9 Cowen, 208; Jackson *v.* Russell, 4 Wend. 543; Jones *v.* Murphy, 8 Watts & S. 275. By statute in New York (2 Rev. St. pt. 2, ch. 6, § 89), the contents of a lost or destroyed will must be shown by two witnesses in order to establish it. Whether the subscribing witnesses to a lost will must be produced as in other cases, see Bailey *v.* Stiles, 1 Green Ch. 231; Graham *v.* O'Fallon, 3 Missou. 507; Johnson *v.* Durant, 2 Rich. (S. Car.) 184. But it seems from some cases that, independent of statute, a lost will may be established by the evidence of a single witness. Duncan J. in Lewis *v* Lewis, 6 Serg. & R. 497; Baker *v.* Dobyns, 4 Dana, 220; Dickey *v.* Malechi, 6 Missou. 177; Dan *v.* Brown, 4 Cowen, 483; Jackson *v.* Betts, 9 Cowen, 208; S. C. 6 Cowen, 377; Kearns *v.* Kearns, 4 Harr. (Del.) 83; note (y^2) below. See, further, as to the evidence to prove wills lost or destroyed, Smith *v.* Steele, 1 Harr. & M'H. 419; Jackson *v.* Russell, 4 Wend. 543; Happy's Will, 4 Bibb, 553. Whether part of the will being proved, that part may be established, when the whole cannot be proved, see Steele *v.* Price, 5 B. Mon. 58; Jackson *v.* Jackson, 4 Missou. 210; Chisholm *v.* Ben, 7 B. Mon. 418; Clark *v.* Morton, 5 Rawle, 235; Hylton *v.* Hylton, 1 Gratt. 169. That it may be, was decided in Sugden *v.* Lord St. Leonards, L. R. 1 P. Div. 154.] See, also, Parker *v.* Hickmoott, 1 Hagg. 211, as to granting probate, in its original state, of a will altered without the testator's concurrence. See, also, In the Goods of Cooke, 3 Curt. 737.

(*u*) Foster *v.* Foster, 1 Add. 462; Knight *v.* Cook, 1 Cas. temp. Lee, 413. See, also, Martin *v.* Laking, 1 Hagg. 244, where the widow, after the testator's death, caused his will to be destroyed, and probate of the draft of such will was granted.

(*x*) Huble *v.* Clark, 1 Hagg. 115; Wharram *v.* Wharram, 3 Sw. & Tr. 307; Moore *v.* Whitehouse, 3 Sw. & Tr. 567; [Hale *v.* Monroe, 28 Md. 98; Rhodes *v.* Vinson, 9 Gill, 171; Davis *v.* Sigourney, 8 Met. 487; In re Johnson's Will, 40 Conn. 587; Durfee *v.* Durfee, 8 Met. 490, note. And very diligent search must have been made for the missing will. Jackson *v.* Hasbrouck, 12 John. 192; Fetherly *v.* Waggoner, 11 Wend. 599; Eure *v.* Pittman, 3 Hawks, 364; Dan *v.* Brown, 4 Cowen, 483.]

(*y*) 8 El. & Bl. 876.

(y^1) [Sugden *v.* Lord St. Leonards, L. R. 1 P. Div. 154; Legare *v.* Ashe, 1 Bay, 464; Havard *v.* Davis, 2 Binn. 406; Day *v.* Day, 2 Green Ch. 330; Jones *v.* Murphy, 8 Watts & S. 275; Nelson *v.* M'Gifert, 3 Barb. Ch. 158.]

(y^2) [Sugden *v.* Lord St. Leonards, *supra*. The proof of a lost or destroyed

Sir C. Cresswell. (*z*) But in Wharram *v.* Wharram, (*a*) Sir J. P. Wilde appeared to doubt the soundness of the doctrine in Brown *v.* Brown, by reason of the provision in the 10th section of the wills act, that "no will shall be valid" "unless it be in writing, &c." *And the learned judge seemed to think that the current of authorities had somewhat hastily flowed on past the period of the wills act, without any notice of that enactment. (*a*[1]) But with the greatest deference it may be observed that it is somewhat difficult to see how that enactment affects the question; and the learned judge himself on a subsequent occasion, where a case of suppression, or if not of destruction, of the will was made out, granted administration with the will annexed to the residuary legatee. (*b*) So where a codicil had been burnt by the testator's order, but not in his presence, as required by the statute, Sir J. Dodson decreed probate of a draft copy. (*c*) And it should seem, that unless in cases of this kind secondary evidence of the will were allowed to be sufficient, much injustice and impunity for fraud would be permitted. If a will be wholly or partially cancelled, or destroyed, by the testator whilst of un-

or cancelled by testator

will proceeds upon the theory that it is not in existence and cannot be produced before the court; and therefore the case is one of secondary evidence exclusively. Everitt *v.* Everitt, 41 Barb. 385. In the late case of Sugden *v.* Lord St. Leonards, *supra*, it was held, upon very full discussion, that the contents of a lost will, like those of any other instrument, may be proved by secondary evidence; that they may be proved by the evidence of a single witness, though interested, whose veracity and competency are unimpeached; and that declarations, written or oral, made by a testator, both before and after the execution of his will, are in the event of its loss admissible as secondary evidence of its contents.]

(*z*) In the Goods of Gardner, 1 Sw. & Tr. 109, where the will had been left, during the mutiny, in India, and probate was granted of the will as contained in the affidavits. See, also, In the Goods of Brown, 1 Sw. & Tr. 32, where the facts were the same as those in Brown *v.* Brown; Wood *v.* Wood, L. R. 1 P. & D. 309.

(*a*) 3 Sw. & Tr. 301.

(*a*[1]) [See Hale *v.* Monroe, 28 Md. 98. Where only a part of the contents of a lost will can be proved, that part has been held admissible for probate. Steele *v.* Price, 5 B. Mon. 58; Sugden *v.* Lord St. Leonards, L. R. 1 P. Div. 154. But see *ante*, 380, note (*t*). So where a will has been mutilated or partially destroyed by the testator while incompetent to revoke, probate may be granted so far as the contents of the paper can be ascertained. Apperson *v.* Cottrell, 3 Porter, 51; Rhodes *v.* Vinson, 9 Gill, 169. Where a prior will has been revoked by a subsequent one, and both are improperly destroyed, the first instrument cannot be set up as the testator's will by proof of its contents, although the contents of the second cannot be ascertained. Day *v.* Day, 2 Green Ch. (N. J.) 549.]

(*b*) Podmore *v.* Whatton, 3 Sw. & Tr. 449.

(*c*) In the Goods of Dadds, Dea. & Sw. 29.

while *non compos.*

sound mind, probate will be granted of it as it existed in its integral state, that being ascertainable. (*d*)

Probate granted to one of several executors, inures to the benefit of all. (*e*)

Double probate where there are several executors.

Where there are several executors, upon the grant of probate to one of them, it is usual to reserve power of making a like grant to the others. But this appears to be unnecessary, both because the probate already granted inures to their benefit and because they have a right to the grant, whether the power be reserved or not. (*f*) There is, however, what in the spiritual court * was called a double probate; which is in this manner: The first executor that comes in takes probate in the usual form, with reservation to the rest. Afterwards, if another comes in, he also is to be sworn in the usual manner, and an engrossment of the original will is to be annexed to such probate in the same manner as the first; and in the second grant such first grant as to be recited. And so on, if there are more that come in afterwards. (*g*)

Probate where there are several executors with distinct powers; or for distinct portions of time.

If there be several executors appointed with distinct powers, as one for one part of the estate, and another for another, yet there being but one will to be proved, one proving of it suffices. (*h*) So if B. is made executor for ten years, and afterwards C. is to be executor, and B. proves the will, and the ten years expire, C. may administer without any further probate. (*i*)

The court may grant a limited probate where the testator has

(*d*) Scruby *v.* Fordham, 1 Add. 74; [*ante*, 147, note (*r*), 159; Rhodes *v.* Vinson, 9 Gill, 169; Apperson *v.* Cottrell, 3 Porter, 51; Voorhees *v.* Voorhees, 39 N. Y. 463; Timon *v.* Claffy, 45 Barb. 438.]

(*e*) Webster *v.* Spencer, 3 B. & Ald. 363, by Bayley J.; Brookes *v.* Stroud, 1 Salk. 3; Walters *v.* Pfeil, 1 Mood. & Malk. 362; Watkins *v.* Brent, 7 Sim. 512; 1 My. & Cr. 104; Scott *v.* Briant, 6 Nev. & M. 381. A person to whom, with others, a term of years had, in the year 1810, been bequeathed in trust, and who was appointed, with the other trustees, an executor of the will, was presumed, in 1844, by Sugden, lord chancellor of Ireland, to have accepted the trust, though he had never acted in it; the will having been proved by the other executors, saving his right and he not having ever disclaimed. In re Needham, 1 Jones & Lat. 34.

(*f*) *Ante*, 284.

(*g*) 4 Burn E. L. 310, Phillimore's ed.; In the Goods of Bell, L. R. 2 P. & D. 247.

(*h*) Wentw. Off. Ex. 31, 14th ed.; Bac. Abr. Exors. C. 4. [A testator may appoint different executors in different countries in which his effects may lie, or different executors as to different parts of his estate in the same country. Hunter *v.* Bryson, 5 Gill & J. 483.]

(*i*) Anon. 1 Freem. 313; Anon. 1 Chan. Cas. 265. See Watkins *v.* Brent, 1 My. & Cr. 10.

limited the executor. (*k*) And it is laid down (*l*) that if a man makes and appoints an executor for one particular thing only, as touching such a statute or bond and no more, and makes no other executor, he dies intestate as to the residue of his estate, and as to this specialty only shall have an executor, and must have a will proved; but in case he makes another will for the residue of his estate, there must be two wills proved. However, where there is an executor appointed without any limitation, the court can only pronounce for the will, or for an absolute intestacy. It cannot pronounce the deceased to be dead intestate as to the residue, though the executor may eventually be considered only as a trustee for the next of kin. (*m*)

Limited probate.

Where an executrix was appointed in a codicil, which * gave her a legacy, and nominated her, together with an executor named in a previous will, executors of the will and codicil, declaring it to be a part of the will, and giving them the residue in moieties, it was held that she had a right to propound both the will and codicil, if she thought proper, though the other executor prayed probate of the will alone, and opposed the codicil; for if the codicil was good, it was part of the will, and gave her an immediate interest in the will; and if she propounded and proved the codicil alone, the next of kin might afterwards oppose the will, and force her into a second suit, which would be unreasonable. (*n*)

An executor named in a codicil may propound both the will and codicil.

Probate of a will cannot be granted to the executor while a contest subsists about the validity of a codicil; for that being undetermined, it does not appear what is the will, and the executor cannot take the common oath. (*o*)

Probate of a will cannot be had during a *lis pendens* as to a codicil:

In a modern case, (*p*) however, where a question arose as to the validity of a codicil revoking the appointment of a co-executor, and the estate required an immediate representation, probate of the undisputed instruments was granted to the other executors, with consent of the co-executor, reserving all questions.

unless by consent.

(*k*) 1 Cas. temp. Lee, 280; Davies *v.* Queen's Proctor, 2 Robert. 413; In the Goods of Beer, Ib. 349.

(*l*) Wentw. Off. Ex. 30, 14th ed.

(*m*) Sutton *v.* Smith, 1 Cas. temp. Lee, 275. See Spratt *v.* Harris, 4 Hagg. 408, 409.

(*n*) Miller *v.* Sheppard, 2 Cas. temp. Lee, 506.

(*o*) Neagle *v.* Castlehaven, 2 Cas. temp. Lee, 246.

(*p*) Fowlis *v.* Davidson, Prerog. T. T. 1845; 4 Notes of Cas. 149.

Executor of executor.

It has already appeared that where there is a sole executor, or sole surviving executor, the office is transmissible, and his executor becomes the representative of the original testator; (*q*) and in such a case no new probate of the original will is requisite. (*r*)

Probate of the will of *feme covert*;

Where a married woman makes a will by virtue of a power, or of property enjoyed by her separately, such will, as there has been already occasion to show, may be admitted to probate, without the consent of her husband. (*s*) Where the will sought to be established was made by her under a * power, it has been held that the instrument creating the power must be pleaded in the allegation of the executor, and exhibited. (*t*) However, the probate of the will of a *feme covert* should not be general, but limited to the property over which she has a disposing power. (*u*) And her husband will be entitled to have a grant of administration *cæterorum*. (*x*)

form of such probate.

In a modern case, (*y*) the deceased, previously to her marriage, had certain property conveyed to trustees, with a power to her to receive the dividends and interest thereof during life, and to dispose of the principal fund by will executed in the presence of, and attested by, two witnesses. She died, leaving her husband surviving, and having duly executed her will according to the power, appointing executors. The question was, whether a certain sum remaining at her bankers to her credit (being her savings out of the trust dividends) was to be included in the probate. The ground on which it was contended that that did not pass, was, not that the deceased did not possess the power of disposing thereof, but that she had not disposed of it. Sir H. Jenner Fust said that it was a question of construction, not for him to

(*q*) *Ante*, 254.

(*r*) Wankford *v.* Wankford, 1 Salk. 309.

(*s*) See *ante*, 56.

(*t*) Temple *v.* Walker, 3 Phillim. 394; In the Goods of Monday, 1 Curt. 590; *ante*, 57, 58. And by rule 15 (1862), P. R. (Non-contentious Business) it must be specified in the grant of the probate, &c. See *ante*, 59.

(*u*) Seammel *v.* Wilkinson, 2 East, 552; Tappenden *v.* Walsh, 1 Phillim. 352; Tugman *v.* Hopkins, 4 M. & Gr. 389; Tucker *v.* Inman, 4 M. & Gr. 1049. See In the Goods of Boswell, 3 Curt. 744; In the Goods of Marten, 3 Sw. & Tr. 1; In the Goods of De Pradel, L. R. 1 P. & D. 454. [The probate should be limited, special, or qualified, where that is necessary to give the will its proper effect. Heath *v.* Withington, 6 Cush. 497, 500, 501; Holman *v.* Perry, 4 Met. 492, 498; Noble *v.* Phelps, L. R. 2 P. & D. 276; Osgood *v.* Breed, 12 Mass. 531.]

(*x*) Boxley *v.* Stubbington, 2 Cas. temp. Lee, 537; Salmon *v.* Hays, 4 Hagg. 388. See 4 M. & Gr. 398, per Tindal C. J.; Brenchley *v.* Lynn, 2 Robert. 441, 471.

(*y*) Ledgard *v.* Garland, 1 Curt. 286.

determine, and that he would grant probate to the executors limited to the settled property and all accumulations over which she had a disposing power, and which she had disposed of; and the learned judge observed, that this was the usual and most convenient mode, in order to give parties an opportunity of making their claims elsewhere. (y^1)

* So, in general cases, if the will be limited to any specific effects of the testator, the probate shall also be so limited, and an *administratio cæterorum* granted. (z) *Administratio cæterorum.*

When the will is proved, the original is deposited in the registry, (a) and a copy thereof in parchment is made out under the seal of the court, and delivered to the executor, together with a certificate of its having been proved; and such copy and certificate are usually styled the probate. Probate making out: deposit of will in registry.

The following is the form of the probate delivered to the executor: General form of probate.

"In her Majesty's Court of Probate,
"The Principal Registry.

"Be it known, that on the day of 18 , the last will and testament [*or* the last will and testament with codicils] hereunto annexed, of A. B., late of deceased, who died on (b) , at , was proved and registered in the

(y^1) [The probate of a will does not necessarily settle any question of title to real estate arising under such will. It establishes the due execution of the will by the testator, and is conclusive thus far; but as to his title, or his right to devise the property named in the will, it binds nobody who has any adverse interest. Questions of that character are to be settled by proper proceedings at law, or in equity. Per Dewey J. in Holman *v.* Perry 4 Met. 492, 497, 498; Parker *v.* Parker, 11 Cush. 530, 531.]

(z) Wentw. Off. Ex. 30, 14th ed.; Toller, 67; *ante*, 382.

(a) See stat. 20 & 21 Vict. c. 77, s. 66, *ante*, 312. On one occasion an original codicil, of which probate had been granted, containing an assignment of 10,000*l.*, part of 15,000*l.* secured by a heritable bond in Scotland, was delivered out of the registry of the prerogative court, in order to its being registered in Scotland, and there finally deposited; this being necessary to carry the same into effect, and the codicil itself (termed in Scotland a deed of disposition or assignation) not relating to any property of the testator in this country. In the Goods of Nicholson, 2 Add. 333. See, also, In the Goods of Russell, 1 Hagg. 91; In re Napoleon Bonaparte, 2 Robert. 290.

(b) By the practice of the prerogative court the time of the death was required to form part of the oath, and to be inserted in the margin, on the ground that, if the time of the death has long past, it becomes reasonable that some inquiry

said principal registry of her majesty's court of probate, and that administration of all and singular * the personal estate and effects of the said deceased was granted by the aforesaid court to C. D., the sole executor [*or as the case may be*] named in the said will, he having been first sworn well and faithfully to administer the same, by paying the just debts of the deceased and the legacies contained in his will [*or* will and codicils], and to exhibit a true and perfect inventory of all and singular the said estate and effects, and to render a just and true account thereof, whenever required by law so to do. Signed E. F., Registrar."

Probate in *fac-simile.*

There has already been occasion to explain the nature of a probate in *fac-simile*, and the occasions on which such a probate is granted. (*c*) The operation of it will be further considered hereafter, together with the subject of the effect of probate, and letters of administration generally. (*d*)

Probate of will in a foreign language.

If a will be in a foreign language, the probate is granted of a translation of the same by a notary public. (*e*) But it should seem that the temporal courts are not bound by it, and may themselves correct any inaccuracy in it. (*f*)

Lost probate.

Where the probate was lost, the spiritual court never granted a second, but merely an exemplification of the probate from their own records, and such exemplification was evidence of the will having been proved. (*g*)

Revocation of probate on citation or appeal.

The probate may be revoked, either on suit by citation (*e. g.* where the executor, after proof in common form, is cited to prove the will in solemn form, or even after proof in solemn form, where the probate is shown to have been obtained by fraud, or the will of which it has been granted is proved to have been revoked, or a later will made), (*h*) or on

should be made why the grant was not sooner taken out; for the delay raises something of a suspicion requiring explanation. By noting the time of the death in the margin, debtors to the estate, whether public bodies, as the bank, or private individuals, had their attention directly drawn to it, and were enabled more easily to ascertain that the payment is made to the right person. In the Goods of Darling, 3 Hagg. 563; *ante*, 325.

(*c*) *Ante*, 331.

(*d*) *Post*, pt. I. bk. VI. ch. I.

(*e*) Toller, 72.

(*f*) L'Fit *v.* L'Batt, 1 P. Wms. 526; *post*, pt. I. bk. VI. ch. I.

(*g*) Shepherd *v.* Shorthose, 1 Stra. 412; Bull. N. P. 246.

(*h*) Wentw. Off. Ex. 111, 112, 14th ed.

appeal to a higher tribunal. But it will be more convenient to consider the mode of such revocation and its * consequences, at a future stage, conjointly with the revocation of grants of administration. (*i*)

SECTION VIII.

Of Mandamus to compel Probate.

Although, as there has already been occasion to show, (*k*) the ecclesiastical courts had exclusive jurisdiction in matters testamentary, yet those courts were subject to the superintendence and control of the superior courts of law at Westminster, and if the ordinary should exceed his authority, or decline to exercise the authority he possessed, the courts of law would interfere by prohibition or *mandamus*.

Thus the ordinary was held to be *bound* to grant probate of an instrument which is undisputedly the will of the deceased; and if the executor accepted the office, and desired probate, and was refused by the ordinary, a writ would go from the temporal courts to compel him; (*l*) for although the spiritual court was to determine whether there be a will or no will, yet if there be a will, the executor has a temporal right, and the ordinary could not put him to any terms but what are mentioned in the will; and therefore if he would not grant the probate, where it was admitted that there was an executor, a *mandamus* could go. (*m*)

Hence, although it was a good answer by the ordinary to such *mandamus*, that a suit was depending before him concerning the validity of the will, and not yet determined, (*n*) yet, as it has already appeared, it was no good return that the person appointed executor in the will was insolvent, and that he refused to give security to pay the legacies; for the ordinary had no authority to interpose

Lis pendens a good return: but not that executor is insolvent and refuses to give security:

(*i*) *Post*, pt. I. bk. VI. ch. II. [Gasque *v.* Moody, 12 Sm. & M. 153.]

(*k*) *Ante*, 288 *et seq.*

(*l*) Luskius *v.* Carver, Style, 7; 1 Gibs. Cod. 469.

(*m*) *Per curiam* in Marriot *v.* Marriot, 1 Stra. 672. [Where every essential fact exists necessary to authorize a probate court to receive, file, and record the authenticated copy of a will, and issue letters testamentary thereon, the entering up of the proper judgment is a ministerial act, and on the refusal of the court so to enter up judgment, *mandamus* will lie. Williams *v.* Saunders, 5 Coldw. (Tenn.) 60.]

(*n*) Rex *v.* Dr. Hay, 5 Burr. 2295; Lovegrove *v.* Bethel, 1 W. Bl. 668.

and demand security of the executor, where the testator himself required none. (*o*)

or that a commission of appraisement has issued.

* Where the return of the judge of the spiritual court to the *mandamus* stated that, by the custom and practice of his court, if any creditor of the deceased entered a *caveat* against granting probate, and swore himself to be a creditor, there went out a commission of appraisement, till the return whereof the judge had not used nor ought to grant probate; and then it set out that two creditors, who swore to their debts, entered a *caveat*, and prayed such a commission, which was decreed, and issued, and was not yet returnable; the court of king's bench held the return to be ill, for that the judge could only stay probate where there is a contest about the validity of the will; and the ecclesiastical court could not be suffered to set up their practice against the law of the land. (*p*)

SECTION IX.

Of what Instruments Probate is necessary, and what Instruments ought not to be proved.

Probate must be obtained of every testamentary instrument operating on personal estate.

If an instrument be testamentary, (*q*) *and is to operate on personal estate*, whatever may be its form, probate of it must be obtained in the court of probate; otherwise its existence cannot be recognized in any court of law or equity.

A codicil merely revoking or confirming former wills should be proved.

A codicil, not containing any disposition of property, but simply revoking all former wills, is of a testamentary nature, and, if proved, ought to be admitted to probate. (*r*) So if the executor, after probate, discovers any testamentary paper, * he ought to bring it into the

(*o*) See *ante*, 236; Rex *v.* Raines, 1 Ld. Raym. 361; S. C. 1 Salk. 299; 3 Salk. 162; 1 Stra. 672; Carth. 457; Holt, 310; Hathornthwaite *v.* Russell, 2 Atk. 127; S. C. Barnard Chan. Cas. 334. See 4 Burn E. L. 315; Phillimore's ed.

(*p*) Rex *v.* Bettesworth, 2 Stra. 857. See also stat. 21 Hen. 8, c. 5, s. 3.

(*q*) As to what is a testamentary instrument, see *post*, pt. III. bk. v. ch. II. and *ante*, 104, 105 *et seq.*

(*r*) Brenchley *v.* Still, 2 Robert. 162; [Laughton *v.* Atkins, 1 Pick. 535.] But a paper which disposes of no property, generally speaking has no testamentary character so as to enable the court to grant probate of it. Van Straubenzee *v.* Monck, 3 Sw. & Tr. 6.

court of probate, even though it be a mere confirmation of the will already proved. (*s*)

A will of lands only ought not to be proved in the probate court:

Where, however, a will *clearly* respects land only, and no personal property, it ought not to be proved in the court of probate; (*t*) and if there be a suit to compel any to prove such a will in that court, a prohibition lies. (*u*)

secus, of a mixed will of lands and goods:

But if a will is a mixed will concerning both lands and goods, it must be proved entirely in the court of probate; (*x*) yet the probate will not prejudice the heirs (unless they have been cited under the court of probate act, see *ante*, 341), inasmuch as it will not be evidence of the will as to the land; nor will the examination of the witnesses in the court of probate be evidence in the courts of common law. (*y*)

or where executors are appointed in a will of lands only:

So the nomination of executors in a testamentary paper purporting to dispose of real property only entitles the document to probate. (*z*)

Therefore, in the case of such a mixed will, if there be occasion to prove the devise of the land, in a suit concerning it, in any of the temporal courts, it is necessary to give the will itself in evidence; and it is usual, on trials at *nisi prius*, to procure for that purpose the attendance of the proper officer, who produces the original will from the registry, in which, after probate, it has been deposited. And it appears, that at one time the ecclesiastical registrars in all cases * refused to deliver out wills of land, in order to be proved at trials, or on commissions, and insisted on being paid for attending with them. (*a*) But according to the present practice, the court of chancery will, on a proper occasion, order on motion, that the

order of court of chancery that such a will shall

(*s*) Weddall *v.* Nixon, 17 Beav. 160.

(*t*) Anon. 3 Salk. 22; Habergham *v.* Vincent, 2 Ves. jun. 230, by Buller J.; In the Goods of Drummond, 2 Sw. & Tr. 8.

(*u*) Netter *v.* Brett, Cro. Car. 395, by Berkley J.

(*x*) Partridge's case, 2 Salk. 553. Formerly the practice was to issue a prohibition *quoad* the lands. Coombe *v.* Coombe, 2 Sid. 143; 2 Roll. Abr. 315, pl. 3; Lady Chester's case, 1 Vent. 207, by Hale. See, also, the observations of Lord Ellesmere, in Mr. Fraser's edition of Coke's Reports, 6 Co. 23 *b*, in a note on Lord Winchester's case.

(*y*) Cro. Car. 395, by Berkley J.

(*z*) O'Dwyer *v.* Geare, 1 Sw. & Tr. 465; In the Goods of Barden, L. R. 1 P. & D. 325; In the Goods of Leese, 2 Sw. & Tr. 442. See, also, Beard *v.* Beard, 3 Atk. 72; *ante*, 204; see, further, In the Goods of Lancaster, 1 Sw. & Tr. 464.

(*a*) Morse *v.* Roach, 2 Stra. 961. See stat. 20 & 21 Vict. c. 77, s. 64; *ante*, 316, by which the probate is made evidence of the will as to real estate, unless the validity of the will is disputed.

be delivered out of the court of probate:

original will shall be delivered out of the registry, by the proper officer, to the solicitor or agent of the party proposing to establish it, upon giving security to return it, within a certain time, not erased or defaced. (*b*) So, it seems, the court of chancery will, where necessary, make an order upon the registrar to deliver a will to the registrar's office in chancery, to lie there till the court of chancery shall have done with it. (*c*)

But Lord Chancellor Eldon, though he made several orders of the former description, in accordance with the established practice, has often expressed his surprise that such a jurisdiction should have been exercised; (*d*) and on one occasion his lordship observed, that he never could answer the question, what he could do to the officer if he refused to obey the order. (*e*)

The order used to be directed to the registrars of the * ecclesiastical court, and the security approved by the master in chancery. (*f*)

where it is doubtful whether all the property is freehold, probate ought to be granted.

If it should be *doubtful* whether some part of the property be freehold, the ecclesiastical court always held that it ought to grant probate; for the obvious reason that the probate may be necessary to the purposes of justice, and no evil can arise from the grant of it. (*g*)

When probate necessary of a will made in execution of a power.

Where a will is made in execution of a power, if it relates to personalty, it must be proved in the court of probate. (*h*)

There has already been occasion to show that this has

(*b*) Morse *v.* Roach, 2 Stra. 961; S. C. 1 Dick. 65, and cited 1 Atk. 626; Frederick *v.* Aynscombe, 1 Atk. 627; Williams *v.* Floyer, Ambl. 343; Pierce *v.* Watkin, 2 Dick. 485; Lake *v.* Causfield, 3 Bro. C. C. 263; Forder *v.* Wade, 5 Bro. C. C. 476; Hodson *v.* ———, 6 Ves. 134; Ford *v.* ———, Ih. 802; Qualey *v.* Qualey 4 Madd. 21. See Wells *v.* Corbyn, 3 Anstr. 648. But the court will not allow a will in its custody to be taken out of its jurisdiction on any alleged necessity for the furtherance of justice. It must presume that other courts, when satisfied that the original document is withheld by a competent authority, will admit secondary evidence. In the Goods of Manfredi, 1 Sw. & Tr. 135.

(*c*) 1 Atk. 628. Such an order was made by Lord Macclesfield, who said at the same time, with some warmth, that he thought his officers of equal credit, and as fit to be intrusted with the custody of the will, as theirs, or any office whatever. Ib.

(*d*) 6 Ves. 134; Ib. 802.

(*e*) Fauquier *v.* Tynte, 7 Ves. 292.

(*f*) Qualey *v.* Qualey, 4 Madd. 213. But see 1 Atk. 627.

(*g*) By Sir John Nicholl, in Thorold *v.* Thorold, 1 Phillim. 8, 9. See, also, the case of Durkin *v.* Johnstone, Prerog. 1796, decided by Sir W. Wynne, and reported in a note to 1 Phillim. 8.

(*h*) See Sugd. on Pow. 21, 6th ed.; Tattnall *v.* Hankey, 2 Moore P. C. C. 342, 351, 352, 353; Goldsworthy *v.* Crossley, 4 Hare, 140.

been determined, in regard to an appointment by the will of a married woman, which, it is now settled, the courts of equity will not read, until it has been duly proved as a proper will in the court of probate. (*i*) But though a court of equity cannot give effect to testamentary papers without probate, it may, perhaps, when necessary, order an inquiry for the very purpose of sending such papers to be proved. (*k*)

However, a will, simply in execution of a power affecting realty, and not even appointing an executor, will be dealt with in chancery without the interference of a court of probate. (*l*)

Where a testatrix had a power of appointment, and a general probate of her will of 1829, and codicil thereto, had been granted, the delegates, reversing a decree of the prerogative, held that the court of probate could not also grant an administration, with a will of 1815 and codicils annexed, limited to become a party to proceedings in equity * touching the execution of the power by such wills; but must itself decide whether the will of 1815, was, under the circumstances, revoked by the will of 1829, and thereupon grant either a probate of the will and codicil of 1829 alone, or a probate of those papers and of the will of 1815 and its codicils, as together containing the will. (*m*)

Probate of sealed packets directed by the will to be delivered unopened to legatees.

In Pelham *v.* Newton, (*n*) a testatrix directed her executors to deliver certain parcels sealed up, and directed to certain persons, which were in a small iron chest, to the persons to whom they were directed, unopened, and desired those persons would not tell one another what was contained in their respective papers. Sir G. Lee was of opinion that the executors could not safely deliver them unopened; for if they should be called to an inventory, they could not give in one on oath, without knowing what was contained in those parcels; and if they assented to them as legacies, and there should not be assets sufficient to pay the debts, they would be guilty of a *devastavit.* The learned judge therefore decreed those parcels to be opened in the presence of the registrar, to see what was contained in them; they were accordingly opened in court, and they contained bank notes, some of 20*l.* and

(*i*) *Ante*, 56, 383.

(*k*) See Brenchley *v.* Lynn, 2 Robert. 458 *et seq.* by Dr. Lushington.

(*l*) Per Bayley B. 4 Hagg. 64.

(*m*) Hughes *v.* Turner, 4 Hagg. 30. See, also, Brenchley *v.* Lynn, 2 Robert. 441; *ante*, 176.

(*n*) 2 Cas. temp. Lee, 46.

some of 30*l.* each, of which a schedule was made, of the names of the persons, and of the sum contained under each person's name, to be added as a codicil to the will; and probate was decreed of the will, and all the aforesaid papers, to the executors.

Instruments of which probate is not necessary: Declaration of trust:

In Inchiquin *v.* French, (*o*) Lord Thomond by his will gave 20,000*l.* to Sir William Wyndham; and by a deed poll of the same date, which referred to his will, he declared that the legacy was given to him upon trust for Lord Clare. Sir William Wyndham died in the testator's lifetime, and the deed poll was not proved. The question was, whether, though the legatee named in the will had died before the * testator, the person who was the *cestui que trust* of the legacy, and was substantially the legatee, was entitled to the 20,000*l.*, under the deed poll, which had not been proved as a testamentary paper. Lord Hardwicke held that the deed poll, though never proved, sufficiently declared the trusts of the legacy of 20,000*l.*, and decreed accordingly.

In Smith *v.* Attersoll, (*p*) a testator bequeathed a legacy to A. and B. in trust for certain purposes, which the will stated to have been fully explained to them; on the same day a paper writing was signed by A. and B. in which they declared that the bequest was upon trust for six persons, whose names were stated; and after their signature, some lines were added in the handwriting of the testator, by which a seventh person (an unborn child) was admitted to a share of the legacy. Upon a bill, filed by one of the six persons named in the body of the paper writing, Lord Gifford M. R. recognized the paper writing as a valid declaration of trust, though it had not been proved as a testamentary paper.

A will appointing testamentary guardians.

From the decisions which have taken place, it is quite clear that it is not necessary that a will appointing testamentary guardians should be proved in the court of probate. (*q*)

A will giving legacies out of real estate:

Nor is it necessary to prove a will in the court of probate, to entitle a legatee to recover a legacy out of real estate. (*r*)

(*o*) 1 Cox, 1.
(*p*) 1 Russ. 266.
(*q*) Gilliat *v.* Gilliat, 3 Phillim. 222; Lady Chester's case, 1 Ventr. 207; In the Goods of Morton, 3 Sw. & Tr. 422.
(*r*) Tucker *v.* Phipps, 3 Atk. 361.

As a court of equity considers money directed to be laid out in land, as land, the court of probate has no jurisdiction over a devise disposing of property so converted. (*s*)

or disposing of money directed to be laid out in land.

(*s*) By Lord Hardwicke, in Pullen *v.* Ready, 2 Atk. 590.

*CHAPTER THE THIRD.

OF THE MAKING AND PROBATE OF THE WILLS OF SEAMEN AND MARINES.

It has already been stated that the statute of frauds contains an exception as to wills made by "any soldier being in actual military service, or any mariner or seaman being at sea." (*a*) This exception is continued by the 1 Vict. c. 26, by the 11th sect. of which it is provided and enacted, "that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act." (*b*) And by section 12 it is further enacted, that that act shall not prejudice or affect any of the provisions contained in the 11 Geo. 4 and 1 W. 4, c. 20, intituled, "An act to amend and consolidate the laws relating to the pay of the royal navy," respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other moneys payable in respect of services in her majesty's navy.

1 Vict. c. 26.

By stat. 11 Geo. 4 and 1 W. 4, c. 20, the stat. 55 Geo. 3, c. 60 is repealed.

11 Geo. 4, c. 20.

Section 48 regulates the execution of letters of attorney and wills of petty officers, non-commissioned officers of marines, seamen, and marines. It provides that letters of attorney shall be expressed to be revocable; that no such * letter of attorney shall be valid, nor shall any will made by any petty officer, &c. who shall be or shall have been in the naval service be valid or sufficient to pass any wages, &c. unless such letter of attorney or will respectively shall contain the name of the ship to which the person executing the same belonged; that, in case any such letter of attorney or will shall be made by any such petty officer, &c. while belong-

(*a*) See *ante*, 116, 117. (*b*) See *ante*, 67, 116, 117.

ing to and on board of any ship as part of her complement, &c. the same shall be executed in the presence of, and be attested by the captain, or (in his absence) by the commanding officer for the time being, and who in that case shall state at the foot of the attestation the absence of the captain at the time, and the occasion thereof, and, in case of the inability of the captain, by reason of wounds or sickness, by the officer next in command, who shall state at the foot of such attestation the inability of the captain to attest the same, and the cause thereof, and, if made in any hospital ship or hospital, or sick quarters at home or abroad, by the governor, physician, surgeon, assistant surgeon, agent, or chaplain of any such hospital or sick quarters, or by the commanding officer, agent, physician, surgeon, assistant surgeon, or chaplain for the time being of any such hospital ship, or by the physician, surgeon, assistant surgeon, agent, chaplain, or chief officer of any military or merchant hospital or other sick quarters, or one of them, and, if made on board of any ship or vessel in the transport service, or in any other merchant ship or vessel, by some commission or warrant officer or chaplain in the navy, or some commission officer or chaplain belonging to the land force or marines, or the governor, physician, surgeon, or agent of any hospital in the naval or military service, if any such shall be then on board, or by the master or first mate thereof, and, if made after he shall have been discharged from the service, or if such letter of attorney be made by the executor or administrator of any such petty officer, &c. if the party making the same shall then reside in London, or within the bills of mortality, by the inspector of seamen's wills and powers of attorney, or * his assistant or clerk, or, if the party making the same shall then reside at or within seven miles from any port or place where the wages of seamen are paid, by one of the clerks of the treasurer of the navy resident at such port or place, or if the party making such letter of attorney or will shall then reside at any other place in Great Britain or Ireland, or in Guernsey, Jersey, Alderney, Sark, or Man, by a justice of the peace, or by the minister or officiating minister or curate of the parish or place in which the same shall be executed, or, if the party making the same shall then reside in any other part of his majesty's dominions, or in any colony, &c. by some commission or warrant officer or chaplain of the navy, or commission officer of marines, or the commissioner of the navy, or naval storekeeper at one of the naval yards, or a minister of the

Church of England or Scotland, or a magistrate or principal officer residing in any of such places respectively, or, if the party making the same shall then reside at any place not within his majesty's dominions or any of the places last mentioned, by the British consul or vice consul, or some officer having a public appointment or commission, civil, naval, or military, under his majesty's government; or by a magistrate or notary public of or near the place where such letter of attorney or will shall be executed; that wills shall not be contained, printed, or written in the same instrument, paper, or parchment with powers of attorney; and that the inspector of seamen's wills may pass the same if it shall appear to the satisfaction of the treasurer of the navy, that, in the attestation thereof, the captain's signature has been omitted by accident or inadvertence.

Wills, &c. made by prisoners of war.

Sect. 49 provides that letters of attorney or wills made by any petty officer, or seaman, non-commissioned officer of marines, or marine, while a prisoner of war, shall be valid, provided it shall have been executed in the presence of and be attested by some commission officer of the army, navy, or royal marines, or by some warrant officer of his majesty's navy, or by a physician, surgeon, or assistant surgeon in the army or * navy, agent to some naval hospital, or chaplain of the army or navy, or by any notary public.

Other provisions.

Sect. 50. Letters of attorney and wills to be noted in the monthly muster books or returns.

Sect. 51. Letters of attorney and wills to be examined by the inspector of seamen's wills, before they are acted upon or put in force.

Sects. 55, 58, 59, 60 regulate the mode by which probate is to be obtained, subject to an alteration introduced by stat. 2 & 3 W. 4, c. 40, s. 33. Sect. 61 (as altered by stat. 2 & 4 W. 4, c. 40, ss. 14, 15, and the schedule thereto annexed) limits the expense of probates. Sect. 62 imposes penalties upon officers of the ecclesiastical court for offences against the act. Sect. 69 (as amended by stat. 2 & 3 W. 4, c. 40, ss. 12, 13, and stat. 4 & 5 W. 4, c. 25, s. 8) provides for the payment without probate of sums not exceeding 20*l.* payable on account of wages, prize-money, &c. for services of deceased petty officers, seamen, &c. and not exceeding 32*l.* on account of pay, half-pay, or pensions, of any deceased officer, or widow of an officer, &c. Sect. 74 provides for the transmis-

sion of letters, &c. free of postage. Sect. 81 extends the provisions of the act, so far as applicable to the marines. Sect. 84 provides for the punishment of parties personating any commission, warrant, or petty officer, seaman, &c. Sect. 85, for taking false oaths in order to obtain probate, &c. Sect. 86, for subscribing false petitions for probate; and sects. 87, 88, for forging certificates, &c. or uttering false vouchers.

By stat. 28 & 29 Vict. c. 72, s. 2, the term "seaman or marine" means a petty officer or seaman, non-commissioned officer of marines or marine, or other person forming part in any capacity of the complement of any of her majesty's vessels, or otherwise belonging to her majesty's naval or marine force, exclusive of commissioned, warrant, and subordinate officers, and assistant engineers, and of kroomen.

Stat. 28 & 29 Vict. c. 72. Interpretation clause.

3. "A will made after the commencement of this act by * any person at any time previously to his entering into service as a seaman or marine shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the admiralty, or any effects or money in charge of the admiralty."

Sect. 3. Will made before entry ineffectual as to wages, &c.

4. "A will made after the commencement of this act by any person while serving as a seaman or marine shall not be valid for any purpose if it is written or contained on or in the same paper, parchment, or instrument with a power of attorney."

Sect. 4. Will invalid if combined with power of attorney.

5. "A will made after the commencement of this act by any person while serving as a seaman or marine, or when he has ceased so to serve, shall not be valid to pass any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the admiralty, or any effects or money in charge of the admiralty, unless it is made in conformity with the following provisions: —

Sect. 5. Regulations for wills of seamen, &c. as to wages, &c.

(1.) Every such will shall be in writing and be executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea;

(2.) Where the will is made on board one of her majesty's ships, one of the two requisite attesting witnesses shall be a com-

missioned officer, chaplain, or warrant or subordinate officer belonging to her majesty's naval or marine or military force;

(3.) Where the will is made elsewhere than on board one of her majesty's ships, one of the two requisite attesting witnesses shall be such a commissioned officer or chaplain, or warrant or subordinate officer as aforesaid, or the governor, agent, physician, surgeon, assistant surgeon, or chaplain of a naval hospital at home or abroad, or a justice of the peace, or the incumbent, curate, or minister of a church or place of worship in the parish where the will is executed, or a * British consular officer, or an officer of customs, or a notary public.

A will made in conformity with the foregoing provisions shall, as regards such wages, money, or effects, be deemed to be well made for the purpose of being admitted to probate in England; and the person taking out representation to the testator under such will shall exclusively be deemed the testator's representative with respect to such wages, money, or effects."

Sect. 6. As to wills made by prisoners of war.

6. "Notwithstanding anything in this or any other act, a will made after the commencement of this act by a seaman or marine while he is a prisoner of war shall (as far as regards the form thereof) be valid for all purposes if it is made in conformity with the following provisions:—

(1.) If it is in writing and is signed by him, and his signature thereto is made or acknowledged by him in the presence of and is in his presence attested by one witness, being either a commissioned officer or chaplain belonging to her majesty's naval or marine or military force, or a warrant or subordinate officer of her majesty's navy, or the agent of a naval hospital, or a notary public;

(2.) If the will is made according to the forms required by the law of the place where it is made;

(3.) If the will is in writing and executed with the formalities required by the law of England in the case of persons not being soldiers in actual military service or mariners or seamen at sea."

Sect. 7. Payment under will

7. "Notwithstanding anything in this act, in case of a will made after the commencement of this act by any person while serving as a marine or seaman, and being either in

actual military service or a mariner or a seaman at sea, the admiralty may pay or deliver any wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the admiralty, or any effects or money in charge of the admiralty, to any person claiming to be entitled thereto under such will, though not made in * conformity with the provisions of this act, if, having regard to the special circumstances of the death of the testator, the admiralty are of opinion that compliance with the requirements of this act may be properly dispensed with."

not in conformity with act.

*BOOK THE FIFTH.

OF THE ORIGIN OF ADMINISTRATION: AND OF THE APPOINTMENT OF ADMINISTRATORS.

CHAPTER THE FIRST.

IN WHAT COURT ADMINISTRATION MUST BE TAKEN OUT: AND THEREWITH OF WHAT MAY BE DONE BY THE ADMINISTRATOR BEFORE LETTERS OF ADMINISTRATION ARE GRANTED.

In case a party makes no testamentary disposition of his personal property, he is said to die intestate; (*a*) the consequences of which it is now proposed to consider.

SECTION I.

In what Court the Letters of Administration shall be obtained.

In ancient time, when a man died without making any disposition of such of his goods as were testable, it is said that the king, who is *parens patriæ*, and has the supreme care to provide for all his subjects, used to seize the goods of the intestate, to the intent that they should be preserved and disposed for the burial of the deceased, the payment of his debts, to advance his wife and children, if he had any, and if not, those of his blood. (*b*) This prerogative the king continued to exercise for some time by his own ministers of justice, and probably in the county court, where matters of all kinds were deter-

Ancient prerogative of the crown:

(*a*) 2 Bl. Com. 494. [Proof of intestacy must be made before letters of administration will be granted. The jurisdiction of the court to grant them is founded on such proof. Bulkley *v.* Redmond, 2 Bradf. Sur. 281; Redfield's L. & Pr. of Sur. Cts. 158, 159, 164, note; Farley *v.* McConnel, 7 Lansing, 428.]

(*b*) Hensloe's case, 9 Co. 38 *b*.

mined; and it was granted as a franchise to many lords of manors, and others, who had, until *the passing of the court of probate act, a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts baron and other courts. (*c*) Afterwards the crown, in favor of the church, invested the prelates with this branch of the prerogative; for it was said, none could be found more fit to have such care and charge of the transitory goods of the deceased, than the ordinary, who all his life had the cure and charge of his soul. (*d*) The goods of the intestate being thus vested in the ordinary, as trustee, (*e*) to dispose of them in *pios usus*, it has been said that the clergy took to themselves (under the name of the church and poor), the whole residue of the deceased's estate, after the *partes rationabiles* of the wife and children had been deducted, without paying even his lawful debts and charges thereon; until by stat. Westm. 2 (13 Edw. 1, c. 19) it was enacted that the ordinary should be bound to pay the debts of the intestate as far as his goods extended, in the same manner that executors were bound in case the deceased had left a will. (*f*) However, in Snelling's *case it was resolved that, if the ordinary took the goods into possession, he was chargeable with the debts of the intestate at common law, and that the stat. Westm. 2 was made in affirmance of the common law. (*g*) But

transferred to the prelates:

by stat. Westm. 2, ordinary bound to pay debts of intestate:

(*c*) 2 Bl. Com. 494. See *ante*, 288.

(*d*) Graysbrook *v.* Fox, Plowd. 277; Hensloe's case, 9 Rep. 39 *a*. There are, however, some authorities to show that the granting of administration and probate of wills were *originally* of ecclesiastical cognizance; but the better opinion seems to be in accordance with Lord Coke's statement, in Hensloe's case. Much learning on this subject may be found in C. B. Gilbert's argument, in Marriott *v.* Marriott, Gilb. Rep. 203; S. C. 1 Stra. 666; and in Bacon's Abridgment, tit. Executors, E. 1. See, also, Swinburne, 7th ed. by Mr. Powell, p. 772, note; 2 Fonbl. Eq. 313; Com. Dig. tit. Administrator, A.; tit. Administration, B. 6; 4 Burn E. L. 291, Phillimore's ed.; Dyke *v.* Walford, 5 Moore P. C. 434; S. C. Notes of Cas. 309.

and never, at any time, in this country, by law, any beneficial interest in the property of intestates, but merely the right or duty of jurisdiction and administration, and the right of possession for the latter purpose. Dyke *v.* Walford, 5 Moore P. C. 434; S. C. 6 Notes of Cas. 309

(*f*) 2 Bl. Com. 495; and see the argument of Pollexfen in Palmer *v.* Allicock, 3 Mod. 59. The 32d article of the Magna Charta extorted from King John expressly provides against these abuses; but it is a curious fact, and one which strongly marks the influence of the papal power in England at that period, that this article was wholly omitted in the Magna Charta of Hen. 3. Note to Warwick *v.* Greville, 1 Phillim. 124, by the learned reporter.

(*g*) 5 Rep. 82 *b*. See, also, Hensloe's case, 9 Rep. 39 *b*, where Lord Coke lays

though the ordinary was (either at common law or by force of this statute) liable to the creditors for their just and lawful demands, yet the *residuum*, after payment of debts, remained still in his hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents; and therefore the statute of 31 Edw. 3, s. 1, c. 11, provides, that "In case where a man dieth intestate, the ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods; which persons so deputed shall have action to demand and recover, as executors, the debts due to the said deceased intestate, in the king's court, to administer and dispend for the soul of the dead; and shall answer also in the king's court, to others to whom the said deceased was holden and bound, in the same manner as executors shall answer. And they shall be accountable to the ordinaries as executors be in the case of testament, as well as of the time past as the time to come."

31 Edw. 3, stat. 1, administration to be granted to the next and most lawful friends; whence originated administrators.

This is the original of administrators, as they stood at the time of the passing of the probate act (1857), 20 & 21 Vict. c. 77. (*h*) They were the officers of the ordinary appointed by him in pursuance of the statute, (*i*) and their title and authority were derived exclusively from the ecclesiastical * judge, by grants which are usually denominated letters of administration.

As in the case of probates, questions of difficulty arose in respect of grants of letters of administration, as to the proper ecclesiastical court in which they were to be obtained.

On this head it may be sufficient to state, that all the authorities that have been cited, and the observations that have been made, in the first chapter of the fourth book of this treatise, respecting the proper ecclesiastical court wherein to obtain probate under the old law; with regard to the archbishop's prerogative, by reason of *bona notabilia*; and the consequences of resorting to the dio-

In which of the spiritual courts the grant of administration should have been obtained.

down the same law, and cites several authorities in support of it. See, also, Snellings *v.* Norton, Cro. Eliz. 409; Com. Dig. Administrator, A.

(*h*) 2 Bl. Com. 495.

(*i*) 2 Bl. Com. 495.

cesan court, when a prerogative probate was the proper one, and *vice versâ*, are equally applicable to the subject of obtaining letters of administration. (*i*[1])

By the court of probate act (1857), s. 3, jurisdiction of ecclesiastical courts to grant administration is abolished. By sect. 4 to be exercised in the court of probate.

But there has already (*j*) been occasion to show that by the 3d section of the court of probate act (1857), the jurisdiction of the ecclesiastical and all other courts to grant letters of administration of the effects of deceased persons is abolished; and by sect. 4, (*k*) that jurisdiction is to be exercised in the queen's name by the court of probate. (*k*[1])

SECTION II.

What may be done by an Administrator before Letters of Administration are granted.

Generally an administrator cannot act before letters:

It has been shown that an executor may perform most of the acts appertaining to his office, before probate. (*l*) But with respect to an administrator, the general rule is, that a party entitled to administration can do nothing as administrator before letters of administration are granted to him; inasmuch as he derives his authority, not like an executor from the will, but entirely from the appointment of the court. (*m*)

(*i*[1]) [See Pinney *v.* McGregory, 102 Mass. 189 *et seq.* When a petition for administration shows sufficiently a residence of the deceased which confers jurisdiction, see Abel *v.* Love, 17 Cal. 233; Townsend *v.* Gordon, 19 Cal. 188. In Maine the judge of probate has no jurisdiction, and cannot grant administration, if it does not appear to his satisfaction "that there is personal estate of the deceased amounting to at least twenty dollars; or that debts due from him amount to that sum; and in the latter case, that he left that amount in value of real estate." Bean *v.* Bumpus, 22 Maine, 549. But in Pinney *v.* McGregory, 102 Mass. 189, Gray J. said: "We are not aware that any particular amount of property has ever been held requisite to sustain a grant of original administration in Massachusetts." See *post*, 473, note (*k*[1]).]

(*j*) *Ante*, 290 *et seq.*

(*k*) *Ante*, 291.

(*k*[1]) [In Pinney *v.* McGregory, 102 Mass. 190, Mr. Justice Gray said: "The more recent statutes give jurisdiction to the probate courts in each county to grant administration on the estates of persons deceased, being inhabitants of or residents in the same county at the time of their decease, or having died without the commonwealth and leaving estate of any kind to be administered within the same; with the single restriction upon original administration, that it shall not be granted after twenty years from the death; and upon administration *de bonis non*, that it must appear to the judge of probate that there is personal estate to the amount of twenty dollars or upwards, or unpaid debts amounting to as much."]

(*l*) *Ante*, 302.

(*m*) Wankford *v.* Wankford, 1 Salk. 301, by Powys J. [See *post*, 629, 630,

* Thus, though an executor may commence an action before proving the will, and it is sufficient if he has probate in time for his declaration, the letters of administration must issue before the commencement of a suit at law by an administrator; for he has no right of action until he has obtained them. (*n*)

he cannot commence an action:

He may, however, file a bill of chancery before he has taken out letters of administration, and it will be sufficient to have them at the hearing. (*o*) But the bill must allege that they are already obtained. (*p*)

but may file a bill.

So if an executor releases before probate, such act will bind him after he has proved the will; (*q*) but if a man releases and afterwards takes out letters of administration, it will not bar him; for the right was not in him at the time of the release. (*r*)

A release by an administrator before letters not binding.

So though an executor may assign a term for years of the testator, before probate, yet an assignment by an administrator before letters is, it seems, of no validity. (*s*) Again, if the deceased was a tenant from year to year, a surrender of this leasehold interest cannot be made by a next of kin before taking out letters of administration. (*t*)

Assignment or surrender by administrator before letters not valid.

* In Doe *v.* Glenn, (*u*) the lessee of premises, under a condition of reëntry if the rent should be in arrear twenty-eight days, died in bad circumstances: his brother administered *de son tort;* and agreed with the landlord to give him possession, and suffer the

650; Shaw C. J. in Rand *v.* Hubbard, 4 Met. 252, 256, 257.]

(*n*) Martin *v.* Fuller, Comberb. 371; Com. Dig. Administration, B. 9; 1 Salk. 303, by Powell J.; Wooldridge *v.* Bishop, 7 B. & C. 406. An administrator with the will annexed has no more right, in this respect, than any other administrator. Phillips *v.* Hartley, 3 C. & P 121.

(*o*) Fell *v.* Lutwidge, Barnard. Chan. Ca. 320, by Lord Hardwicke, who observed that it was different at law. [M'Fadden *v.* Geddis, 17 Serg. & R. 41; Peebles's Appeal, 15 Serg. & R. 41.] See, also, S. P. as to the relation of the letters obtained after bill filed, Humphreys *v.* Humphreys, 3 P. Wms. 351, by Lord Talbot C.; Bateman *v.* Margerison, 6 Hare, 496. But see Simons *v.* Milman, 2 Sim. 241; Jones *v.* Howells, 2 Hare, 353; *ante*, 309, note (*x*).

(*p*) Humphreys *v.* Ingledon, 1 P. Wms. 753; Moses *v.* Levi, 3 Y. & Coll. 359, 366. But see *ante*, 309, note (*x*).

(*q*) *Ante*, 302.

(*r*) Middleton's case, 5 Co. 28, *b;* S. P. by Walmsley, Sergeant, *arguendo*, in Leeke *v.* Grevell, Moore, 119; S. P. Barefoot *v.* Barefoot, Palm. 411; S. P. by Holt C. J. in Whitehall *v.* Squire, 1 Salk. 295; S. C. Holt, 45.

(*s*) 3 Preston on Abst. 146. See Bacon *v.* Simpson, 3 M. & W. 87, per Parke B.

(*t*) Rex *v.* Great Glenn (Inhabitants of), 5 B. & Ad. 188.

(*u*) 1 Ad. & El. 49; S. C. 3 N. & M. 839.

lease to be cancelled, on his abandoning the rent, which was twenty-eight days in arrear. The brother afterwards took out letters of administration. And it was held that his agreement as administrator *de son tort* did not conclude him as rightful administrator, nor give a right of possession to the landlord who had entered under the agreement, but who had not made demand of the rent according to the common law, or proceeded by ejectment according to stat. 4 Geo. 2, c. 28.

Accordingly it was held in a subsequent case, (*v*) that an administrator was not estopped by a mortgage he had made of the premises in dispute at a time prior to his having become administrator.

Notice to be given as administrator not effectually given before letters.

Where it had been agreed by articles of partnership that the executor or administrator of a deceased partner should have the option of succeeding to the share of the deceased in the partnership business and effects on giving notice within three calendar months of the decease to the surviving partners, it was held that a notice given by the administrator of the deceased partner within the three months of his death, but before taking out letters of administration, was not an effectual notice within the meaning of the indenture, for that the letters of administration had not relation back to the act of giving notice, so as to clothe him with the character of administrator at the time. (*w*)

Instances of valid acts, though done before administration granted:

Yet cases may certainly be found, where the letters of administration have been held to have a relation to the death of the intestate, so as to give a validity to acts done before the letters were obtained. Thus, if a man takes the goods * of the intestate as executor *de son tort*, and sells them, and afterwards obtains letters of administration, it seems the sale is good. (*x*) So in Whitehall *v.* Squire, (*y*) where an intestate had delivered to the defendant a horse to depasture, and the plaintiff, before administration granted, desired the defendant to bury the intestate decently, who thereupon buried him, and the plaintiff agreed that the defendant should keep the

(*v*) Metters *v.* Brown, 1 H. & C. 686.

(*w*) Holland *v.* King, 6 C. B. 727.

(*x*) Kenrick *v.* Burgess, Moore, 126; Godolph. pt. 2, c. 8, s. 5, p. 99, 4th ed.; Hill *v.* Curtis, *ante*, 264, note (*n*), [273 note (*i*[1]); Vroom *v.* Van Horne, 10 Paige, 558; Walker *v.* May, 2 Hill Ch. (S. Car.) 23.]

(*y*) 1 Salk. 295; S. C. Holt, 45; 3 Salk. 161; 2 Mod. 276; Carth. 103; Skin. 274

horse in part satisfaction of the charges; and afterwards the plaintiff took administration, and brought trover for the horse; it was held by Dolben and Eyre, JJ. (Holt C. J. *dissentiente*), that the plaintiff was bound by the agreement, and could not maintain the action. The principle, however, of this decision appears to have been, that the plaintiff, being a *particeps criminis* in the very act of which he complained, should not be permitted to recover upon it against the person with whom he colluded. (*z*)

Other instances, of the relation of the letters of administration to the death of the intestate, will be found in a subsequent part of this treatise. (*a*)

* But it may here be observed, that it has been lately laid down that such relation exists only in those cases where the act done is for the benefit of the estate. And accordingly, in a case where the widow of an intestate had remained in the possession of her husband's property for some time after his decease, and the intestate's son had not interfered in any way with the property, which was seized under a writ of *fi. fa.* issued against the widow, and the son afterwards took out administration, it was held that there was no evidence from which the administrator's assent to the widow's taking the property could be implied. And, by Parke B., even if there had been, the estate was not bound by it, as the act to which the assent was given did not benefit the estate. (*b*)

only when done for the benefit of the estate.

Where a question was pending in the ecclesiastical court, as to a party's right to a grant of letters of admin-

Security demanded by the ec-

(*z*) Mountford *v.* Gibson, 4 East, 446, by Lord Ellenborough. In Stewart Administrators *v.* Edmonds, Sittings after Hil. Term, 1828, *coram* Abbott C. J., the intestate had sent some plate to the defendant, a silversmith, for safe custody, and was at the same time indebted to him in a sum exceeding the value of the plate. The plaintiff, after the death of the intestate, and before he obtained letters of administration, assented to the defendant retaining the plate, in satisfaction of his debt; he afterwards took out administration, and brought trover for the plate. For the defendant, Whitehall *v.* Squire was cited; but the C. J. held that the assent was not binding upon the administrator. See, further, accord. 8 Exch. 305, by Parke B. See, also, Parsons *v.* Mayesden, 1 Freem. 152, where it was laid down, that if a man takes the goods of the deceased by the consent of him to whom administration is afterwards granted, this is no defence, if he is sued as executor *de son tort*. But see Hill *v.* Curtis, *ante*, 264, note (*n*).

(*a*) *Post*, pt. II. bk. I. ch. I. As to the right, founded on mere possession, to bring actions against wrong-doers, without producing letters of administration, see *ante*, 305.

(*b*) Morgan *v.* Thomas, 8 Ex. 302; [Leber *v.* Kauffelt, 5 Watts & S. 445.]

istration, and such party possessed himself of a portion of the goods of the deceased before he had established his title, Sir G. Lee decreed that he should give such security for the safety of the goods as the court should approve. (*c*)

clesiastical court from parties possessing the assets before administration granted.

(*c*) Jones *v.* Yarnold, 2 Cas. temp. Lee, 570.

* CHAPTER THE SECOND.

OF THE GRANT OF GENERAL ORIGINAL ADMINISTRATION IN CASES OF TOTAL INTESTACY.

SECTION I.

To whom General Administration is to be granted.

Stat. 31 Edw. 3, administration to be granted to the nearest and most lawful friends:

Stat 2 Hen. 8, c. 5, to the widow or next of kin, or both at discretion.

IT has already appeared that the stat. 31 Edw. 3, stat. 1, c. 11, provides, that in cases of intestacy, "the ordinaries shall depute of the next and most lawful friends of the dead person intestate to administer his goods." (*a*) The power of the ecclesiastical judge was a little more enlarged by the statute 21 Hen. 8, c. 5, s. 3, which provides, that in case any person die intestate, or that the executors named in any testament refuse to prove it, the ordinary shall grant administration, "to the widow of the deceased, *or* to the next of his kin, *or* to both, as by the discretion of the same ordinary shall be thought good;" and the same section goes on to enact, that "where divers persons claim the administration as next of kin,

(*a*) *Ante*, 403. [The only jurisdiction is over the estate of a person deceased. Jochumsen *v.* Suffolk Savings Bank, 3 Allen, 87, 89, 96. Administration granted upon the estate of a living person under the erroneous belief that he was dead, after he had been absent for more than seven years without being heard from, is void, and affords no protection to those who have acted under it. Jochumsen *v.* Suffolk Savings Bank, 3 Allen, 87; Hooper *v.* Stewart, 25 Ala. 408; Morgan *v.* Dodge, 44 N. H. 259. But see Roderigas *v.* East River Savings Institution, N. Y., Albany Law Journal, vol. 13, No. 3, p. 12, Jan. 15, 1876; 15 Am. Law Reg. (N. S.) 205, in which it was held that a payment by a debtor to an administrator duly appointed is valid, and a bar to a second action, although the supposed intestate is alive at the time, and the letters of administration are subsequently revoked for this reason. See Succession of Vogel, 16 La. Ann. 13. As to civil death, by imprisonment, &c. see Cannon *v.* Windsor, 1 Houst. Del. 143; Frazer *v.* Fulcher, 17 Ohio, 260; Graham *v.* Adams, 2 John. 408; O'Brien *v.* Hagan, 1 Duer, 664. As to the inference of death of the intestate arising from grant of letters of administration, see *post*, 1887, note (*i*).]

which be equal in degree of kindred to the testator, or person deceased, and where any person only desireth the administration, as next of kin, where indeed divers persons be in equality of kindred as is aforesaid, that in every such case the ordinary to be at his election and liberty to accept any one or more making request where divers do require the administration." (a^1)

Exclusive right of the husband to be the wife's administrator:

Before inquiring into the rights of those persons expressly pointed out in the above statutes, it is proper to consider the right of the husband to be the administrator of his wife. * This right belongs to the husband exclusively of all other persons, (b) and the ordinary has no power or election to grant it to any other. (c) The foundation of this claim has been variously stated. By some it is said to be derived from the statute of 31 Edw. 3, on the ground of the husband's being "the next and most lawful friend" of his wife; (d) while there are other authorities which insist that the husband is entitled at common law, *jure mariti*, and independently of the statutes. (e) But the right, however founded, is now unquestion-

(a^1) [*Post*, 425.]

(b) Humphrey *v.* Bullen, 1 Atk. 459; [Bellows J. in Weeks *v.* Jewett, 45 N. H. 540, 541; Judge of Probate *v.* Chamberlain, 3 N. H. 129, and cases cited; Hubbard *v.* Barcas, 38 Md. 175; Genl. Sts. Mass. c. 94, s. 1, "Fourth" clause; 2 R. S. (New York) 74, § 27; Dewey *v.* Goodenough, 56 Barb. 54; Redfield L. & Pr. Sur. Ct. 160, 162, 163; Weaver *v.* Chace, 5 R. I. 356; case of Jacob Altemus, 1 Ashm. 49. He may assign it to another; Patterson *v.* High, 8 Ired. Eq. 52; see Hilborn *v.* Hester, 8 Ired. Eq. 55; though not resident within the state. Weaver *v.* Chace, 5 R. I. 356.]

(c) Sir George Sand's case, 3 Salk. 22. [In Alabama the husband is not entitled to administration on his wife's estate to the exclusion of her children, or one appointed at their request. Randall *v.* Shrader, 17 Ala. 333. On the marriage of an administratrix, the husband becomes administrator in her right for his own safety, and takes upon himself all the duties, and is entitled to all the privileges, which belonged to her before the marriage. He is therefore the proper representative of both, and service of citation upon him alone is sufficient to support a final settlement of the administration. Kavanaugh *v.* Thompson, 16 Ala. 817; Pistole *v.* Street, 5 Porter, 64.]

(d) 3 Salk. 22; Elliott *v.* Gurr, 2 Phillim. 19.

(e) Com. Dig. Administrator, B. 6; Watt *v.* Watt, 3 Ves. 247. Others have supposed that the husband is entitled, as next of kin to the wife. Fortre *v.* Fortre, 1 Show. 351. Rex *v.* Bettesworth, 2 Stra. 1111, 1112; but it seems clear that the husband is not of kin to his wife at all. Watt *v.* Watt, 3 Ves. 244. [As between husband and wife, in the ordinary sense, neither can be said to be next of kin to the other. 2 Jarman Wills (4th Am. ed.) 36, note (1); 2 Kent, 136, 142; Whitaker *v.* Whitaker, 6 John. 112; Hoskins *v.* Miller, 2 Dev. 360; Dennington *v.* Mitchell, 1 Green Ch. 243; Byrne *v.* Stewart, 3 Desaus. 135; Storer *v.* Wheatley, 1 Penn. St. 506; Lucas *v.* New York Central R.

able; and is expressly confirmed by the statute 29 Car. 2, c. 3, which enacts, that the statute of distributions (22 & 23 Car. 2, c. 10), "shall not extend to the estates of *femes covert* that shall die intestate, but that *their husbands may demand and have administration* of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the said act."

This right of administration to the wife is not an ecclesiastical, but a civil right of the husband, though it is a right to be administered in the court of probate. (*f*)

where the marriage was voidable the husband is entitled to administration:

Though a marriage be voidable, by reason of some *canonical* disability (such as being within the prohibited degrees of consanguinity or affinity, or on account of corporal infirmities), yet the husband is entitled to the administration of the wife, unless sentence of nullity was declared before her death. (*g*) But where the marriage took place under one of *the *civil* disabilities (such as prior marriage, want of age, idiocy, and the like), the contract of marriage is absolutely void *ab initio;* and consequently the husband cannot be entitled to take administration. Thus in a modern case, where it appeared that the woman was of unsound mind at the time of the celebration of the marriage, the husband was refused administration of her effects, and condemned in costs. (*h*)

secus, where it was void.

Administration to wife dying after a protection order.

Where a wife, having been deserted by her husband, has obtained a protection order, under stat. 20 & 21 Vict. c. 85, s. 21, (*i*) afterwards dies in the lifetime of her husband, intestate, the court will decree administration, limited to such personal property as she acquired since the desertion (without specifying of what that property consisted), to the next of kin of the wife. (*j*)

R. Co. 21 Barb. 245; Milne *v.* Gilbart, 2 De G., M. & G. 715; S. C., 5 De G., M. & G. 510; Allen J. in Green *v.* Hudson &c. R. R. Co. 32 Barb. 25; Wilson *v.* Frazier, 2 Humph. 30.]

(*f*) By Sir J. Nicholl, in Elliott *v.* Gurr, 2 Phillim. 19, 20.

(*g*) Elliott *v.* Gurr, 2 Phillim. 19; [White *v.* Lowe, 1 Redf. Sur. 376.] By stat. 5 & 6 W. 4, c. 54, s. 1 (Royal Assent, 31st August, 1835), all marriages, celebrated before the passing of this act, within the prohibited degrees of *affinity*, shall not be annulled for that cause, unless by suit in an action depending at the time of such passing. And by sect. 2, all marriages, hereafter celebrated, within the prohibited degrees of consanguinity or affinity, shall be absolutely null and void.

(*h*) Browning *v.* Reane, 2 Phillim. 69.

(*i*) See *ante*, 59, 60.

(*j*) In the Goods of Worman, 1 Sw. & Tr. 513. See, also, In the Goods of Faraday, 2 Sw. & Tr. 369. It is necessary,

It should seem that a man convicted of bigamy, in respect of his marriage with the intestate, may, nevertheless, propound his interest as the lawful husband of the deceased, in a suit touching the administration of her effects in the ecclesiastical court; and may succeed in such suit on proof shown of his not having been guilty of the crime, notwithstanding his said conviction be pleaded and proved. (*k*)

Husband convicted of bigamy:

In case the wife dies intestate, and afterwards the husband dies without having taken out administration to her, the ecclesiastical court has considered itself bound by the statute to grant administration to the next of kin of the wife * and not to the representatives of the husband. (*l*) But such administrator shall be considered in equity as a trustee for the representatives of the husband. (*m*)

by the old practice if the husband died before he obtained administration, it was granted to the wife's next of kin:

generally speaking, that the husband should be cited. In the Goods of Brighton, 34 L. J., P. M. & A. 55. He has no right to the administration if the marriage has been dissolved on the ground of his adultery and desertion. In the Goods of Hay, 35 L. J., P. M. & A. 13. [See Coover's Appeal, 52 Penn. St. 427.]

(*k*) Wilkinson *v.* Gordon, 2 Add. 152. See 1 Phil. on Ev. 336 *et seq.* 7th ed.

(*l*) Reece *v.* Strafford, 1 Hagg. 347; Wellington *v.* Dolman, 1 Hagg. 344; S. C. *nom.* Hole *v.* Dolman; 2 Hagg. Appendix, 165; Kindleside *v.* Cleaver, 1 Hagg. 345; S. C. 2 Hagg. Appendix, 169; *contra*, Bacon *v.* Bryant, 11 Vin. Abr. 88, pl. 25; Hargrave's Law Tracts, 475. See also, the other cases reported in the Appendix to 2 Haggard.

(*m*) Cart *v.* Rees, cited in Squib *v.* Wyn, 1 P. Wms. 381; Humphrey *v.* Bullen, 1 Atk. 458; S. C. 11 Vin. Abr. 86; Elliott *v.* Collier, 3 Atk. 526; S. C. 1 Ves. sen. 15; 1 Wils. 168. [Partington *v.* Atty. Gen. L. R. 4 H. L. 100, 109; Bellows J. in Weeks *v.* Jewett, 45 N. H. 540; Clark *v.* Clark, 6 Watts & S. 85; Williams's Appeal, 7 Penn. St. 260; Happiss *v.* Eskridge, 2 Ired. Eq. 54; Allen *v.* Wilkins, 3 Allen, 321. It is held that the interest of the husband is such that if he obtains possession of the wife's personal property without suit, and without taking administration, he is entitled to hold it subject to the claims of creditors. In Elliott *v.* Collier, 3 Atk. 526, Lord Hardwicke says, that, although the ecclesiastical court was bound by statute to grant administration to the next of kin of the wife, yet that does not bind the right in that court; for, the husband surviving the wife, the whole estate vested in him at the time of her death, and no person could possibly be entitled to the rights of the wife but himself, so that her whole property belonged to him. In Whitaker *v.* Whitaker, 6 John. 117, the court say that "the administration, given by the statute to the husband who survives the wife, cannot be necessary to entitle him to the beneficial use of what he recovers. It merely confers a right to sue for her choses in action, and, if he can obtain them without suit, his title is as perfect as though he had taken letters of administration." This case also lays it down as settled, that the right of administration follows the right to the estate. The same general doctrine is recognized in other cases. See McKee *v.* McKee, 8 B. Mon. 461; Coleman *v.* Hallowell, 1 Jones Eq. (N. Car.) 204; Bellows J. in Weeks *v.* Jewett, 45 N. H. 541.]

In a modern case, (*n*) Sir John Nicholl adverted to the inconvenience of this rule of granting administration to those who have no beneficial interest, and its defiance of all principles; and added that he felt inclined, if the point should come before the court in a contested form, to send it up to the court of delegates for a deliberate reconsideration. If the persons, who, at the time of the wife's death, were her next of kin, die before the grant of administration, it has always been held that the court may exercise its discretion, and grant administration to the party who has the interest. (*o*)

but by the modern practice, if the property does not belong to them, it shall be granted to the husband's representative:

And in a subsequent case (*p*) that learned judge granted administration *de bonis non* of a *feme covert* to the representatives of the husband, (*p*[1]) an appearance having been entered, and administration prayed by the next of kin of the wife, and observed, that he should have done the same if the husband had not taken out administration, unless it could be shown that he had not the interest, but that the property belonged to the wife's next of kin. And the learned judge desired that it might be understood in the registry that this was to be the rule for the future, unless special cause to the contrary be shown. (*q*) But if the next *of kin are entitled to the beneficial interest (as by settlement), the administration is still to be decreed to them; because the principle is that the grant ought to follow the interest. (*r*)

(*n*) In the Goods of Gill, 1 Hagg. 341.

(*o*) In the Goods of Gill, 1 Hagg. 344.

(*p*) Fielder *v.* Hanger, 3 Hagg. 769.

(*p*[1]) [See Hendrin *v.* Colgin, 4 Munf. 231; Patterson *v.* High, 8 Ired. Eq. 52; Washington *v.* Blunt, 8 Ired. Eq. 253.

(*q*) [Bellows J. in Weeks *v.* Jewett, 45 N. H. 540, 541; Judge of Probate *v.* Chamberlain, 3 N. H. 129.] Administration of the effects of a former wife was refused to the representatives of a second wife who had taken out administration to her husband, the next of kin of the husband not having been cited. In the Goods of Sowerby, 2 Curt. 852. See In the Goods of Bell, 1 Sw. & Tr. 288. If the husband's representatives are several administrators, they must all join in taking out the administration to the wife; for it is not the practice to make a subsequent grant *to one alone* of co-administrators. *Secus*, as to co-executors, In the Goods of Nayler, 2 Robert. 409.

(*r*) In the Goods of Pountney, 4 Hagg. 289; [Fowler *v.* Kell, 14 Sm. & M. 68; Hendrin *v.* Colgin, 4 Munf. 231. Where the personal property of the wife was so settled, by a deed executed before marriage and duly recorded, that upon her dying intestate in her husband's lifetime, the trustee was to convey the same to her legal heirs, it was held that her nearest blood relation was entitled to the administration of her estate in the event of her thus dying, in preference to her husband. Bray *v.* Dudgeon, 6 Munf. 132; Ward *v.* Thompson, 6 Gill & J. 349; Sheldon *v.* Wright, 1 Selden, 497; Owens *v.* Bates,

It must be observed, however, that the husband's next of kin must constitute themselves his legal personal representatives before they have any claim to administer to the wife's estate. (*s*)

In Gutteridge *v.* Stilwell, (*t*) Lord Brougham appears to have acted inconsistently with this doctrine. In that case there was a fund in the court of chancery, standing to the separate account of a married woman, whose husband survived her and died before administering to her estate, and Sir John Leach M. R. refused to order it to be paid to the wife's legal personal representative, on the ground that, in order to complete the title, administration should also have been taken out to the estate of the husband. But on a renewed application to Lord Brougham, his lordship made the order, observing, that he came to this determination after consulting the judges of the ecclesiastical courts, (*u*) and that he considered it impossible to look beyond the admitted personal representative.

However, in delivering the judgment of the court of exchequer chamber in the Attorney General *v.* Partington, (*x*) Willes J. said, "We can only treat that decision (Gutteridge *v.* Stilwell) as one affecting the practice of the * court of chancery, and even so regarded, it must be read with its correction by Lord Cottenham in Loy *v.* Duckett." (*y*)

It appears to have been ruled in the prerogative court, that where the husband and wife are drowned in the same ship, they must be presumed to have perished at the same moment unless proof can be obtained as to the exact time of the death of either. (*z*) At all events, in such

husband and wife drowned in the same ship.

9 Gill, 463; Patterson *v.* High, 8 Ired. Eq. 52; Hilborn *v.* Hester, 8 Ired. Eq. 55; Smith *v.* Smith, 1 Texas, 621.]

(*s*) In the Goods of Crause, 1 Sw. & Tr. 146; Attorney General *v.* Partington, 3 H. & C. 193, 206; [Partington *v.* Atty. Gen. L. R. 4 H. L. 100, 109.]

(*t*) 1 My. & K. 486.

(*u*) See Loy *v.* Duckett, 1 Cr. & Ph. 312.

(*x*) 3 H. & C. 206; [L. R. 4 H. L. 100.]

(*y*) 1 Cr. & Ph. 312. His lordship there said that Sir J. Leach's view was more correct than Lord Brougham's; because it would follow from Lord Brougham's that even where an executor had assented to a legacy, he might still sue for the fund out of which the legacy was to be paid on the strength of his legal title, without making the legatee a party; which would, in fact, be administering the fund in the absence of the owner. See, also, Pennington *v.* Buckley, 6 Hare, 459, by Wigram V. C.

(*z*) In the Goods of Selwyn, 3 Hagg. 784; 1 Curt. 705; [*post*, 464, note (*q*); Coye *v.* Leach, 8 Met. 371; 2 Kent, 434–437; Phené's Trusts, L. R. 5 Ch. Ap. 139.] But see Underwood *v.* Wing, 4 De G., M. & G. 633; *post*, pt. III. bk. III. ch. II. § V. [p. 1204 *et seq.*] where this subject is more fully considered.

cases, in order to entitle the husband to the wife's property it must be proved that he survived her; and consequently the administration thereof must be granted to her next of kin, if his representative cannot give any such proof. (*a*)

In what cases the will of the wife may control the husband's right to administer:

It has already appeared that in several cases a *feme covert* may make a will; and it remains to consider to what extent her will operates as a bar to the husband's right to be her administrator. If the wife by her husband's agreement be empowered to make a general will, disposing of her whole estate, the husband's right will be barred by her exercise of such power; and though, strictly speaking, the instrument executed under such circumstances by the wife is no will, but rather an appointment which is to operate in equity, the common law courts will not interfere in favor of the husband. (*b*) But if she be empowered by her husband to dispose by will of *part* of her estate only, as where by articles before marriage it was agreed that the wife should have power to make a will, and dispose of her * leasehold estate; or where her will affects the property to which she is entitled for her separate use, or that which she has in *auter droit*, as executrix of a third party; in all such cases probate must be limited to the particular property which passes by such will, and administration of the other part of her property (which is called an administration *cæterorum*) must be granted to the husband. (*c*)

whether, if she makes a will and appoints no executor, administration *cum testamento annexo* shall be granted to her husband, *quære:*

And where a *feme covert* has a power to dispose of her estate by will, which she executes, but without appointing an executor, it has been held that administration should be granted to the husband *cum testamento annexo*. (*d*) But the practice in the registry of the prerogative court has been, notwithstanding, to make such grants, not to the husband but to the persons having the interest under the will, the rule being that the grant should follow the interest. (*e*) And it has been

(*a*) Satterthwaite *v.* Powell, 1 Curt. 705; In the Goods of Wheeler, 31 L. J., P. M. & A. 40; *post*, pt. 1. bk. v. ch. III. § 1. [p. 464.]

(*b*) Rex *v.* Bettesworth, 2 Stra. 1111.

(*c*) Rex *v.* Bettesworth, 2 Stra. 891, 1118; Stevens *v.* Bagwell, 15 Ves. 139.

(*d*) Ross *v.* Ewer, 3 Atk. 160; Salmon v. Hays, 4 Hagg. 386; Dempsey *v.* King, 2 Robert. 397. [And not a limited administration to the legatees under the appointment, the effect of which would be, that if the deceased left other property, a further administration, *i. e.* a general administration to the husband, would be requisite. 1 Jarman Wills (3d Eng. ed.), 25.]

(*e*) See accord. In the Goods of Bailey, 2 Sw. & Tr. 135.

lately held by Dr. Lushington, that it is not true, as a general proposition, that the husband has a right to the administration, but that such a grant is, according to circumstances, discretionary. (*f*) If a *feme covert* has a power to dispose of certain personal property by her will, but *no* power to make an executor, and she makes a will, disposing of such property, and appointing an executor, the court will grant to the executor an administration with the will annexed, limited to that property, and decree a general administration *cæterorum bonorum* to her husband. (*g*)

If the wife be executrix to another, and dies intestate, then, as to the goods which she had in that capacity, administration must not be granted, generally speaking, to her * husband. (*h*) In fact, in this case, the administration is not of the goods of the wife but *de bonis non* of her testator *cum testamento annexo*. Consequently, the administration must be granted according to the rules established with respect to that species of grant, which will be explained in the subsequent chapter. (*i*)

administration where wife is executrix of another.

The subject now proceeds to the right of the widow and next of kin under the statutes. And first, as to the right of the widow, the stat. 21 Hen. 8, c. 5, s. 3, directs that the ordinary shall grant administration "to the widow *or* the next of kin *or* to both" at his discretion. (*j*) Therefore, where it was moved for a *man-*

Of the right of the widow:

The ordinary may grant administration to her *or* next of

(*f*) Brenchley *v.* Lynn, 2 Robert. 441. See, also, In the Goods of Dawson, 2 Robert. 135; S. C. 7 Notes of Cas. 317. When it is refused to the husband, he may, if necessary, take a *cæterorum* grant. 2 Robert. 441.

(*g*) Boxley *v.* Stubbington, 2 Cas. temp. Lee, 537.

(*h*) Smith *v.* Jones, Bulstr. 45; Jones *v.* Roe, W. Jones, 176; Anon. 3 Salk. 21.

(*i*) Sections 1, 2.

(*j*) The court is precluded by this statute from making a joint grant to a widow and one of the persons entitled in distribution (but not next of kin), even with the consent of the next of kin, and of all the other persons entitled in distribution, and the 73d section of the court of probate act, 1857 (see *post*, 446), does not enlarge the power of the court in such a case. In the Goods of Browning, 2 Sw. & Tr. 634. But see In the Goods of Grundy, L. R. 1 P. & D. 459. [The statute of 21 Hen. 8, c. 5, which, in relation to persons entitled to administration, is the same as the Pennsylvania act of 1832, places the widow and next of kin on the same platform. The widow is not placed in a class by herself, and as such entitled to the administration of the estate. Under the construction given to the above Pennsylvania act, the ordinary or register grants administration of the effects of the husband to the widow, or next of kin, or he may grant it to either or both, at his discretion. If the widow renounces administration, it shall be granted to the children, or other next of

kin, *or* to them jointly:

damus to the official of the Bishop of Gloucester to commit administration to the widow of an intestate, the

kin, in preference to strangers or even to creditors. The discretion given to the register is limited to a selection from those *asking, if competent,* in each class in their order. When the widow renounces her right to administer, it is the duty of the register to select from the children, or next of kin, a person or persons competent to perform the duties of administration, preferring males to females. It has never been understood that the widow or next of kin, or both combined, having the greatest stake in the estate, can pass by any one of the children, or next of kin, competent and willing to take, and vest the appointment in a stranger. Rogers J. in McClellan's Appeal, 16 Penn. St. 110, 115; Williams's Appeal, 7 Penn. St. 288. And so in Massachusetts, administration of the estate of an intestate may be granted to his widow, *or* next of kin, or both, as the probate court shall deem fit; and if they do not either take or renounce the administration, they shall if resident within the county, be cited by the court for that purpose. Genl. Sts. c. 94, s. 1, clause "First;" Cobb *v.* Newcomb, 19 Pick. 336. In order to be effectual such renunciation must be recorded in the probate court. Arnold *v.* Sabin, 1 Cush. 525, 529. If there be no fit person among the next of kin to take administration, either alone, or jointly with the widow, she is exclusively entitled to it. M'Gooch *v.* M'Gooch, 4 Mass. 348. But a renunciation of her claim by the widow does not give her a right to nominate another person, to the exclusion of the next of kin. Cobb *v.* Newcomb, 19 Pick. 336, 337; *post,* 417, note (*o*). In New York the widow has the first claim to the administration in a class by herself. The right to administration in this state belongs to the relatives of the deceased, who would be entitled to succeed to his personal estate, in the following order. First, his widow; second, his children; third, his father; fourth, his mother; fifth, his brothers; sixth, his sisters; seventh, his grandchildren; eighth, any of the next of kin who would be entitled to share in the distribution of the estate; next, to the creditors, the one first applying, if otherwise competent, to have the preference. 2 R. S. (New York) 74, § 27; as amended, Laws, 1863, c. 362, § 3; Laws, 1867, c. 782, § 6. A widow having consented to join a stranger with her in the administration, cannot revoke the consent. Williams's case, 1 Tuck. (N. Y.), Sur. 8. In a case where the widow renounced her right to administer her husband's estate, and recommended another person, all the children being minors, it was held that the surrogate had jurisdiction to appoint such person without citing the next of kin. Sheldon *v.* Wright, 1 Selden, 497. In Kentucky the court may, at the request of the widow, associate with her a stranger in blood to the intestate, in the administration, even against the objection of the blood relations. Shropshire *v.* Withers, 5 J. J. Marsh. 210. In Mississippi, only husband or wife and distributees have a legal right to administer; the appointment of others is within the discretion of the court. Byrd *v.* Gibson, 1 How. (Miss.) 568. A son in that state will be removed from the administration and the widow appointed in his place if she makes application. Muirhead *v.* Muirhead, 6 Sm. & M. 451. A mere parol renunciation will not be a waiver of her right. Muirhead *v.* Muirhead, *supra.* Under the Alabama Code, after fifteen days from the time when the death is known, there may be appointed the husband or widow, or if he or she relinquish, the next of kin, or if they also relinquish, the largest creditor, and if he also relinquishes, any other person; and either of those entitled, who do not claim the right within forty days from the time the death is known, is deemed to have relinquished. Curtis *v.* Williams, 33 Ala. 570; Curtis *v.* Burt, 34 Ala. 729; Forrester *v.* Forrester, 37 Ala. 398.]

court refused the motion, saying, that it would be to deprive the ordinary of his election in granting it to her, or the next of kin. (*k*)

administration may be granted to them both jointly or both separately:

The statute further directs the ordinary, in his discretion, to grant administration to *both* the widow and the next of kin; and it has been held that the grant may be to them both jointly, or both separately, by committing several administrations of several parts of the goods of the intestate. (*l*) Thus, in a case where a man died intestate, leaving a wife and brother, the ordinary granted the administration of some particular debts to the brother, and of the residue to the wife; and a *mandamus* was moved for, to *grant administration to the wife. But by the court: The ordinary may grant administration to the brother as to part, and to the wife for the rest; in which case neither can complain, since the ordinary need not have granted any part of the administration to the party complaining. But if the intestate leave a bond of 100*l.*, the ordinary cannot grant administration of 50*l.* to one person and 50*l.* to another, because this is an entire thing. (*m*)

the election of the court is in favor of the widow:

But the court prefers a sole to a joint administration, (*n*) and never forces a joint one. And in modern practice the election of the judge is in favor of the widow, under ordinary circumstances. (*o*) But the court has

(*k*) Anon. 1 Stra. 525.

(*l*) 1 Roll. Abr. tit. Exor. D. pl. 1, p. 908; 4 Burn E. L. 361, Phillimore's ed.

(*m*) Fawtry *v.* Fawtry, 1 Salk. 36; S. C. but not S. P. 1 Show. 351.

(*n*) Where a joint grant is made to the widow and one of the next of kin, all the other next of kin must consent that the grant shall be so made. In the Goods of Newbold, L. R. 1 P. & D. 285.

(*o*) Stretch *v.* Pynn, 1 Cas. temp. Lee, 30; Goddard *v.* Goddard, 3 Phillim. 638. See, also, Atkinson *v.* Barnard, 2 Phillim. 317. But administration of the effects of a domiciled Scotchman was lately granted to the brother (the next of kin of the deceased) without citing the widow, a similar grant having already been made in Scotland. In the Goods of Rogerson, 2 Curt. 656. [Where a widow releases or renounces her right to administer in favor of a particular person designated by her, she is bound by the renunciation only in case such person is appointed. McClellan's Appeal, 16 Penn. St. 110, 116. A renunciation by the widow gives her no right to nominate another person to the exclusion of the next of kin. Cobb *v.* Newcomb, 19 Pick. 337; M'Beth *v.* Hunt, 2 Strobh. 335. The right to administer is personal, and cannot be exercised by nominating a third person; Redfield L. & Pr. Sur. Cts. 159; Matter of Root, 5 N. Y. Leg. Obs. 449; Matter of Ward, 6 N. Y. Leg. Obs. 111; or by delegation; Georgetown College *v.* Brown, 34 Md. 450. See, as to the mode of renouncing administration, Arnold *v.* Sabin, 1 Cush. 525, 529; Genl. Sts. Mass. c. 94, s. 1, clause "First." As to the validity of an agreement to transfer the right to administer on an estate for a consideration, see Brown *v.* Stewart, 4 Md. Ch. 368; Bassett *v.* Miller, 8 Md. 548; Bowers *v.* Bowers, 26 Penn. St. 74.]

always held that administration may be granted to the next of kin, and the widow be set aside upon good cause; (*p*) for instance, if she has barred herself of all interest in her husband's personal estate by her marriage settlement, (*q*) or where she is a lunatic, (*r*) or where she has eloped from her husband, or cohabited in his lifetime with another man, (*s*) or has lived separate from her husband. (*t*) But the circumstance * of the wife having married again is no valid objection. (*u*) However, if the deceased left children, one of whom, supported by the rest, applies for administration, the second marriage *might* induce the court to prefer the child. (*x*)

a divorce according to foreign law allowed in a question of granting administration to a second wife:

Where the intestate had married a first wife in Denmark, both parties being domiciled there, from whom he was divorced by a contract of separation and other proceedings amounting to a divorce *a vinculo matrimonii* according to the Danish law, and then married a second wife; such second wife was allowed by the prerogative court to take out administration to the husband. (*y*)

wife divorced *a mensa et thoro*.

If a wife has been divorced *a mensa et thoro*, for adultery, on her part, she forfeits, it should seem, her right to the administration. (*z*)

Of the right of the next of kin:

It now becomes necessary to inquire, who are the "next and most lawful friends," and the "next of kin," entitled to the grant of the administration under the statutes.

Who are the next of kin en-

Lord Coke describes them to be, "the next of blood who

(*p*) See accord. In the Goods of Anderson, 3 Sw. & Tr. 489; [Thornton *v.* Winston, 4 Leigh, 152. In Kentucky, if the widow be a resident of another state, that will exclude her from administering. Radford *v.* Radford, 5 Dana, 156. So, if either the widow or any other party is evidently unsuitable to discharge the duties of the trust, they are not entitled thereto. Stearns *v.* Fiske, 18 Pick. 24.]

(*q*) Walker *v.* Carless, 2 Cas. temp. Lee, 560; [Maurer *v.* Maurer, 5 Md. 324.]

(*r*) In the Goods of Williams, 3 Hagg. 217; In the Goods of Dunn, 5 Notes of Cas. 97. See, however, Alford *v.* Alford, Dea. & Sw. 322, where Sir J. Dodson held the committee of a lunatic widow entitled preferably, as the widow herself would be, unless good cause is shown by the next of kin.

(*s*) Fleming *v.* Pelham, 3 Hagg. 217, note (*b*); Conyers *v.* Kitson, 3 Hagg. 556.

(*t*) Lambell *v.* Lambell, 3 Hagg. 568. See Chappell *v.* Chappell, 3 Curt. 429; [Odiorne's Appeal, 54 Penn. St. 175. But see Nusz *v.* Grove, 27 Md. 391.]

(*u*) Webb *v.* Needham, 1 Add. 494.

(*x*) Webb *v.* Needham, 1 Add. 496.

(*y*) Ryan *v.* Ryan, 2 Phillim. 332.

(*z*) Pettifer *v.* James, Bunbury, 16; In the Goods of Davies, 2 Curt. 628.

are not attainted of treason, felony, or have any other lawful disability." (*a*)

titled to administration under the statutes.

It may here be observed, that it is an established principle in the ecclesiastical court, that the right to the administration of the effects of an intestate follows the right to the property in them. (*b*) Whence it seems to follow, that all the cases which have decided what persons are next of kin so as to be entitled to a share of the intestate's personal estate under the statute of distribution, are authorities upon the question as to what parties are next of kin so as to be entitled to administration under the statutes of administration.

* It has been laid down, that the statute of distribution must be construed according to the common law. (*c*) Nevertheless the more modern cases seem to have fully established, that its construction, as to the proximity of degrees of kindred at least, shall be according to the rules of the civil law. (*d*)

Definition of consanguinity.

Consanguinity, or kindred, is defined by the writers on these subjects to be "*vinculum personarum ab eodem stipite descendentium*," the connection or relation of persons descended from the same stock or common ancestor. (*e*) This consanguinity is either lineal or collateral.

Lineal consanguinity.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between the propositus in the accompanying table of consanguinity, (*e*[1]) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between the propositus and his son, grandson, great-grandson, and so

(*a*) Hensloe's case, 9 Co. 39 *b*.

(*b*) By Sir John Nicholl, In the Goods of Gill, 1 Hagg. 342. [The right to administration is predicated upon the ground of interest in the estate, either as an heir, legatee, next of kin, or creditor. Ellmaker's Estate, 4 Watts, 34, 37; Chapman C. J. in Hall *v.* Thayer, 105 Mass. 219, 224; Sweezey *v.* Willis, 1 Bradf. Sur. 495; Redfield L. & Pr. Sur. Cts. 159–161; Leverett *v.* Dismukes, 10 Geo. 98; Bieber's Appeal, 11 Penn. St. 157; *post*, 462; Thornton *v.* Winston, 4 Leigh, 152. Administration should not be granted to one whose interests are adverse to those of the estate. Estate of Horn, 6 Phil. (Pa.) 87. Objection cannot be taken by a stranger to the grant of administration, on the ground that there are other persons whom the law prefers. Burton *v.* Waples, 4 Harring. 73.]

(*c*) Blackborough *v.* Davis, 1 P. Wms. 50; S. C. 12 Mod. 616.

(*d*) Mentney *v.* Petty, Prec. Chanc. 594; Thomas *v.* Ketteriche, 1 Ves. sen. 333; Lloyd *v.* Tench, 2 Ves. sen. 214; Wallis *v.* Hodgson, 2 Atk. 117; Lock *v.* Lake, 2 Cas. temp. Lee, 420; 4 Burn E. L. 543, Phillimore's ed.

(*e*) 2 Bl. Com. 203.

(*e*[1]) [This table will be found at the end of the work.]

downwards in the descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards. The father of the propositus is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only natural way of reckoning the degrees in the direct line; and therefore universally obtains, as well in the civil and canon as in the common law. This lineal consanguinity, it may be observed, falls strictly within the definition of *vinculum personarum ab eodem stipite descendentium;* since lineal relations are such as descend one from the other, and both of course from the same common ancestor. (*f*)

Collateral consanguinity.

* Collateral kindred answers to the same description; collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such, then, as literally spring from one and the same ancestor who is the *stirps*, or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles has two sons, who have each a numerous issue; both these issue are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos.* (*g*)

It must be carefully remembered, that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus, Titius and his brother are related; why? because both are derived from one father. Titius and his first cousin are related; why? because both are descended from the same grandfather; and his second cousin's claim to consanguinity is this: that they are both derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by Holy Writ that there is one couple of ancestors belonging to us all from whom the whole race of mankind is descended, the obvious and undeniable consequence is, that all men are in some degree related to each other. (*h*)

(*f*) 2 Bl. Com. 203.
(*g*) 2 Bl. Com. 204.
(*h*) 2 Bl. Com. 205.

Mode of calculating degrees of consanguinity in the collateral line.

The mode of calculating the degrees in the collateral line for the purpose of ascertaining who are the next of kin, so as to be entitled to administration, conforms, as it has been above observed, to that of the civil law, and is as follows: to count upwards from either of the parties related to the common stock, and then downwards again to the other, * reckoning a degree for each person, both ascending and descending; (*i*) or, in other words, to take the sum of the degrees in both lines to the common ancestor. (*k*)

In the annexed table of consanguinity (*k*[1]) the degrees are computed as far as the sixth. It may be useful to apply some examples from it to the rule of calculation above laid down. The propositus and his cousin-german will be found designated in the table as related in the fourth degree; because, following the rule of computation, from the propositus ascending to his father, is one degree; from him to the common ancestor, the grandfather, two; then, descending from the grandfather to the uncle, three; and from the uncle to the cousin-german, four. Again, the second cousin of the propositus will be found described in the table as related in the sixth degree; because, from the propositus, ascending to his father is one degree; from his father to his grandfather,

(*i*) 2 Bl. Com. 207; Mentney *v.* Petty, Prec. Chanc. 593; Toller, 88.

(*k*) Ib. and Mr. Christian's note to 2 Black. 207. According to the canon law, the mode of computation is to begin at the common ancestor, and reckon downwards, and in whatsoever degree the two persons, or the more remote of them, is distant from the common ancestor, that is the degree in which they are related to each other. It is obvious that the degrees by this calculation are fewer than by the mode of the civilians. And Sir J. Jekyl, in Prec. Chanc. 593, and Lord Hardwicke, in 1 Ves. sen. 335, attribute the establishment of the mode of canonists to this circumstance; inasmuch as the nearer they brought the relation, the greater was their trade of dispensations of marriage. [" The distribution of personal property of intestates in the United States has undergone considerable modifications. In many of them the English statute of distributions as to personal property is pretty closely followed. In a majority of the states the descent of real and personal property is to the same persons and in the same proportions, and the regulation is the same in substance as the English statute of distributions, with the exception of the widow, as to the real estate, who takes one third for life only, as dower. The half blood take equally with the whole blood, as they do under the English statute of distributions. Such a uniform rule in the descent of real and personal property gives simplicity and symmetry to the whole doctrine of descent. The English statute of distributions, being founded in justice and on the wisdom of ages, and fully and profoundly illustrated by a series of judicial decisions, was well selected as the most suitable and judicious basis on which to establish our American law of descent and distribution." 2 Kent, 426–428, and the notes.]

(*k*[1]) [This table will be found at the end of the work.]

two; from his grandfather to his great-grandfather, the common ancestor, three; then, descending, from the great-grandfather to the great-uncle of the propositus, four; from the great-uncle to the great-uncle's son, five; from his great-uncle's son to his second cousin, six. It will be observed that kindred are found distant from the propositus by an equal number of degrees, although they are relations to him of very different denominations. Thus, a granddaughter of the sister, and a daughter of the intestate's * aunt (*i. e.* a great-niece and a first cousin), are in equal degree, being each four degrees removed. (*l*)

In the further consideration of this mode of computing proximity of kindred, and the rights to administration derived from it, several remarkable distinctions may be observed, with reference to the corresponding rules of the common law respecting succession to inheritances.

1st. Relations by the father's side and the mother's side are in equal degree of kindred; and, therefore, equally entitled to administration; for, in this respect, dignity of blood gives no preference. (*m*) Hence it may happen that relations are distant from the intestate by an equal number of degrees, and equally entitled to the administration of his effects, who are no relations at all to each other.

Relations by mother's side equally entitled with those of father's.

2dly. The half blood is admitted to administration as well as the whole; (*n*) for they are kindred of the intestate, and have been excluded from the inheritance of land only on feudal reasons. Therefore, the brother of the half blood shall exclude the uncle of the whole blood; (*o*) and the ordinary *may* grant administration to the sister of the half or the brother of the whole blood, at his discretion. (*p*)

Half blood not excluded.

(*l*) Thomas *v.* Ketteriche, 1 Ves. sen. 333; Thirt *v.* Robinson, cited Ambl. 192. So a first cousin twice removed is in the same degree as a second cousin; for they are both in the sixth degree of consanguinity. Silcox *v.* Bell, 1 Sim. & Stu. 301; Lock *v.* Lake, 2 Cas. temp. Lee, 421.

(*m*) Moor *v.* Barham, cited in Blackborough *v.* Davis, 1 P. Wms. 53.

(*n*) Smith *v.* Tracy, 1 Ventr. 323; S. C. 1 Freem. 294; T. Jones, 93; 2 Lev. 173; 1 Mod. 209; 2 Mod. 204; 3 Keb. 601, 620, 669, 730, 776, 806, 831; Collingwood *v.* Pace, 1 Vent. 424; Lord Winchelsea *v.* Norcliffe, 1 Vern. 437; S. C. 2 Freem. 95; Brown *v.* Farndell, Carth. 51; Anon. 2 Vent. 317; Janson *v.* Bury, Bunb. 158; Croke *v.* Watts, 2 Freem. 112; Watts *v.* Crooke, Show. P. C. 108; Burnet *v.* Mann, 1 Ves. sen. 155; [*ante*, 421, note (*k*).]

(*o*) Collingwood *v.* Pace, 1 Ventr. 424.

(*p*) Brown *v.* Wood, Aleyn, 36; S. C. Style, 74; 2 Bl. Com. 505. But see *post*, 426.

3dly. As younger children must stand in the same degree of kindred as the eldest, primogeniture can give no *right* to preference in the grant of administration. (*q*)

Primogeniture gives no *right* to preference.

* 4thly. The right to administration will follow the proximity of kindred, though ascendant; and, therefore, when a child dies intestate, without wife or child, leaving a father, the father is entitled to the administration of the personal effects of the intestate as next of kin, exclusive of all others. (*r*) Indeed, anciently, that is, in the reign of Henry 1, a surviving father could have taken even the real estate of his deceased child. (*s*) But this law of succession was altered soon afterwards; for we find by Glanville, that in the time of King Henry 2, the father could not take the real estate of his deceased child, the inheritance being then carried over to the collateral line. And it was subsequently held an inviolable maxim, that an inheritance could not ascend. But this alteration of the law never extended to personal estate. (*t*) So with respect to the mother, if a child dies intestate without a wife, child, or father, the mother is entitled to administration; (*u*) and before the statute of 1 Jac. 2, c. 17, she could claim as next of kin the whole personal estate; but by that statute, every brother and sister shall have an equal share with her. (*v*) Again, if a man dies intestate, leaving no nearer relations than a grandfather or grandmother, and an uncle or aunt, the grandfather or grandmother, being in the second degree, though ascendant, will be entitled to administration to the exclusion of the uncle or aunt, who are related only in the third degree. (*x*) So a great-grandmother is equally entitled as an aunt. (*y*)

The right of ascendants:

of the father:

of the mother:

grandfather preferred to the uncle.

* However, though the ecclesiastical law of England acknowl-

(*q*) Warwick *v.* Greville, 1 Phillim. 124; but see *post*, 427.

(*r*) Ratcliffe's case, 3 Co. 40 *a*; Collingwood *v.* Pace, 1 Ventr. 414; Blackborough *v.* Davis, 1 P. Wms. 51.

(*s*) Blackborough *v.* Davis, 1 P. Wms. 50.

(*t*) 1 P. Wms. 51. And now, by stat. 3 & 4 W. 4, c. 106, s. 6, every lineal ancestor shall be capable of being heir to any of his issue.

(*u*) Ratcliffe's case, 3 Co. 40 *a*, where the well-known case of the Duchess of Suffolk, Bro. Admor. pl. 47, was denied. S. P. Collingwood *v.* Pace, 1 Ventr. 424, by Hale C. B.

(*v*) See *infra*, pt. III. bk. IV. ch. I. § IV.

(*x*) Mentney *v.* Petty, Prec. Chanc. 593; Blackborough *v.* Davis, 1 P. Wms. 41; S. C. 1 Ld. Raym. 686; Woodroof *v.* Winkworth, Prec. Chanc. 527.

(*y*) Burton *v.* Sharp, cited in 1 Ld. Raym. 686; 1 P. Wms. 45; S. C. but differently reported as to the facts; Lutw. 1055; Lloyd *v.* Tench, 2 Ves. sen. 215, by Strange M. R.

edges the rights of ascendants generally, yet it does not recognize them to the extent of the civil law, according to which, ascendants, of whatever degree, shall be preferred before all collaterals, except in the case of brothers and sisters. But our law prefers the next of kin, though collateral, before one, who, though lineal, is more remote. (*z*)

Females equally entitled with males, at the discretion of the court.

5thly. With respect to the right to administration, those in equal degree are equally entitled, subject to the discretionary election of the court, whether males or females. (*a*) The preference of males to females, which exists in the succession of inheritances, seems to have arisen entirely from the feudal law; and has never been applied to rights respecting personal estate. (*b*)

Exceptions in our law to the rules of proximity of blood:

It remains to notice certain exceptions to the rule of computation, above stated, of the proximity of kindred and consequent right to administration.

Children of intestate preferred to his parents:

1st. The parents of an intestate are as near akin to him as his children; for they are both in the first degree, but in our law children are allowed the preference, (*c*) and so are their lineal descendants to the remotest degree. (*d*)

brother to grandfather.

2d. Where the nearest relations, according to the above computation, are a grandfather or grandmother, and brothers or sisters of the intestate, although these are all related in the second degree, yet the latter are entitled to the administration to the exclusion of the former. (*e*)

(*z*) 1 P. Wms. 51, by Lord Holt, Stanley *v.* Stanley, 1 Atk. 458, by Lord Hardwicke.

(*a*) Brown *v.* Wood, Aleyn, 36; S. C. Style, 74.

(*b*) But see *post*, 427; [McClellan's Appeal, 16 Penn. St. 115; *ante*, 416, note (*j*); Sarkie's Appeal, 2 Penn. St. 159. Under the statute of New York, males are preferred to females, and unmarried women to such as are married. 2 R. S. 74, § 28. The preference of a *feme sole* to a married woman was applied to a case where an intestate left two daughters, one of whom was married and the other not, in Smith *v.* Young, 5 Gill, 197. In some states where a *feme sole* administratrix marries, her office ceases and goes into the hands of her husband. See Pistole *v.* Street, 5 Port. 64; Ferguson *v.* Collins, 3 Eng. 241; Kavanaugh *v.* Thompson, 16 Ala. 817.]

(*c*) 2 Bl. Com. 504. But by this preference it is not to be understood that they are not considered as perfectly equal in degree of proximity. Withy *v.* Mangles, 4 Beav. 358; S. C. in Dom. Proc. 10 Cl. & Fin. 215.

(*d*) Carter *v.* Crawley, Sir T. Raym. 500; Evelyn *v.* Evelyn, Ambl. 192.

(*e*) Evelyn *v.* Evelyn, 3 Atk. 762; S. C. Ambl. 191; Winchelsea *v.* Norcliff, 2 Freem. 95; S. C. 1 Vern. 403; 2 Chanc. Rep. 374, 376; Blackborough *v.* Davis, 1 P. Wms. 45.

* To recapitulate, in the first place the children, and their lineal descendants to the remotest degree; and on failure of children, the parents of the deceased are entitled to the administration; then follow brothers and sisters, then grandfathers and grandmothers, then uncles or nephews, great-grandfathers and great-grandmothers, and lastly cousins. (*f*)

Recapitulation.

A more particular discussion of some parts of the present subject will be found in a subsequent part of this treatise, where the rights of the next of kin of an intestate, under the statute of distributions, are considered. (*g*)

If the next of kin is a married woman, and renounces, the grant is made to the husband; for he has an interest, and the grant must follow the interest, and the wife cannot, by renouncing, deprive her husband of his right to the grant. (*h*)

Right of husband of next of kin who renounces.

Where two parties contest the right to administration before any grant has been made, both are to propound their interests, and to proceed *pari passu;* and this whether the mutual interests are denied, or whether an interest is denied and a will opposed: nor does the rule vary, whether the asserted next of kin are in the same or different degrees of relationship. (*i*) In Waller *v.* Heseltine, (*k*) the prerogative court decided that the question concerning a will and the question of interest between the crown and the next of kin, must all go on together.

Parties contesting the right to administration before any grant, must proceed *pari passu.*

Where there are several persons standing in the same degree of kindred to the intestate, the statute, we have seen, gives the ordinary his election to accept any one or more of such persons. (*l*) It remains to inquire * by

Where there are several next of kin in equal degree:

(*f*) 2 Bl. Com. 505.

(*g*) *Post,* pt. III. bk. IV. ch. I. § IV.

(*h*) Haynes *v.* Matthews, 1 Sw. & Tr. 460. [See Leverett *v.* Dismukes, 10 Geo. 98. But the husband of an heir-at-law is not entitled as a matter of right to administration *cum testamento annexo* upon the estate of the ancestor. If he stand in the position of a litigant against the interests of the heirs and legatees of the estate, it would be improper to grant letters to him. Ellmaker's Estate, 4 Watts, 34.]

(*i*) Dabbs *v.* Chisman, 1 Phillim. 159. It is otherwise when a party is in the possession of the administration. See *post,* 440, note (*i*).

(*k*) Cited by Sir John Nicholl in 1 Phillim. 159; reported 1 Phillim. 170.

(*l*) By rule P. R. (Non-contentious Business) No. 28, "Where administra-

what principles and rules of practice his discretion, in making such election, has been guided in the ecclesiastical court.

The court have considered it their first duty, to place the administration in the hands of that person who is likely best to convert it to the advantage of those who have claims either in paying the creditors, or in making distribution; the primary object being the interest of the estate. (*m*) But where there is no material objection on one hand, or reasons for preference on the other, the court, in its discretion, puts the administration into the hands of that person, amongst those of the same degree of kindred, with whom the majority of parties interested are desirous of intrusting the estate. (*n*) On this principle, in a case as early as 1678, (*o*) it was decided by the two chief justices, the chief baron *et aliis*, that, where the deceased left four grandchildren, whereof one was of age and the other three minors, the administration should be granted to the mother as guardian to the three *durante minore ætate*, in preference to the grandchild who was of age; because, since the new statute (22 & 23 Car. 2, c. 10), which entitled them all to distribution, the interest of the three preponderated.

the court grants administration to him whom the majority of parties interested desire:

tion is applied for by one or some of the next of kin only, there being another or other next of kin equally entitled thereto, the registrars may require proof by affidavit or statutory declaration that notice of such application has been given to such other next of kin."

(*m*) Warwick *v.* Greville, 1 Phillim. 125; [Moore *v.* Moore, 1 Dev. (N. Car.) 352; Taylor *v.* Delaneey, 2 Caines Cas. 143; Atkins *v.* McCormiek, 4 Jones (Law), 274; Shomo's Appeal, 57 Penn. St. 356.]

(*n*) Elwes *v.* Elwes, 2 Cas. temp. Lee, 573; Budd *v.* Silver, 2 Phillim. 115; Williams *v.* Wilkins, Ib. 101; Warwick *v.* Greville, 1 Phillim. 123; Coppin *v.* Dillon, 4 Hagg. 376; [Mandeville *v.* Mandeville, 35 Geo. 243.] However, administration is not always granted to the majority of interests. Wetdrill *v.* Wright, 2 Phillim. 248. See, also, In the Goods of Stainton, L. R. 2 P. & D. 212. [But a register, in granting letters of administration, is bound to respect the nomination of the next of kin, when they decline to exercise their right to administer. Ellmaker's Estate, 4 Watts, 34. But see *ante*, 417, note (*o*). So in making choice among the next of kin, great respect is paid to the recommendation of those persons who have the most interest in the assets, on the reasonable presumption, that those who have the greatest interest to increase the estate, are most fit to advise as to the administration. Rogers J. in McClellan's Appeal, 16 Penn. St. 110, 115; M'Beth *v.* Hunt, 2 Strobh. 335. And so, one of several next of kin in equal degree who has the greatest interest, has been held entitled to administration. Horskins *v.* Morel, T. U. P. Charlt. 69. A devisee under the will has preference to the next of kin, who has no beneficial interest in the estate. Jordan *v.* Ball, 44 Miss. 194.]

(*o*) Cartwright's case, 1 Freem. 258. See, also, Sawbridge *v.* Hill, L. R. 2 P. & D. 219.

whole blood preferred, unless material objections can be proved:

But, although, when the contest for an administration is between two persons in equal degree of the whole blood, the general rule has been to grant it to that person in whom * the majority of those entitled to distribution concur; yet that rule does not hold when the contest is between one of the whole blood and one of the half blood; for in that case, the whole blood is preferable in the grant of administration to the half blood, though the majority of interests concur in the latter, unless material objections can be proved against him of the whole blood. (*p*)

primogeniture:

Primogeniture, as it has been already observed, gives no right to preference, so as to weigh against the wish of the majority of interests; yet if things are precisely equal, — if the scale is exactly poised, being the elder brother would incline the balance. (*q*)

son preferred to daughter:

Again, by the practice of the court, a son has the preference to a daughter, (q^1) unless there are material objections to him. (q^2) And it has been held not enough to divest him of that preference, to show that he has intermeddled with the effects of the deceased without competent authority. (*r*)

a man used to business preferred:

Cæteris paribus, a man accustomed to business is preferred by the court to be administrator. (*s*)

next of kin also creditor:

The fact of one of several next of kin being also a creditor is rather adverse to, than in favor of, his being preferred in a contest for the administration. (*t*)

In a case where the administration was contested between two

(*p*) Mercer *v.* Moorland, 2 Cas. temp. Lee, 499; Stratton *v.* Linton, 31 L. J., P. M. & A. 48. [Under the New York law, relatives of the whole blood are preferred to those of the half blood. 2 R. S. 74, § 28.]

(*q*) Warwick *v.* Greville, 1 Phillim. 125; S. P. as to an elder of two sisters, Coppin *v.* Dillon, 4 Hagg. 376.

(q^1) [See *ante*, 416, note (*j*); Rogers J. in McClellan's Appeal, 16 Penn. St. 115; Sargent J. in Sarkie's Appeal, 2 Penn. St. 159.]

(q^2) [In New York, male relatives of the deceased, being minors and not residing in the state, have not a right to be appointed administrators in preference to adult females related in the same degree and residing in the state. Wickwire *v.* Chapman, 15 Barb. 302.]

(*r*) Chittenden *v.* Knight, 2 Cas. temp. Lee, 559. The rules that males are to be preferred to females is not so stringent as the rule that the grant will follow the majority of interests. Iredale *v.* Ford, 1 Sw. & Tr. 305. Again, the former rule may be met by another rule, viz, that the grant will be made *priori petenti*. Cordeux *v.* Trasler, 34 L. J. N. S., P. M. & A. 127; S. C. 29 Jur. N. S. 587.

(*s*) Williams *v.* Wilkins, 2 Phillim. 100.

(*t*) Webb *v.* Needham, 1 Add. 494.

in an equal degree of relationship, one of whom was unobjectionable, but the other had been twice a bankrupt, * the court granted the administration to the former, and condemned the latter in costs. (*u*)

next of kin a bankrupt.

The court prefers a sole to a joint administration: and never forces a joint administration.

The court prefers *cæteris paribus*, a sole to a joint administration, because it is much better for the estate, and more convenient for the claimants on it, since the administrators must join and be joined in every act; (*x*) and, *à fortiori*, the court never forces a joint administration upon unwilling parties. (*y*)

When an administrator is once appointed, another of same degree of kindred cannot come into the administration till the administrator is dead.

When administration has been once committed to any of the next of kin, others, even in the same degree of kindred, have, during the life of the administrator, no title to a similar grant; so different is this case from that of an executor, who has a right to probate, though it has been already taken out by his co-executor. The maxim, "*qui prior est tempore potior est jure*," applies in the former but not in the latter instance. (*z*) But a next of kin who has even renounced may, upon the death of the party appointed administrator, come in and take administration *de bonis non*. (*a*)

Where a party entitled to administration is resident abroad.

Where a person entitled to administration is resident in a foreign country, the court will expect that due diligence shall be used to give him notice of the application, before it will grant administration to another party. Thus where the intestate died in the department of Oise in France, leaving a widow resident there, and application was made for administration * by the next of kin, the court held

(*u*) Bell *v.* Timiswood, 2 Phillim. 22.

(*x*) 1 Phillim. 126; Stanley *v.* Bernes, 1 Hagg. 222; In the Goods of Nayler, 2 Robert. 409; *ante*, 412, note (*q*); but see, *contra*, Jacomb *v.* Harwood, 2 Ves. sen. 267, 268; *post*, pt. III. bk. I. ch. II.

(*y*) Leggatt *v.* Leggatt, 1 Cas. temp. Lee, 348; Bell *v.* Timiswood, 2 Phillim. 22; Dampier *v.* Colson, 2 Phillim. 55; Coppin *v.* Dillon, 4 Hagg. 376; Coe *v.* Hume, 4 Hagg. 398. [But the probate court has power to appoint an additional administrator against the protest of one already appointed. Read *v.* Howe, 13 Iowa, 50.] It is contrary to the ordinary practice of the prerogative court of Canterbury to join more than three in an administration; but where five residuary legatees had been admitted joint administrators by the court of York, the *Forum Domicilii*, a limited administration was also granted to the same parties by the former court. In the Goods of Blakelock, 1 Hagg. 682.

(*z*) Toller, 98.

(*a*) Skeffington *v.* White, 1 Hagg. 700, 702, 703; 2 Hagg. 626.

that service of the decree in the usual manner on the Royal Exchange was insufficient. (*b*)

Administration of property out of this country.

If the intestate left personal property, as well in the colonies as in this country, the grant of administration obtained here will not extend to the colonies, though the intestate died and was resident here. (*c*) So a defendant who had been arrested in Ireland, by a writ of *ne exeat regno* issued out of chancery there, for a debt due to an intestate, was discharged, on the ground that the plaintiff had not obtained administration in that country. (*d*)

Administration of the effects of a foreigner.

In the case of a foreigner dying intestate within the British dominions, it should seem, that if no question is raised, the court will grant administration to the person entitled to the effects of the deceased, according to the law of his own country. (*e*) If the legal title be disputed, the question will depend on the fact whether the deceased was domiciled within the British dominions, or only a temporary resident there. (*f*)

Administration to a person domiciled out of this

* If the intestate was domiciled in a foreign country, or within the king's dominions out of England, and left assets in this country, administration must be taken out here, as well as in the country of domicil. (*g*) But if he left no

(*b*) Goddard *v.* Cressonier, 3 Phillim. 637. The same, where the next of kin is resident in the West Indies. Miller *v.* Washington, 3 Hagg. 277. See *post*, 441.

(*c*) Burn *v.* Cole, Ambl. 416; Atkins *v.* Smith, 2 Atk. 63, by Lord Hardwicke; [Trecothick *v.* Austin, 4 Mason, 33.] But the rights of such an administrator will extend to the property there, if the deceased was domiciled here; and the judge of probate in the colonies ought to follow the English grant. See *ante*, 365.

(*d*) Swift *v.* Swift, 1 Ball & Beat. 326.

(*e*) In the Goods of Beggia, 1 Add. 340; In the Goods of the Countess Da Cunha, 1 Hagg. 237. Administration of the effects of a deceased, who died domiciled in Scotland, was granted to a party entitled to them according to the Scotch law, on proof of the law by affidavit from a Scotch solicitor. In the Goods of Stewart, 1 Curt. 904. See, also, In the Goods of Rogerson, 2 Curt. 656; In the Goods of Hill, L. R. 2 P. & D. 89. The regular course seems to be that the ambassador should certify the law of the country he represents. In the Goods of Dormoy, 3 Hagg. 767.

(*f*) 1 Add. 342; and see *ante*, 366 *et seq.* and *infra*, pt. III. bk. IV. ch. I. § V. Where a party applies for administration, as the agent of a foreigner resident abroad, and entitled to administration, the application cannot be supported, without exhibiting to the court a proper authority from the person so entitled. In the Goods of the Elector of Hesse, 1 Hagg. 93.

(*g*) See *ante*, 361, 362; Le Briton *v.* Le Quesne, 2 Cas. temp. Lee, 261; Attorney General *v.* Bouwens, 4 M. & W. 193; [Pinney *v.* McGregory, 102 Mass. 186, 189–193; Taylor *v.* Barron, 35 N. H. 494–497. The administration granted in the

country of property here.

assets in this country, the court of probate has no jurisdiction to make any grant of administration is respect of his estate. (*h*) If the party applying for administration here has already obtained a grant in the proper court of the country where the domicil was, it should seem that the court here, generally speaking, would follow that grant. (*i*) But if an original administration be applied for here, in such case, whether the deceased were a British subject, or an alien, since, in either event, the distribution of his personal property is to be regulated according to

country of the domicil of the deceased is the principal administration, and that granted in any other country is merely ancillary to it. Stevens *v.* Gaylord, 11 Mass. 256; Fay *v.* Haven, 3 Met. 109, 114; Clark *v.* Clement, 33 N. H. 567; Merrill *v.* New England Mut. Life Ins. Co. 103 Mass. 245, 248; Dawes *v.* Boylston, 9 Mass. 337; Green *v.* Rugely, 23 Texas, 539; Spraddling *v.* Pippin, 15 Missou. 118; Childress *v.* Bennett, 10 Ala. 751; Adams *v.* Adams, 11 B. Mon. 77; Perkins *v.* Stone, 18 Conn. 270; Collins *v.* Bankhead, 1 Strobh. (S. Car.) 25; *post*, 1663, note (*h*[1]), 1664, note (*l*[1]). It is not essential that administration should be taken in the place of the domicil of the deceased before an administrator is appointed in another state or country where administration is necessary. Stevens *v.* Gaylord, 11 Mass. 256; Bowdoin *v.* Holland, 10 Cush. 17; Pinney *v.* McGregory, 102 Mass. 192, 193. So it is not necessary that the will of a non-resident testator should be proved in the state of his domicil, before granting administration upon estate left by him in another state. Bowdoin *v.* Holland, 10 Cush. 17; *ante*, 361, note (*p*); Shephard *v.* Rhodes, 60 Ill. 301. Administration granted in one state on property there situated of a resident of another state, is not impaired or abridged by previous grant of administration in such other state. Henderson *v.* Clarke, 4 Litt. (Ky.) 277; Crosby *v.* Gilchrist, 7 Dana, 206; Pond *v.* Makepeace, 2 Met. 114; Moore *v.* Farmer, 5 T. B. Mon. 42. It was held in Illinois that a citizen of another state, in which an intestate died leaving estate upon which administration was granted in the state of his domicil, and also real estate in Illinois, might cause administration to be taken out in Illinois, a claim to be allowed, and the real estate to be sold for its payment; and that it was not necessary to show that the personal estate of the intestate in such other state was exhausted. Rosenthal *v.* Remick, 44 Ill. 202.]

(*h*) In the Goods of Tucker, 3 Sw. & Tr. 585; Evans *v.* Burrell, 28 L. J., P. M. & A. 82; In the Goods of Fittock, 32 L. J., P. M. & A. 157; In the Goods of Coode, L. R. 1 P. & D. 449; [Miller *v.* Jones, 26 Ala. 247; Crosby *v.* Leavitt, 4 Allen, 410; Grimes *v.* Talbert, 14 Md. 169; Thumb *v.* Gresham, 2 Metc. (Ky.) 306; Boughton *v.* Bradley, 34 Ala. 694; Henderson *v.* Clarke, 4 Litt. (Ky.) 277; Jeffersonville R. R. Co. *v.* Swayne, 26 Ind. 477. But in Alabama it is only when the intestate resides out of the state that the existence of assets within the state is necessary to give the probate court jurisdiction to appoint an administrator. Watson *v.* Collins, 37 Ala. 587; S. C. 1 Ala. Sel. Cas. 515. See Pinney *v.* McGregory, 102 Mass. 186; Estate of Harlan, 24 Cal. 182; *ante*, 291, note (*o*[1]).]

(*i*) See *ante*, 362, 369, 370; Viesca *v.* D'Aramburn, 2 Curt. 277; In the Goods of Rogerson, 2 Curt. 656; In the Goods of Henderson, 2 Robert. 144. As to whether the court will grant administration limited to the pendency of a suit in the foreign court, to a person duly appointed by that court, see In the Goods of Morgan, 2 Robert. 415.

the law of the country in which he was a domiciled inhabitant at the time of his death, (*k*) it appears to be a necessary consequence that the grant should be made to the person entitled to the effects of the deceased according to the law of that country. (*l*)

* By stat. 24 & 25 Vict. c. 121, s. 4, "Whenever a convention shall be made between her majesty and any foreign state, whereby her majesty's consuls or vice consuls in such foreign state shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her majesty by order in council to direct, and from and after the publication of such order in the London Gazette, it shall be and is hereby enacted, that whenever any subject of such foreign state shall die within the dominions of her majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice consul, or consular agent of such foreign state, within that part of her majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice consul, or consular agent shall immediately apply for and shall be entitled to obtain from the proper court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such court shall seem fit."

Stat. 24 & 25 Vict. c. 121. When subjects of foreign states shall die in her majesty's dominions and there shall be no person to administer to their estates the consuls of such foreign states may administer.

(*k*) See *post*, pt. III. bk. IV. ch. I. § V.

(*l*) See In the Goods of Johnston, 4 Hagg. 182. But see, also, In the Goods of Veiga, 3 Sw. & Tr. 13. But administration of the effects of a domiciled American dying in this country, *in itinere* limited to the purpose of paying his debts, &c. and transmitting the balance to the treasury of the United States, was refused to the American consul, the crown opposing the grant, though none of the next of kin appeared to show cause against it. Aspinwall *v.* The Queen's Proctor, 2 Curt. 241. See In the Goods of Wyckoff, 3 Sw. & Tr. 20. The law of this country will not, it should seem, recognize the right of a foreign consul to take possession of the property of a foreigner dying here, *in itinere*, domiciled in his own country. 2 Curt. 247. See stat. 24 & 25 Vict. c. 131, s. 4, *supra*. [A citizen of Virginia started, with his family and effects, to settle in Kentucky, and died on the route, in Virginia. His family continued the journey with the property to Kentucky, where they settled. No part of his property was in Kentucky at the time of his death; it was held that the county court of the county where the family located had jurisdiction to grant administration. Burnett *v.* Meadows, 7 B. Mon. 277. See Briggs *v.* Rochester, 16 Gray, 337.]

Rights and liabilities of foreign administrators.

It may here be remarked, that although it is fully settled (as there will hereafter be occasion to show), (*m*) that the right of succession to the personal estate of an intestate is to be regulated by the law of the country in which he was domiciled at the time of his death, yet the administration of the estate must be in the country in which possession of it is taken and held under lawful authority. (*m*[1]) Thus, by the law of England, the person to whom administration is granted by the court of probate is by statute bound to administer the estate, and to pay the debts of the deceased. (*m*[2]) The letters of * administration, under which he acts, direct him to do so, and he takes an oath that he will well and truly administer all and every the goods of the deceased and pay his debts so far as his goods will extend, and exhibit a full and true account of his administration. And these duties remain the same, notwithstanding the intestate may have died domiciled elsewhere. Accordingly, in Preston *v.* Lord Melville, (*n*) the persons named as trustees and executors in the will of a domiciled Scotchman having declined to act, his next of kin obtained letters of administration of his personal estate in England from the proper ecclesiastical court there, and afterwards consented to the appointment, by the court of session of Scotland, of other persons as trustees and executors in place of those named in the will, with all the powers that had been thereby given to them. These trustees so appointed raised an action in the court of session against the administratrix, calling on her to transfer to them the personal estate possessed by her under the administration, and offering her a full release from liability; and it was held by the house of lords (reversing the decree of the court of session), that the personal estate in England must

(*m*) *Post*, pt. III. bk. IV. ch. I. § V.

(*m*[1]) [See Burbank *v.* Payne, 17 La. Ann. 15; Clark *v.* Clement, 33 N. H. 563; Banta *v.* Moore, 2 McCarter (N. J.), 97; Fay *v.* Haven, 3 Met. 109. In Norton *v.* Palmer, 7 Cush. 523, 524, Bigelow J. said: "It is a well settled rule of law in this commonwealth, that an executor or administrator duly appointed under the authority and jurisdiction of another state or country, acquires a good title to the personal property and assets of his testator or intestate, which are there found, and which come to his hands by virtue of such appointment, and that he is to be held accountable therefor only in the legal tribunals of the state or country under which he holds his office. Boston *v.* Boylston, 2 Mass. 384; Stevens *v.* Gaylord, 11 Mass. 256; Campbell *v.* Sheldon, 13 Pick. 23; Fay *v.* Haven, 3 Met. 114."]

(*m*[2]) [See *post*, pt. IV. bk. I. ch. I.]

(*n*) 8 Cl. & Fin. 1.

be administered there by the administratrix, by virtue of the letters of administration. (*o*)

Again, with respect to all the property of which the intestate died possessed in the queen's dominions out of England, the administrator, under the letters granted there, has, it should seem, a right to hold it against an administrator under a grant obtained in this country. (*o*[1]) Thus, in Currie *v.* Bircham, (*p*) the widow of an officer who died intestate in India obtained letters of adminis-

(*o*) See accord. per Lord Cranworth in Enohin *v.* Wylie, 10 H. L. Cas. 19. See, also, Lord St. Leonard's observations on this case in the Carron Iron Company *v.* Maclaren, 5 H. L. Cas. 456.

(*o*[1]) [But see *ante*, 362, notes. It has been held that the administrator appointed in one state has no power over property in another state; Morrell *v.* Dickey, 1 John. Ch. 153; Doolittle *v.* Lewis, 7 John. Ch. 45; Goodwin *v.* Jones, 3 Mass. 514; Smith *v.* Guild, 34 Maine, 443; Goodall *v.* Marshall, 11 N. H. 88; Willard *v.* Hammond, 21 N. H. 385; Sabin *v.* Gilman, 1 N. H. 193; Mason *v.* Nutt, 19 La. Ann. 41; Henderson *v.* Rost, 15 La. Ann. 405; Dorsey *v.* Dorsey, 5 J. J. Marsh. 280; McCarty, *v.* Hull, 13 Misson. 480; Riley *v.* Riley, 3 Day, 74; Williams *v.* Storrs, 6 John. Ch. 353; Vaughan *v.* Barrett, 5 Vt. 333; Sanders *v.* Jones, 8 Ired. Eq. 246; that he has no interest in debts due there; Sabin *v.* Gilman, 1 N. H. 193; Thompson *v.* Wilson, 2 N. H. 291, 292; Heydock's Appeal, 7 N. H. 503; nor any authority to collect them; Chapman *v.* Fish, 6 Hill, 555; Cosby *v.* Gilchrist, 7 Dana, 206; Moore *v.* Tanner, 5 Monr. 42; Smith *v.* Guild, 34 Maine, 443; Sabin *v.* Gilman, 1 N. H. 193; Rand *v.* Hubbard, 4 Met. 255; Thompson *v.* Wilson, 2 N. H. 291, 292; Willard *v.* Hammond, 21 N. H. 385; Heydock's Appeal, 7 N. H. 503; Goodall *v.* Marshall, 11 N. H. 88; Picquet, appellant, 5 Pick. 75; see Hutchins *v.* State Bank, 12 Met. 421; Goodwin *v.* Jones, 3 Mass. 514; Stevens *v.* Gaylord, 11 Mass. 256; Vaughan *v.* Barrett, 5 Vt. 333; Pond *v.* Makepeace, 2 Met. 114; Mason *v.* Nutt, 19 La. Ann. 41; Henderson *v.* Rost, 15 La. Ann. 405; Commonwealth *v.* Griffith, 2 Pick. 181; that he cannot indorse a note so as to enable an indorsee to sue thereon, Thompson *v.* Wilson, 2 N. H. 291, 292; McCarthy *v.* Hall, 13 Miss. 480; Stearns *v.* Burnham, 5 Greenl. 261 (otherwise held in Grace *v.* Hannah, 6 Jones (Law), 94; and in Rand *v.* Hubbard, 4 Met. 252, 259 *et seq.*); nor discharge a debt so as to bar a suit by an administrator appointed there. Willard *v.* Hammond, 21 N. H. 382; Vaughan *v.* Barrett, 5 Vt. 333. A judgment recovered in one state, in a case where no defence was made by an administrator appointed in another state, on a demand due to the intestate from a citizen of the former state, is no bar to a suit on the same demand by an administrator of the same intestate duly appointed in the former state, although execution on the first judgment was levied on the debtor's real estate and returned satisfied. Pond *v.* Makepeace, 2 Met. 114; Langdon *v.* Potter, 11 Mass. 313; Borden *v.* Borden, 5 Mass. 77. See Smith *v.* Guild, 34 Maine, 443; Taylor *v* Barron, 35 N. H. 484, 495, 496. But it was held in Commonwealth *v.* Griffith, 2 Pick. 11, that the administrator of a deceased owner of a fugitive slave, who had escaped from Virginia to Massachusetts before the owner's decease, being appointed in Virginia, and being by the laws of that state the person to whom the service of the slave was due, might reclaim the slave in Massachusett without taking out administration in the latter state.]

(*p*) 1 Dowl. & Ryl. 35. [See Wheelock *v.* Pierce, 6 Cush. 288; Bell J. in Taylor *v.* Barron, 35 N. H. 495.]

tration in her husband's effects in the recorder's court, at Bombay, and remitted the proceeds of the effects in government bills to her agent in England. *A creditor of the intestate took out letters of administration to him in this country, and brought an action against the widow's agent for money in his hands, part of such proceeds so remitted. It was held that the wife was entitled to all the effects of which the husband died possessed in India, by virtue of the letters of administration granted to her in that country, and that therefore no action lay against her agent at the suit of the plaintiff, under the letters he had obtained in the prerogative court here. (*q*) However, in Hervey *v.* Fitzpatrick, (*r*) it was held by Wood V. C. that where the foreign administrator remits a part of the assets to England to be sold and the proceeds to be carried to the account of the intestate's estate, and comes himself to this country, he may be sued in a court of equity here by a next of kin of the deceased, who has taken out administration here, in respect of those assets; and that the court has a right to deal with them, and to appoint a receiver, if there is danger of their being taken out of the jurisdiction.

Administration to a bastard, or other person without kindred.

If a bastard, who, as *nullius filius* has no kindred, or any other person having no kindred, die intestate, and without wife or child, it has formerly been holden, that the ordinary could seize his goods, and dispose of them to pious uses; but it is now settled that the king is entitled to them as *ultimus hæres*, (*s*) not in a fiduciary character

(*q*) See, also, Jauncey *v.* Sealey, 1 Vern. 397; Story Confl. Laws, ch. xiii. § 518; *ante*, 360 *et seq.*, [362, note (*u*), 371; *post*, 1929, note (*b*). The executor of one dying in Tahiti, having administered upon the estate there, and paid all the debts and legacies of the testator there payable, remitted the balance to an agent in Massachusetts, with directions to pay the same to the residuary legatee, who was the testator's father, resident in the United States; it was held that such balance was not assets, and could not be claimed by an administrator of the testator subsequently appointed in Massachusetts, but was money had and received by the agent to the use of the residuary legatee, who was entitled to recover the same. Wheelock *v.* Pierce, 6 Cush. 288. Shaw C. J.: "This sum was not assets. The defendant received no property from the testator; nor was he indebted to him, or in any way a debtor to his estate." 6 Cush. 291; Fay *v.* Haven, 3 Met. 109. Property legally situated within one state at the time of the death of the testator or intestate, and already disposed of and administered, in its courts by its laws, cannot be affected by administration or the want of it in another state to which a legatee carries it after being delivered to him by order of the probate court. Wells *v.* Wells, 35 Miss. 638; *post*, 1663, note (h^2).]

(*r*) Kay, 421.

(*s*) Jones *v.* Goodchild, 3 P. Wms. 33; Rutherford *v.* Maule, 4 Hagg. 213; Dyke *v.* Walford, 5 Moore P. C. 434; S. C. 6 Notes of Cas. 309. In this last case it was

but beneficially; (*t*) subject, nevertheless, to the debts of the intestate. (*u*) Yet in such case it is the practice to transfer the royal claim by letters patent, or other authority, from the crown, with * a reservation, as it is said, of a tenth, or other small proportion of the property, and then the court of course grants to such appointee the administration. (*x*) It has indeed been asserted, that such letters patent are merely in the nature of a recommendation; and that though it be usual for the court to admit such patentee, yet it is rather out of respect to the king, than strictly of right. (*y*) But if the court chose to grant administration to any other person, the right of the crown would remain the same. The administrator, whoever he might be, would be a trustee for the crown. (*z*)

Where a bastard or other person having no kindred dies intestate, leaving a widow but no children, the widow is not entitled to the whole of his personal estate, but to one moiety only, and the crown is entitled to the other. (*a*)

15 Vict. c. 3, administration to be granted to the solicitor of the treasury as the queen's nominee.

By stat. 15 Vict. c. 3, administration of the personal estate of intestates, where the queen is entitled, may be granted to the solicitor to the treasury for the time being, as nominee of her majesty. This statute only dispenses (by section 2) with the necessity of the nominee of the crown giving the usual administration bond on taking out administration to the estate of an intestate. In other respects he is to be subject to the same obligations as any other administrator, and all the duties and liabilities of an ordinary administrator are imposed on him. (*b*) If he improperly pays to the crown part of the intestate's effects,

Liability of such administrator.

held that the right of administration to the goods of a bastard, who died intestate and unmarried, in the county of Lancaster, belonged to the queen in right of her duchy of Lancaster, and not in right of her crown.

(*t*) Kane *v.* Reynolds, 4 De G., M. & G. 571, by Lord Cranworth.

(*u*) Megit *v.* Johnson, 2 Dougl. 548, by Lord Mansfield.

(*x*) Stote *v.* Tyndall, 2 Cas. temp. Lee, 394. But as the most remote relation will defeat the king's title, an allegation will be admitted as against the king's nominee, though it does not set forth any pedigree, but rests only on mutual ownings and general reputation of relationship. 2 Cas. temp. Lee, 396, 397.

(*y*) Manning *v.* Knapp, 1 Salk. 37.

(*z*) 5 Moore P. C. 495. Where a case is not within the statutes of administration, the court, in the exercise of its discretion, usually grants the administration to the interest. See *post*, ch. III. § I. p. 462.

(*a*) Cave *v.* Roberts, 8 Sim. 214.

(*b*) Re Dewell, Edgar *v.* Reynolds, 4 Drew. 269; Attorney General *v.* Kohler, 9 H. L. Cas. 654. See, also, *post*, 439.

though such payment is made under authority of a warrant under the sign manual, he makes himself personally liable to restore it with interest * to parties afterwards proving themselves legally entitled as next of kin. (*c*)

Administration to a felon.

If the effects of an intestate vested in the crown by forfeiture, (*d*) as in the case of a *felo de se*, and letters of administration were granted to an administrator in consequence of a warrant from the king, such administration was not void; and though the letters, after the usual form, viz, "to pay debts, &c." contained this additional clause, "For the use and benefit of his majesty," the administrator would have been answerable for the debts of the deceased, and would not have been permitted to deny the validity or operation of the grant of administration. (*e*)

Mandamus to compel grant of administration to parties entitled under the statute.

In a case of complete intestacy, if the ordinary would not grant administration as the statutes appointed, a *mandamus* lay to compel him. (*f*) Thus if he refused to commit administration to the husband of the wife's effects, a *mandamus* would have issued. (*g*) So that writ may be obtained to enforce the right of a sole next of kin. (*h*) And in a case where the widow applied for a *mandamus* to commit administration to her, although the court refused it in that form, on the ground that it would deprive the ordinary of the election, which the statute gave him, between her and the next of kin, yet they issued the writ generally, to grant administration of the goods of the intestate. (*i*)

(*c*) The interest ought to be computed from the time when all payments on the part of the estate have been made. 4 Drew. 296. Upon the death of the nominee of the crown the liability only continues against his personal representative, and not against his successor in office, unless he takes out administration *de bonis non* to the same estate. 9 H. L. Cas. 654.

(*d*) But see now stat. 33 & 34 Vict. c. 23, s. 1, by which forfeiture for any treason or felony or *felo de se* is abolished.

(*e*) Megit *v.* Johnson, 2 Dougl. 542; Rex *v.* Sutton, 1 Saund. 271 *b*, note (1).

(*f*) Anon. 2 Sid. 114; Offley *v.* Best, 1 Lev. 187. In case of an undue grant of administration, if it is about to be sealed, a prohibition issues; if it has passed the seal, a *mandamus* lies to grant it to the proper party. Anon. 1 Freem. 372. [The superior court of Georgia may issue a *mandamus* to the clerk of a court of ordinary to issue a citation to show cause why the applicant should not be appointed administrator. Ex parte Carnochan, T. U. P. Charlt. 215.]

(*g*) Rex *v.* Bettesworth, 2 Stra. 891; Ib. 1118.

(*h*) Rex *v.* Dr. Hay, 1 W. Bl. 640; Rex *v.* Horsley, 8 East, 405.

(*i*) Anon. 1 Stra. 552, cited by Lawrence J. in 8 East, 408. [*Mandamus* is the remedy for the refusal of the ordinary to allow an appeal from his deci-

* It is a good return to such a *mandamus*, that a controversy is depending in the court, whether there is a will or not; for then, as Holt C. J. said, suppose the will prove good, what will the granting of the administration signify. (*j*)

Next of kin excluded from the administration, when they have no interest.

It has always been considered, both in the common law and spiritual courts, that the object of the statutes of administration (31 Edw. 3, c. 11, and 21 Hen. 8, c. 5) is to give the management of the property to the person who has the beneficial interest in it. (*k*) And the inclination has been so strong to effectuate this object, by granting the administration to the interest, that in some instances, not only the practice of the ecclesiastical court, but the decisions of the judges delegate, have not scrupled to disregard the express words of the statute. (*l*) Thus, in Bridges *v.* The Duke of Newcastle (Delegates, 1712), Lord Hollis died intestate, and Bridges claimed administration as next of kin. The effects were vested by act of parliament in the Duke of Newcastle, to pay the debts of the deceased. The judge of the prerogative court (Sir Charles Hedges) and afterwards the delegates, held that the next of kin was excluded, on the ground that he had no interest, and granted administration to the Duke of Newcastle. (*m*) So in Young *v.* Pierce, (*n*) administration was refused by the prerogative and the delegates to a next of kin, on the ground that she had released all her interest, and the letters were granted to the party beneficially entitled to the personal estate. (*o*) Another strong instance will

sion. Gresham *v.* Pyron, 17 Geo. 263. So where a judge of probate improperly refuses to transfer to the proper court a cause in which he is personally interested, *mandamus* lies to compel its transfer. State *v.* Castleberry, 23 Ala. 85. But the proper mode of proceeding where administration is granted to one not entitled to it, is by appeal, and not by *mandamus*. State *v.* Mitchell, 3 Brev. (S. Car.) 520.]

(*j*) Anon. 5 Mod. 375; Rex *v.* Dr. Hay, 1 W. Bl. 640.

(*k*) Wetdrill *v.* Wright, 2 Phillim. 248; [Clay *v.* Jackson, T. U. P. Charlt. 71; Leverett *v.* Dismukes, 10 Geo. 98; Bieber's Appeal, 11 Penn. St. 157; *ante*, 426, note (*n*); *post*, 462. Where the right to administer is not settled by statute, it will be assigned to him who is to have the surplus of the personal estate. Sweezy *v.* Willis, 1 Bradf. Sur. 495.]

(*l*) See the judgment of Lord Cottenham, in Withy *v.* Mangles, 10 Cl. & Fin. 248, accord.

(*m*) Cited by the court in West *v.* Wilby, 3 Phillim. 381. [Where two applicants for administration are of the same degree of affinity to the deceased, the facts that one of them has received his full share in advancements, and that he claims part of the property adversely to the intestate, are to be taken into consideration. Moody *v.* Moody, 29 Geo. 519.]

(*n*) 1 Freem. 496.

(*o*) This was a case of administration *de bonis non;* but it will appear in a subsequent section, that, with respect to the obligation of the statute, there is no dif-

be found in the next section, with respect to administration *cum testamento annexo;* in *granting which, it has been established by the decisions both of common lawyers and civilians, contrary to the words of the act, that the next of kin is to be excluded from the administration when there is a residuary legatee who desires it.

If the next of kin die before administration granted, his representative is entitled to it:

Again, the statutes of administration (31 Edw. 3, c. 2, and 21 Hen. 8, c. 5) provide that the ordinary shall grant administration to the next of kin, or the widow, or to both; and therefore these parties have a statutory right to the administration, enforceable, as it has just appeared, by *mandamus.* But the obligation of the statutes has, in several adjudged cases, as well as in practice, been considered to extend only to such persons as are next of kin *at the time of the intestate's death;* (*p*) and therefore the court is not bound to grant administration to one who is not entitled to a beneficial interest in the effects, although by the death of intermediate persons, he may have become next of kin at the time the grant is required. Accordingly, it was the established practice and course of the prerogative office, that if all those who were next of kin at the time of the death of the intestate are dead, then the representative of such next of kin, being entitled to the beneficial interest, is also entitled to the administration, whether original or *de bonis non;* with this limitation, however, in both cases, that a person originally in distribution is preferred to the representative of the next of kin. (*q*)

but payment to the next of kin is no answer to an action by his representative as administrator to the original intestate.

But it is no defence to an action brought by such representative, as administrator to the original intestate, against a debtor to his estate, that the defendant paid the debt in question to the next of kin, who died without taking out letters of administration. (*r*)

*There is a distinction between a person appointed executor, and one entitled to the administration as next of kin, with respect to the obligatory consequences of

ference between an administration *de bonis non* and an original administration.

(*p*) Savage *v.* Blythe, 2 Hagg. Appendix, 150; Almes *v.* Almes, Ib. 155; and see the observations of the learned reporter, Ib. 156.

(*q*) 2 Hagg. Appendix, 157; and see Palmer *v.* Alicock, 3 Mod. 58; S. C. Skinn. 212, 218; Comberb. 14; Show. 407, 486; but see, also, Rex *v.* Hay, 1 W. Bl. 641; S. C. 4 Burr. 2295.

(*r*) Mitchell *v.* Moorman, 1 Y. & Jerv. 21; and it shall make no difference, though the grant of administration to the plaintiff be, in its terms, of the goods, &c. "*left unadministered*" by the next of kin. Ib.

administering the goods of the deceased. An executor, it has been shown, after an act of administration, cannot refuse to accept the executorship, and take probate; (*s*) but although a next of kin may have intermeddled with the effects, and made himself liable as executor *de son tort*, he cannot be compelled by the court to take upon himself the office of administrator. (*t*)

A next of kin cannot be compelled to take out administration, though he has intermeddled with the effects.

Administration may be granted to the attorney of all the next of kin, provided they reside out of the country; and if the effects are under twenty pounds, such administration may be granted whether they are so resident or not. (*u*) By rule 32, P. R. (Non-contentious Business), "In the case of a person residing out of England, administration, or administration with the will annexed, may be granted to his attorney acting under a power of attorney." (*u*[1]) But where a person solely entitled to the grant is resident in this country, and able to take it himself, the court will decline to decree it to his attorney, for his use and benefit. (*x*)

Administration granted to the attorney of the next of kin.

On one occasion the court granted, to the agent of the Elector of Hesse, an administration limited to substantiate proceedings in chancery respecting a debt due to the late elector; but declined to extend the administration to the receipt of the debt, without a power of attorney from the proper authorities. (*y*)

* Where letters of administration are granted to persons under a power of attorney from the party entitled to the representation, the letters express that they are granted "for the use and benefit" of the latter. (*z*) But these words do not exclude the claim of other persons to share in the personal estate. (*a*) It was, indeed,

(*s*) *Ante*, 276.

(*t*) Ackerley *v.* Oldham, 1 Phillim. 248; Ackerley *v.* Parkinson, 3 M. & Sel. 411; In the Goods of Fell, 2 Sw. & Tr. 126.

(*u*) Toller, 108. As to what shall constitute a proper authority to apply for the grant, as the attorney of the party entitled to it, see Lucas *v.* Lucas, 3 Cas. temp. Lee, 576; In the Goods of Reitz, 3 Hagg. 766; In the Goods of Elderton, 4 Hagg. 210; [Bleakley's Estate, 5 Whart. 361.]

(*u*[1]) [Smith *v.* Munroe, 1 Ired. (Law) 345. And the grant is according to the locus of the assets. St. Jurgo *v.* Dunscomb, 2 Bradf. Sur. 105; Isham *v.* Gibbons, 1 Bradf. Sur. 69; Plummer *v.* Brandon, 5 Ired. Eq. 190; Willing *v.* Perot, 5 Rawle, 264.]

(*x*) In the Goods of Burch, 2 Sw. & Tr. 139.

(*y*) In the Goods of the Elector of Hesse, 1 Hagg. 93. See, also, In the Goods of Beggia, 3 Add. 340.

(*z*) The form of such letters will be found at length in 10 Sim. 629; 2 Hare, 537, note (*a*). See, also, In the Goods of Cassidy, 4 Hagg. 360; *post*, 468, 469.

(*a*) Anstruther *v.* Chalmer, 2 Sim. 5.

held, in the case of De la Viesca *v.* Lubbock, (*b*) that where administration has been granted to the attorney of a person abroad for the use and benefit of that person, the latter may sue the administrator in this country without making the parties beneficially interested parties to the suit, and without taking out letters of administration in this country; for that as the letters were expressly granted to the administrator as the attorney of the party abroad, he might safely pay over to that party the moneys received under the authority of the letters. However, in the subsequent case of Chambers *v.* Bicknell, (*c*) it was held that such an administrator is liable to be sued, in respect of the estate of the intestate, by the parties beneficially interested in it, in the same way as if he had obtained letters of administration in his own right. (*d*)

The general rule is, that where a person is authorized by a simple power of attorney to take out administration, the court ought to decree him such administration as it would have granted to the person who conferred the power if he had applied for it himself. (*e*)

If the attorney be resident out of the jurisdiction, the sureties to the bond must be resident within the kingdom. (*f*)

* If none of the next of kin will take out administration, a creditor may, by custom, do it; (*g*) on the single ground that he cannot

(*b*) 10 Sim. 629.

(*c*) 2 Hare, 536.

(*d*) See, also, accord. Re Dewell, Edgar *v.* Reynolds, 4 Drew. 269; Attorney General *v.* Kohler, 9 H. L. Cas. 654; *ante*, 434.

(*e*) In the Goods of Goldborough, 1 Sw. & Tr. 295.

(*f*) In the Goods of O'Byrne, 1 Hagg. 316; In the Goods of Leeson, 1 Sw. & Tr. 463. But see In the Goods of Reed, 3 Sw. & Tr. 439; *post*, pt. I. bk. v. ch. IV.

(*g*) 2 Bl. Com. 505. He has no right to the administration except by the practice of the court. He is the appointee of the court. And if circumstances showed that the creditor was not a proper person, *non constat* that the court might not appoint another. 2 Curt. 850. [Under the statute of Massachusetts, if the widow and next of kin are incompetent, or evidently unsuitable for the discharge of the trust, or if they neglect without sufficient cause, for thirty days after the death of the intestate, to take administration of his estate, the probate court shall commit administration to one or more of the principal creditors, if there is any competent and willing to undertake the trust. Genl. Sts. c. 94, § 1, clause "Second." See *ante*, 416, note (*j*). See Arnold *v.* Sabin, 1 Cush. 525; Hall *v.* Thayer, 105 Mass. 224; Smith *v.* Sherman, 4 Cush. 408, 412; Stebbins *v.* Lathrop, 4 Pick. 33; Churchill *v.* Prescott, 2 Bradf. Sur. 304; Munsey *v.* Webster, 24 N. H. 126; Mullanphy *v.* County Court, 6 Misson. 563. As to the circumstances held to render a person "evidently unsuitable," see Stearns *v.* Fiske, 18 Pick. 24. The judge of probate cannot pass over the next of kin of the intestate, although they do not live in the county or are not competent or suitable for the trust, and appoint a stranger, before the expiration of thirty days from the death of the intes-

be paid his debt until representation to the deceased is made; (*h*) and therefore administration is only granted to him, failing every other representative. (*i*) So letters of administration may be granted to the executors of a creditor. (*j*)

Administration granted to a creditor:

The necessary course is, when a creditor applies for administration, to issue a citation for the next of kin in particular and all others in general, to accept or refuse letters of administration, or show cause why administration should not be granted to such creditor. (*k*) In point of practice it is not uncommon, upon a decree issuing to show cause why administration should be committed to A. B. a creditor, to substitute C. D. another creditor, on the day assigned for the appearance of the parties interested, and to suffer administration to pass to C. D. though not the person in whose name the decree originally went. (*l*)

citation by creditor of next of kin:

tate, without citation or notice to the next of kin. Cobb *v.* Newcomb, 19 Pick. 336. In Arkansas, the preference given to the husband, wife, or distributees of an intestate, to take out administration, is limited to sixty days after the death of the intestate, and that of the creditors to ninety days, at the end of which time they all stand upon an equal footing with all other persons. Grantham *v.* Williams, 1 Pike, 270. A creditor, as such, has no special claim to administration in Texas. Cain *v.* Haas, 18 Texas, 616. See, as to Virginia, M'Candlish *v.* Hopkins, 6 Call, 208.]

(*h*) Elme *v.* Da Costa, 1 Phillim. 177. [In Bowdoin *v.* Holland, 10 Cush. 17, it was held that administration may be granted in Massachusetts upon the estate situated there, of a person who died while residing in another state, although the deceased left a will which has not been proved and allowed in the state of his domicil. Bigelow J. said: "If the will is never proved in the place of the testator's domicil, and is purposely withheld from probate, have creditors, in this state, no means of procuring administration on their deceased debtor's estate, and thereby reaching his property here? This point was substantially settled in Stevens *v.* Gaylord, 11 Mass. 256, 264. The courts there say, that if it should happen that administration is never granted in the foreign state, the debts due here, under such circumstances, to a deceased person, could never be collected, and the debts due from him to citizens of this state might remain unpaid." Gray J. in Pinney *v.* McGregory, 102 Mass. 192, 193. A citizen of another state, in which an intestate died, and administration has been granted, can cause administration to be taken out in Illinois (if the intestate has left property there), a claim to be allowed, and real estate to be sold for its payment; and it is not necessary to show that the personal property of the intestate in such other state is exhausted. Rosenthal *v.* Remick, 44 Ill. 202.]

(*i*) Webb *v.* Needham, 1 Add. 494; Graham *v.* Maclean, 2 Curt. 659; In the Goods of Waters, 2 Robert. 142. A creditor cannot deny an interest or oppose a will. Dabbs *v.* Chisman, 1 Phillim. 159; Elme *v.* Da Costa, 1 Phillim. 177; Menzies *v.* Pulbrook, 2 Curt. 845; *ante*, 338; *post*, 443, 444.

(*j*) Jones *v.* Beytagh, 3 Phillim. 635.

(*k*) Whenever a party has a right to the administration, the court always requires that he should be cited, or consent. In the Goods of Barker, 1 Curt. 592; *post*, 448.

(*l*) Maidman *v.* All persons in general, 1 Phillim. 53; Law *v.* Campbell, 1 Hagg. 55; Talbot *v.* Andrews, 1 Hagg. 697; Andrews *v.* Murphy, 30 L. J., P. M. & A. 37.

The next of kin may appear to the citation, and will then be preferred to the creditor; (l^1) but if the next of kin has unduly delayed to take out administration (as where six months elapse from the death of the intestate), the creditor will be allowed his * costs. (m) If there are no next of kin, as in case of an intestate bastard, a citation should issue to the crown; that is, it should seem, the king's proctor must be cited. (n)

Administration will not be granted to a creditor on a general citation on the Royal Exchange, without particular notice, when it is known where the party first entitled resides; (o) and if he is abroad, the decree must be served on his agent, or an affidavit must be made that he has no agent in this country. (p) On one occasion, (q) where administration to a person long dead was prayed by a creditor, and there had been no personal service on the next of kin (who had no known agent in this country), the court required full information as to the debt and the cause of the delay, and that notice should be given to the next of kin in the West Indies. And the judge (Sir J. Nicholl) said that he wished it to be considered as a general rule, that where a next of kin was as accessible as in this case, a notice should be sent to the party. (r)

In cases where a general citation is sufficient, the practice is to serve the decree on one of the pillars of the Royal Exchange, and the decree itself is made returnable into court on a certain subsequent day. (s) In a case where one of the parties entitled in distribution was a private in the army, being with his regiment in India, the decree had been served as above, and the court was moved to dispense with the formality of awaiting the return of the process, on the ground that the necessity for a representation to the deceased was urgent, and that the party cited being in India, it was impossible he could appear; but the court refused * the application, and observed that he might possibly return before the

(l^1) [In most cases a distributee, or one who takes an interest under the intestate laws, will be preferred in the administration to a creditor. Haxall *v.* Lee, 2 Leigh, 267. See M'Candlish *v.* Hopkins, 6 Call, 208.]

(m) Cole *v.* Rea, 2 Phillim. 428. See Jones *v.* Beytagh, 3 Phillim. 635.

(n) Colvin *v.* Proctor General, 1 Hagg. 92.

(o) Lindsdale *v.* Baloo, cited in Elme *v.* Da Costa, 1 Phillim. 175.

(p) 3 Hagg. 194, 195, note (a). See, also, *ante*, 428.

(q) Miller *v.* Washington, 3 Hagg. 277.

(r) As to citing next of kin residing in Scotland, see King *v.* Gordon, 2 Cas. temp. Lee, 139.

(s) Hawke *v.* All persons in general, 2 Cas. temp. Lee, 263.

time expired; but the object was to give notice to his friends, and to any agent he might have in this country. (*t*)

one creditor preferred to the rest upon terms:

The court does sometimes grant administration to more creditors than one, but it prefers that one should be fixed upon: (*u*) and on the petition of the others, it will compel the one selected to enter into articles, to pay debts of equal degree, in equal proportions, without any preference of his own. (*x*)

affidavit of the amount of property, &c.:

Before granting letters of administration to a creditor, the court always requires an affidavit as to the amount of the property to be administered: unless where there has been a personal service of the usual citation on the parties entitled to the administration in the first instance. (*y*) An affidavit is also necessary of the amount of the debt, and that the creditor has no other security; (*z*) and also of the time the debt became due, in order that it may be seen that the debt is not barred by the statute of limitations. (*a*)

creditor a mortgagee:

The court will grant administration to a bond creditor, who has also a mortgage on the leasehold property; but if the grant were prayed by a mortgagee of real property, there might be a reason why the administration should not pass to him, because it would give him a priority, and exclude simple contract creditors. (*b*)

* A person who was joint assignee of the estate of a bankrupt with

(*t*) Woolley *v.* Green, 3 Phillim. 314. See In the Goods of Robinson, 3 Phillim. 512, as to the difference, in effect, of a service *viis et modis* and a personal service.

(*u*) Harrison *v.* All persons in general, 2 Phillim. 249. See, as to the preference of one creditor to another, by reason of the superior nature, or larger amount of the debt, Kearney *v.* Whittaker, 2 Cas. temp. Lee, 324; Carpenter *v.* Shelford, 2 Cas. temp. Lee, 502; Ernest *v.* Eustace, Dea. & S. 271; [Cutlar *v.* Quince, 2 Hayw. 60; Freeman *v.* Worrill, 42 Geo. 401. As to Alabama, see *ante*, 416, note (*j*). In Louisiana, the first applicant among creditors is entitled to the appointment of administrator without reference to the amount or dignity of their claims against the estate. Succession of Beraud, 21 La. Ann. 666.]

(*x*) Fonblanque on Eq. bk. 4, pt. 2, c. 2, s. 2, note (*m*); Toller, 106; 4 Burn E. L. 366, Phillimore's ed.

(*y*) Martineau *v.* Rede, 2 Add. 455; Briggs *v.* Roope, 29 L. J., P. M. & A. 96.

(*z*) Aitkin *v.* Ford, 3 Hagg. 193. [See Thomas *v.* Buckner, 2 Hill Ch. (S. Car.) 499.]

(*a*) Rawlinson *v.* Burnell, 3 Sw. & Tr. 479. [But as to the validity of the objection to the rights of a creditor to administration on the ground that his claim is barred by the statute of limitation, see Ex parte Caig, T. U. P. Charlt. 159.]

(*b*) Roxburgh *v.* Lambert, 2 Hagg. 557; but see now stat. 3 & 4 W. 4, c. 104; *post*, pt. IV. bk. I. ch. II. § I.

the deceased, out of which the latter had applied a sum of money to his own use, for which he had not accounted at the time of his death, is not a creditor to the estate of the deceased so as to be entitled to pray administration to him. (*c*)

who is not to be considered a creditor:

On one occasion, (*d*) where a partner died leaving the partnership accounts unsettled, an eminent civilian, (*e*) before whom a case was laid by the direction of Sir John Leach V. C. gave his opinion that a person to whom one of the surviving partners had assigned his share of the profits of the partnership had not such an interest in the effects of the deceased partner as would entitle him to be considered a creditor, and in that character to cite the next of kin to accept or refuse administration of his effects; but that the ecclesiastical court would grant a limited administration to a person nominated by him, for the purpose of substantiating proceedings in chancery, on the refusal of the next of kin after citation; and upon showing the necessity for such a representation.

It is the established practice of the court of probate to refuse to grant administration as creditor to a person who has bought up a debt after the death of the deceased. (*f*)

But this practice is not inconsistent with a grant being made to a creditor of the party beneficially entitled to an interest in the estate of the deceased, who has assigned it, by way of mortgage or otherwise, to the parties seeking the grant. (*g*)

* It has been held, that a surety who, after the death of the principal, pays off the debt, is entitled to be regarded as a creditor of the estate of the deceased, so as to be entitled to pray administration to him. (*h*)

In the case of Aitkin *v.* Ford, (*i*) administration, as to a cred-

(*c*) Snape *v.* Webb, 2 Cas. temp. Lee, 411.

(*d*) Cawthorn *v.* Chalie, 2 Sim. & Stu. 129.

(*e*) Dr. Jenner.

(*f*) Baynes *v.* Harrison, Dea. & Sw. 15; Depit *v.* Delerieleuse, 2 Sw. & Tr. 131; In the Goods of Coles, 3 Sw. & Tr. 181; S. C. *nomine* Macnin *v.* Coles, 33 L. J., P. M. & A. 175; Day *v.* Thompson, 2 Sw. & Tr. 169; Downward *v.* Dickinson, 3 Sw. & Tr. 564; [Pearce *v.* Castrix, 8 Jones (Law), 71.] As to administration being granted to an undertaker as a creditor for funeral expenses, see Newcome *v.* Beloe, L. R. 1 P. & D. 314.

(*g*) In the Goods of Godfrey, 2 Sw. & Tr. 133; In the Goods of Coles, 3 Sw. & Tr. 181; Downward *v.* Dickinson, *ubi supra;* nor with a grant to the assignee of a creditor where he is assignee in bankruptcy. Ib.

(*h*) Williams *v.* Jukes, 34 L. J., P. M. & A. 60. [One is a creditor who has a cause of action against the deceased, which by law survives. Shaw C. J. in Smith *v.* Sherman, 4 Cush. 412; Mitchell *v.* Lunt, 4 Mass. 654; Royce *v.* Burrell, 12 Mass. 395.]

(*i*) 3 Hagg. 193.

itor, was decreed to the mother of an intestate, who had been advanced by her; the father, though alive, having been divorced in the commissary court of Scotland, and married again. In Hudleston *v.* Hudleston, (*j*) administration to the effects of a wife who had lived with her husband until her death, was granted to an antenuptial creditor of the wife. (*k*)

next of kin cannot oust a creditor administrator during his life:

When a creditor administrator has been duly appointed, the next of kin cannot, during his lifetime, take the administration from him; but upon his death they may come in, and claim administration *de bonis non*. (*l*)

a creditor in possession of administration may oppose an interest or contest a will.

Although before administration granted a creditor cannot deny an interest or oppose a will, yet when he has obtained administration he has a right to maintain it against the executor or the next of kin; and it is not to be revoked on mere suggestion. (*m*) And where administration has been granted to a creditor, and a will is afterwards produced, he is entitled to contest it in the same manner that the next of kin might have done, without being subject to costs. (*n*)

When administration may be granted to a person without interest:

* For want as well of creditors as of next of kin desirous to take out administration, the court may grant it to any person at his discretion. (*o*) In a case where the brother and only next of kin renounced, the court granted administration to the nephew, although he had no interest. (*p*) Or the court may, *ex officio*, grant to a stranger letters *ad*

(*j*) 2 Robert. 424.

(*k*) A decree had been personally served on the husband, but no appearance was given.

(*l*) Skeffington *v.* White, 1 Hagg. 702, 703.

(*m*) Elme *v.* Da Costa, 1 Phillim. 173; Menzies *v.* Pulbrook, 2 Curt. 851; *ante*, 338. And he is not bound to bring in the administration till an admissible allegation has been brought in, either propounding a will, or propounding an interest. Dabbs *v.* Chisman, 1 Phillim. 159, 160.

(*n*) Norman *v.* Bourne, 1 Phillim. 160, note (*c*) to Dabbs *v.* Chisman, 2 Curt. 851; *ante*, 340.

(*o*) See the judgment of Sir H. Jenner Fust, 1 Robert. 274, 275; In the Goods of Chanter, Davis *v.* Chanter, 14 Sim. 212; [Genl. Sts. Mass. c. 94, § 1, clause "Third;" Redfield L. & Pr. Sur. Cts. 160; Hoffman *v.* Gold, 8 Gill & J. 79; Thompson *v.* Hucket, 2 Hill (S. Car.), 347.] The general rule seems to be that a grant of full letters of administration will never be made to any one who is not either a creditor or next of kin. But perhaps the court might make such a grant to a nominee of its own. And see stat. 20 & 21 Vict. c. 77, s. 73; *post*, 446.

(*p*) In the Goods of Keane, 1 Hagg. 692. See, also, in the Goods of Blagrave, 2 Hagg. 83; In the Goods of Johnson, 2 Sw. & Tr. 595. But see In the Goods of Allen, 3 Sw. & Tr. 559.

letters *ad colligendum.*

colligendum bona defuncti, to gather up the goods of the deceased. (p^1) In a late case, where a sole next of kin refused to take administration, the court decreed letters of administration to a person who had been her agent, limited "to the collection of all the personal property of the deceased, and giving discharges for the debts which might have been due to the estate on the payment of the same, and doing what further might be necessary for the preservation of the property aforesaid, and to the safe keeping of the same, to abide the directions of the court." (q) So, in a subsequent case, (r) the court, under special circumstances, made a grant to a creditor *ad colligendum bona*, limited to collect the personal estate of the deceased, to give receipts for his debts on the payment of the same, and to renew the lease of his business premises, which would expire before a general grant could be made. But the court refused to include in the grant a power to dispose of the lease and good-will of the business, or a power to carry on the business. (s) Or the court * may take the goods of the deceased into its own hands, to pay the debts of the deceased in such order as an executor or administrator ought to pay them; but he, or the stranger who has letters *ad colligendum*, cannot sell them, without making themselves executors of their own wrong. The court has only an authority, and no such power itself, and therefore it cannot give that power to any other. (t)

20 & 21 Vict. c. 77, s. 73.

The power of the court in making grants of administration, and in deciding to whom they should be granted, has been much enlarged by the 73d section of the court of probate act, 1857 (20 & 21 Vict. c. 77).

It is thereby enacted, that "where a person has died or shall die wholly intestate as to his personal estate, or leaving a will

(p^1) [See Flora *v.* Mennice, 12 Ala. 836; Mootrie *v.* Hunt, 4 Bradf. Sur. 173; Lawrence *v.* Parsons, 27 How. Pr. 26; *ante*, 275.]

(q) In the Goods of Radnall, 2 Add. 232.

(r) In the Goods of Clarkington, 2 Sw. & Tr. 380.

(s) See, also, In the Goods of Wyckhoff, 3 Sw. & Tr. 20, where a similar grant was made under the 73d section of the court of probate act, 1857, *supra*. In the Goods of Earl, L. R. 1 P. & D. 450; In the Goods of Warren, L. R. 1 P. & D. 538; In the Goods of Grundy, L. R. 1 P. & D. 459. In that case a joint grant of administration *de bonis non* was made under the above section to a next of kin and to a person entitled in distribution, the next of kin consenting to the grant, and there being special circumstances rendering such joint grant convenient.

(t) 11 Vin. Abr. 87, Exors. K. pl. 19.

a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the court to be necessary or convenient in any such case by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this act had not been passed, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the court to grant administration of the personal estate of such deceased person to the person who, if this act had not passed, would by law have been entitled to a grant thereof; but it shall be lawful for the court, in its discretion, to appoint such person as the court shall think fit to be such administrator upon his giving such security (if any) as the * court shall direct, and every such administration may be limited as the court shall think fit." (*u*)

when a person shall die intestate or without an executor willing and competent to take probate:

or where the executor is resident out of the United Kingdom:

if it shall appear to be necessary, the court may appoint a person administrator who would not be otherwise entitled to the grant:

on giving security, and limited as the court shall think fit.

(*u*) The court will not make a grant under this section, unless there are special circumstances to justify it. In the Goods of White, Sw. & Tr. 457. In order to satisfy the court that it is "necessary and convenient" that the extraordinary power given by the section should be used by the court, a general statement that "it is necessary for the preservation of the personal estate and effects of the deceased that the grant should be made" is not sufficient. In the Goods of Cooke, 1 Sw. & Tr. 267; In the Goods of Bateman, L. R. 2 P. & D. 242. For cases where the court has thought that the circumstances warranted such a grant, see In the Goods of Jones, 1 Sw. & Tr. 13; In the Goods of Roberts, 1 Sw. & Tr. 64; In the Goods of Burrell, 1 Sw. & Tr. 64; In the Goods of Drinkwater, 2 Sw. & Tr. 611; In the Goods of Sawtell, 2 Sw. & Tr. 448; In the Goods of Peck, 2 Sw. & Tr. 506; In the Goods of Smith, 2 Sw. & Tr. 508; In the Goods of Hagger, 3 Sw. & Tr. 65; In the Goods of Findlay, 3 Sw. & Tr. 264; In the Goods of Fraser, L. R. 1 P. & D. 327; In the Goods of Cooper, L. R. 2 P. & D. 21; In the Goods of Richardson, L. R. 2 P. & D. 242; In the Goods of Llanwarne, L. R. 1 P. & D. 306. The court will not grant administration under this section to a person entitled to a grant in another character, *e. g.* as a creditor. In the Goods of Fairweather, 2 Sw. & Tr. 588; Teague *v.* Wharton, L. R. 2 P. & D. 360. In Farrell *v.* Brownbill, 3 Sw. & Tr. 467, the court granted administration under this section, with the consent of all parties interested, to their nominee, who took no interest in the property himself. The section is wholly inapplicable where there is no absence of persons entitled to administration and no insolvency. It would then be a mere arbitrary selection on the part

Rule 31, P. R. (Non-contentious Business).

By rule 31, P. R. (Non-contentious Business), "whenever the court, under sect. 73, appoints an administrator other than the person who, prior to the court of probate act, 1859, would have been entitled to the grant, the same is to be made plainly to appear in the oath of the administrator, in the letters of administration and in the administration bond."

Citation or consent of party having a prior right requisite before administration granted to another.

In concluding this subject, it may be expedient to advert *to an established rule of the ecclesiastical court, viz, that wherever a party has a prior right to administer, the court requires that he should be cited or consent, before it will grant administration to any other person. And the rule will not be relaxed, notwithstanding the party who has the right has no interest in the property in respect of which the grant of administration is sought. (*x*) But in cases where the court has a discretion, viz, in cases where the party entitled in priority is so entitled by the practice of the court, and not by statute, the court will sometimes dispense with the citation or consent of the party having the prior claim. (*y*)

of the court. Haynes *v.* Mathews, 1 Sw. & Tr. 460. The court will not exercise the power conferred on it by the above section by passing over a person entitled to a grant of administration in favor of a creditor when the fact of the insolvency of the intestate is disputed. Hawke *v.* Wedderburne, L. R. 1 P. & D. 594.

(*x*) In the Goods of Barker, 1 Curt. 592; In the Goods of Currey, 5 Notes of Cas. 54. When the next of kin is of unsound mind, the practice is that his next of kin must also be cited, in order that they may take administration for his use and benefit if they think proper. Windeatt *v.* Sharland, L. R. 2 P. & D. 217. [Giving notice has been held indispensable to the validity of a grant of administration, in such cases. Torrance *v.* McDougald, 12 Geo. 526; Bean *v.* Bumpus, 22 Maine, 549. But it cannot be pleaded in defence to an action by an administrator, that the proper parties were not cited before the probate court. That court obtains jurisdiction, not by the citations, but by the residence of the intestate within the county. The validity of the letters cannot be attacked collaterally for want of citation. James *v.* Adams, 22 How. Pr. 409; *post*, 550, note (*h*[1]).]

(*y*) In the Goods of Rogerson, 2 Curt. 656; In the Goods of Southmead, 3 Curt. 28; In the Goods of Widger, 3 Curt. 55. The court granted administration to the sister of a bachelor intestate, upon a proxy of renunciation from the mother (a married woman) without her husband joining in it, she living separate from her husband, and all right to the estate and effects of the deceased having been conveyed to her under a deed of separation. In the Goods of Hardinge, 2 Curt. 640. [Where several are equally entitled to administration, either may be appointed without citing the others. Peters *v.* Public Administrator, 1 Bradf. Sur. 200; Cobb *v.* Beardsley, 37 Barb. 192. In Maine notice is not required prior to the granting of administration on an intestate estate if it be granted "to the widow, husband, next of kin, or husband of the daughter of the deceased, or to two or

By rule 69, P. R. (Non-contentious Business), "Citations are to be served personally when that can be done. Personal service shall be effected by leaving a true copy of the citation with the party cited, and showing him the original, if required by him to do so." How citations are to be served. Rule 69, P. R. (Non-contentious Business).

By rule 70, "Citations and other instruments which cannot be personally served are to be served by the insertion of the same, or of an abstract thereof, settled and signed by one of the registrars, as an advertisement in such morning and evening London newspapers, and such local newspapers, and at such intervals as the judge or one of the registrars shall direct." (y^1) Rule 70.

*SECTION II.

Who are incapable of being Administrators.

A widow, or next of kin who would otherwise be entitled, may be incapable of the office of administrator on account of some legal disqualification.

It will be shown in a subsequent part of this treatise, to whom, upon such an event, the administration is to be committed. (y^2)

The incapacities of an administrator not only comprise those persons who have already been mentioned as disqualified for the office of executor, (z) but extend to attainder of treason or felony, (a) or other lawful disability, (b) outlawry, (c) and bankruptcy. (d) But it is no incapacity to be an administrator that the next of kin is an alien. (e)

more of them." Bean *v.* Bumpus, 22 Maine, 549.]

(y^1) [The fact that an administrator gave public notice of his appointment may be proved by oral evidence, as well as by an affidavit filed and recorded pursuant to the statute in Massachusetts. Henry *v.* Estes, 13 Gray, 336.]

(y^2) See *post*, pt. I. bk. v. ch. III. § VI.

(z) See *ante*, 237, 238.

(a) But now, since the abolition of forfeiture of a felon's property (33 & 34 Vict. c. 23), it would seem that a felon can be an administrator.

(b) Hensloe's case, 9 Co. 39 *b*. For the statute binds the ordinary to grant administration to the *lawful* friends of the deceased. [It is no objection to the grant of letters of administration to the daughter of an intestate in Maryland, that she is a nun in a convent in the District of Columbia. Smith *v.* Young, 5 Gill, 197.]

(c) 1 Roll. Abr. 908; Bac. Abr. Exors. G.; Toller, 93.

(d) Hills *v.* Mills, 1 Salk. 36; Com. Dig. Admor. B. 6; *ante*, 427; [Cornpropst's Appeal, 33 Penn. St. 537.]

(e) Com. Dig. Admor. B. 6. Upon this subject, see *ante*, 229, [note (k). The statute of New York provides that "no letters of administration shall be granted to a person convicted of an infamous crime,

Infancy.

If the next of kin be a minor, administration must be granted to another person during his minority; (e^1) which species of administration will hereafter be considered separately. (f) But on one occasion, administration, limited to the receipts of dividends in the English funds, was granted by Sir John Nicholl to a minor residuary legatee, the wife of a minor, both subjects of and resident in Portugal, on a certificate being produced that by the law of Portugal she was entitled. (g)

*However, in a subsequent case, Sir C. Cresswell refused to grant administration to a minor, though by the law of the country where the deceased was domiciled the minor was entitled to the grant, and that learned judge appeared to be of opinion, that the court ought not to follow the practice of the court of domicil, where it was in contradiction to the English law, according to which the minor could not take upon himself the liabilities which the law casts upon an administrator — for instance, he could not execute a bond. (h)

nor to any one incapable by law of making a contract, nor to a person not a citizen of the United States, unless such person reside within the state, nor to any one who is under twenty-one years of age, nor to any person who shall be judged incompetent by the surrogate to execute the duties of such trust, by reason of drunkenness, improvidence, or want of understanding." 2 R. S. 75, § 32, as amended by Laws, 1830, c. 320, § 18. That a professional gambler is *primâ facie* disqualified by reason of improvidence, see M'Mahon *v.* Harrison, 10 Barb. 659; Harrison *v.* M'Mahon, 1 Bradf. Sur. 283; M'Mahon *v.* Harrison, 6 N. Y. 443. What condition of drunkenness is sufficient ground of objection under the above statute, see Elmer *v.* Kechele, 5 N. Y. Sur. 472; Kechele's case, 1 Tuck. (N. Y.) Sur. 52. See, as to Pennsylvania, *ante*, 235, note (q). As to the effect of immoral habits or offences of moral turpitude, see Shilton's case, 1 Tuck. (N. Y.) Sur. 73; Berry *v.* Hamilton, 12 B. Mon. 191; *ante*, 238, note (f); Coope *v.* Lowerre, 1 Barb. Ch. 45. As to the degree of improvidence sufficient to raise the objection under the above act, see Coope *v.* Lowerre, 1 Barb. Ch. 45; it refers to such habits of mind and body as render a man generally, and under all ordinary circumstances, unfit to serve. Emerson *v.* Bowers, 14 N. Y. 449; Shilton's case, 1 Tuck. (N. Y.) Sur. 73. A person who cannot write, nor read writing, and has no experience in keeping accounts, or in settling estates, is held to be incompetent to act as administrator within the meaning of the North Carolina statute respecting administrations. Stephenson *v.* Stephenson, 4 Jones (Law), 472. But in Maryland, the inability of the wife to read or write does not disqualify her from acting as administratrix of her husband's estate. Nusz *v.* Grove, 27 Md. 391. See, also, Gregg *v.* Wilson, 24 Ind. 227; Estate of Pacheco, 23 Ala. 476.]

(e^1) [An infant cannot lawfully be appointed administrator, and such an appointment may be revoked by the judge of probate by whom it was made; but such administrator will be compelled to account for moneys received by him after becoming of age. Carow *v.* Mowatt, 2 Edw. Ch. 57.]

(f) *Post*, pt. I. bk. v. ch. III. § III.

(g) In the Goods of the Countess of Da Cunha, 1 Hagg. 237.

(h) In the Goods of the Duchess of Or-

Coverture is no incapacity for the office of administrator. (h^1) Therefore, if a *feme covert* be next of kin to the intestate, administration shall be granted to her. (i) But she cannot take administration without the consent of her husband, (k) inasmuch, among other reasons, as he is required to enter into the administration bond, which she is incapable of doing. (k^1) Yet if it can be shown that the husband is abroad, or otherwise incompetent, a stranger may join in the security in his stead. (l) In either case the administration is committed to her alone, and not to her jointly with her husband; otherwise, if he should survive her, he would be administrator, contrary to the meaning of the act. (m) *Feme covert.*

In Da Rosa *v.* De Pinna, (n) a married woman prayed administration to her mother and sister, and was opposed by another sister. The judge of the prerogative decreed administration to pass under seal to the married woman, who was sworn administratrix. The sister appealed, and in the * delegates the married woman gave a proxy to renounce her right to the administration, in order to prejudice her husband; the husband intervened, and prayed that her proxy might be rejected. The court was of opinion, that on decreeing the administration to the wife, an interest was vested in her husband which she could not by any subsequent act deprive him of, and therefore rejected her proxy of renunciation.

leans, 1 Sw. & Tr. 253; [Carow *v.* Mowatt, 2 Edw. Ch. 57; Collins *v.* Spears, 1 Miss. (Walk.) 310.]

(h^1) [Note (i) below; *ante*, 232, note (c). But in Georgia a *feme covert* is disqualified by statute. See Leverett *v.* Dismukes, 10 Geo. 98. And see Kavanaugh *v.* Thompson, 16 Ala. 817.]

(i) Com. Dig. Admor. B. 6; Ib. Admor. D. [By a recent statute of New York (1867, c. 782, § 2) married women are rendered competent in that state to receive letters of administration the same as if sole; so in Massachusetts, by St. 1874, c. 184, § 4; *ante*, 232, note (c). In Maryland, a married woman may act as administratrix or executrix. Binnerman *v.* Weaver, 8 Md. 517. As to Pennsylvania, see Gyger's Estate, 65 Penn. St. 311.]

(k) [See statutes of Massachusetts, 1869, c. 409; 1874, c. 184, § 5; *ante*, 232, note (c).] See Bubbers *v.* Harby, 3 Curt. 50, in which case a motion for administration with a will annexed to the attorney of a residuary legatee, a married woman, upon her proxy alone, her husband refusing to join, was rejected.

(k^1) [English *v.* McNair, 34 Ala. 40. This difficulty is obviated in Massachusetts by statute 1869, c. 409.]

(l) Toller, 91.

(m) Anon. Style, 74; S. C. *semble*, by the name of Wood *v.* Brown, Aleyn, 36; Toller, 91; [Stewart's Appeal, 56 Maine, 302.] If it were committed to them jointly during the coverture, it might perhaps be good, because, if committed to the wife alone, the husband for such period may act in the administration with or without her assent. Aleyn, 36.

(n) 2 Cas. temp. Lee, 390. See, also, Haynes *v.* Matthews, 1 Sw. & Tr. 460; *ante*, 425.

SECTION III.

Of the Mode of granting Letters of Administration, and the Practice relating thereto, and Form thereof.

Practice as to grants of letters of administration.

In pursuance of the authority conferred by the court of probate act, 1857, sect. 30, (*o*) a great many rules, orders, and instructions as to grants of letters of administration were made in the year 1862, for the regulation of the practice and of the fees of the court, in respect both of contentious and non-contentious business, and the guidance both of the principal and district registrars. They run to so great a length that it would be impracticable to insert them in a treatise such as this.

It is, therefore, thought better merely to refer the reader for them to the books of practice. (*p*) But inasmuch as these "orders, rules, and instructions" are in fact in a great measure founded on the old practice of the prerogative court as it stood at the time of the passing of the act, and the practice of the court of probate, subject to the rules and orders (by sect. 29 of the court of probate act, 1857), (*q*) is generally to be according to the then present practice of the prerogative court, it is thought advisable to retain all the statements contained in this and the preceding and some of * the following sections of the former editions of this work as to the then established practice of that court.

By what instrument or form.

Administration is generally granted by writing under seal. (*q*[1]) It may also be committed by entry in the registry, without letters *sub sigillo;* but it cannot be granted by parol. (*r*)

Form.

The following is to be the form of the grant to a next of kin:

(*o*) See *ante*, 323.

(*p*) Coote's Practice; Dodd & Brooke's Practice. Some further rules, relating principally to pleas to declarations propounding wills, were made and issued (to take effect on and after 11 January, 1866).

(*q*) See *ante*, 323.

(*q*[1]) [See Tuck *v.* Boone, 8 Gill, 187; Post *v.* Caulk, 3 Missou. 35.]

(*r*) Anon. Show. 408, 409; Godolph. pt. 2, c. 30, s. 5; Toller, 119. [The possession of letters of administration by the person to whom they purport to be granted is *primâ facie* evidence of delivery. M'Nair *v.* Dodge, 7 Misson. 404; Hensely *v.* Dodge, 7 Missou. 479.]

"In her Majesty's Court of Probate.
"The Principal Registry.

"Be it known that on the day of , 18 , letters of administration of all and singular the personal estate and effects of A. B., late of , deceased, who died on , (*s*) 18 , at intestate, were granted by her majesty's court of probate to C. D., the lawful widow and relict [*or as the case may be*] of the said intestate, she having been first sworn well and faithfully to administer the same, by paying the just debts of the said intestate, and distributing the residue of his estate and effects according to law, and to exhibit a true and perfect inventory of all and singular the said estate and effects, and to render a just and true account thereof whensoever required by law so to do.

"(Signed) E. F. (*s*[1])
"Registrar."

Time of granting letters.

By a modern regulation of the prerogative court of Canterbury, where letters of administration were applied for after the expiration of five years from the death of the intestate, the delay must have been satisfactorily accounted for by an affidavit made by the administrator or other competent person. (*t*) And now by rule 45, P. R. (Non-contentious Business), "In every case where probate or administration is for the first time applied

(*s*) The time of the death was required to form part of the oath, and to be inserted in the margin of the grant, by a rule of the prerogative court of Canterbury. See the reason, *ante*, 385, note (*b*).

(*s*[1]) [See Post *v.* Caulk, 3 Misson. 35; Witsel *v.* Pierce, 22 Geo. 112; Farley *v.* McConnell, 7 Lansing, 428. As to appointment, and certificate of it, see Tucker *v.* Harris, 13 Geo. 1; Witsel *v.* Pierce, 22 Geo. 112; Haskins *v.* Miller, 2 Dev. (Law) 360. In Missouri the order of the court is a sufficient appointment of an administrator, without any formal letters, if the party gives the bond and takes the oath required by law. State *v.* Price, 21 Misson. 434.]

(*t*) Gwyne on Probate and Legacy Duties, p. 10. See In the Goods of Darling, 3 Hagg. 561; *ante*, 385, note (*b*). [In Massachusetts, administration, except in special cases, cannot be originally granted after twenty years from the death of the testator or intestate. Genl. Sts. c. 94, s. 3. The grant of original administration after the expiration of that period is a nullity. Wales *v.* Willard, 2 Mass. 120; Jochumsen *v.* Willard, 3 Allen, 87, 90. But administration *de bonis non* may be granted after the expiration of twenty years from the death of the former administrator. Bancroft *v.* Andrews, 6 Cush. 493; Kempton *v.* Swift, 2 Met. 70. To the same effect is Holmes, petitioner, 33 Maine, 577. For the limitation in Tennessee, see Townsend *v.* Townsend, 4 Coldw. 70, the same as to letters testamentary and of administration. As to Texas, see Cochran *v.* Thompson, 18 Texas, 652; Lloyd *v.* Mason, 38 Texas, 212. In Alabama an administrator cannot be appointed within fifteen days after the death is known. Curtis *v.* Williams, 33 Ala. 570; Curtis *v.* Burt, 34 Ala. 729. As to the liability of sureties on a bond given by an administrator upon a grant to him of original

for after the lapse of three years from the death * of the deceased, the reason of the delay is to be certified to the registrars, and should the certificate be unsatisfactory, the registrars are to require such proof of the alleged cause of delay as they may see fit." In the case of a recent death, if a party swears that he is one of the next of kin, the grant will issue without inquiry as to the knowledge of the other next of kin. (*u*)

The practice of the prerogative court was, and of the court of probate (by rule 44, P. R. Non-contentious Business) is, that letters of administration shall not issue until after the expiration of fourteen days from the death of the intestate; unless, for special cause (as that the goods would otherwise perish, or the like), the judge or two of the registrars shall think fit to order them sooner. (*x*)

Retracting renunciation.

Where a party entitled to the grant of administration has renounced, such renunciation may be retracted before the administration has passed the seal. (*y*)

The oath to be made by the administrator, on his taking out letters of administration, is to be in this form:

"In her Majesty's Court of Probate.

"The Principal Registry.

"In the goods of A. B., deceased.

"I, C. D., of , in the county of , make oath and say [*or* solemnly, sincerely, and truly declare and affirm, according to the form of words prescribed by the statute applicable to the particular case], that A. B., late of , deceased, died intestate, (*z*) a bachelor, without parent, * brother or sister, uncle or aunt, nephew or niece [*or as the case may be*], and that I am the lawful cousin german [*or as the case may be*], that I will faithfully

letters of administration after the time prescribed by statute, see Foster *v.* Commonwealth, 35 Penn. St. 148.]

(*u*) 3 Hagg. 565. But see rule 28, P. R., *ante*, 425, 426, note (*l*).

(*x*) 1 Ought. 323, tit. 219, s. 1, note (*a*).

(*y*) West *v.* Wilby, 3 Phillim. 379; [Casey *v.* Gardiner, 4 Bradf. Sur. 13.] See M'Donnell *v.* Prendergrast, 3 Hagg. 212; [McClellan's Appeal, 16 Penn. St. 110, 116;] *ante*, 283, [417, note (*o*); Stocksdale *v.* Conaway, 14 Md. 99; Estate of Kirtlan, 16 Cal. 161.]

(*z*) It is sufficient if the administrator swears that the deceased made no will except as to real estate. O'Dwyer *v.* Geare, 1 Sw. & Tr. 465. A party having died insane, leaving a will, which upon face of it exhibited marks of insanity, the court granted administration of the effects of the deceased as dead intestate, but directed the will to be deposited in the registry. In the Goods of Bourget, 1 Curt. 591. See, also, Palmer *v.* Dent, 2 Robert. 284; Perry *v.* Dyke, 1 Sw. & Tr. 12.

administer the personal estate and effects of the said deceased, by paying his just debts and distributing the residue of his said estate and effects according to law; that I will exhibit a true and perfect inventory of all and singular the said estate and effects, and render a just and true account thereof, whenever required by law so to do; that the said deceased died at , on the day of , 18 ; (*a*) and that the whole of the personal estate and effects of the said deceased does not amount in value to the sum of pounds, to the best of my knowledge, information, and belief. "(Signed) A. B.

"Sworn at , on the day of , 18 .

"Before me,

"(Person authorized to administer oaths under the act)."

The concluding part of this oath is in accordance with the stat. 55 Geo. 3, c. 184, s. 38 (the stamp act), by which it is enacted that no ecclesiastical person shall grant letters of administration, without first receiving from the person applying for them, or some other competent person, an affidavit whether the estate and effects of the deceased, in respect of which administration is to be granted, are under the value of a certain sum to be therein specified. (*a*)

SECTION IV.

Of Administration to the Effects of Intestate Seamen, Marines, and Soldiers.

By stat. 11 Geo. 4 and 1 W. 4, c. 20, the statute 55 Geo. 3, c. 60 is repealed. 11 Geo. 4, c. 20.

By section 56, the wages, prize money, &c. of a petty officer, or seaman, or non-commissioned officer of marines, or *marine, dying intestate, are to be paid to his representatives, only upon administration obtained in the following manner; (*b*) *videlicet*, the person claiming administration shall send a letter to the inspector, stating his abode, his relationship to the deceased, the names of the

Mode of obtaining administration to effects of intestate seamen, &c.

(*a*) See *post*, pt. I. bk. VII.

(*b*) If an application is made for administration to be granted to the nominee of the crown of the personal estate of a seaman in the queen's service, as a bastard, and it is intended that such administration should extend to the pay or prize money due to the deceased, the requirements of this section must be attended to. In the Goods of Bevan, 11 Jur. N. S. 982.

deceased and of the ship or ships to which he belonged, that he has been informed of the death, and requesting such directions as may enable him to procure administration, or to the like effect; upon receipt whereof the inspector shall send by post, under cover, to the minister of the parish wherein the claimant shall reside, a form of petition, together with the requisite certificates, in blank, to be filled up as hereafter mentioned, and a letter pointing out the steps to be taken thereon; and shall also send to the claimant a letter advising him of the forwarding of the said petition or paper as aforesaid, and pointing out the measures to be taken by him for substantiating his claim; and, upon receipt of the said petition, the minister or curate shall examine him, the claimant, and also such two inhabitant householders of the parish as may be disposed to certify their personal knowledge of him, and their belief of his right to administer to the effects of the intestate, according to the degree of relationship set forth at the head of the petition; and the minister or curate being satisfied of the truth of their answers, and having seen the claimant sign the application, and the two householders sign the certificate (which the minister is required to do), shall add thereto a description of the height, &c. of the claimant; and, after the blanks in the petition, certificates, and description shall have been filled up, shall certify to the several particulars by subscribing his signature thereto, for which purposes the claimant and householders shall attend at such time and place as the minister *or curate shall appoint; and the claimant shall pay to the minister or curate a fee of two shillings and sixpence; and, the paper being completed according to the directions given, the minister shall return the same by post to the treasurer of the navy, London; and, upon its receipt at the navy pay office, the inspector shall examine it, and, being satisfied of the claim, he shall transmit to a proctor a certificate thereof; and in case the claimant shall not reside within the bills of mortality, the inspector shall at the same time inclose and send to the proctor a letter addressed to the minister and churchwardens or elders (as the case may be) of the claimant's panel, signifying the transmission of a commission (which the proctor is to obtain) for swearing the claimant as administrator, with the necessary instructions for executing the same; and the proctor shall, upon receipt thereof, take the requisite steps towards enabling the claimant to obtain administration, and shall, in the inspector's letter to

the minister, inclose the commission or other necessary instrument, with instructions for executing the same, and forward the same by post, agreeably to the address put thereon by the inspector.

Minister rejecting petition to state his reasons.

Sect. 57 provides, that, in case the minister or curate shall reject any petition, he shall state his reasons for such rejection on the petition, and forthwith return the same to the treasurer of the navy; and in case no application shall be made by the claimant, or no effectual steps taken by him to complete the petition and the certificates, within two calendar months from the date of the inspector's letter, the minister or curate shall return the petition to the treasurer of the navy, with his reason for doing so noted thereon.

Manner of proceeding in case of executors, &c. dying before the receipt of wages.

Sect. 63 enacts, that, when the executor or administrator shall die before he shall have received the wages, &c. payable to his testator or intestate, the inspector may investigate the right of any person claiming payment of the same, or to represent the person of such deceased petty officer, &c.; and, being satisfied of such right, shall certify the name and place of abode of such person upon the check or certificate, and * that in his judgment the claimant is the rightful representative of such deceased petty officer, &c. and entitled to receive whatever may remain due in respect of his services as aforesaid; and thereupon, if the wages, &c. remaining unpaid shall appear to the inspector not to amount nor likely to amount to more than twenty pounds, the treasurer, or any prize agent, may pay to such person all wages, &c. so due or to become payable, without requiring fresh administration; but if the same shall amount or appear to the said inspector to be likely to amount to more than that sum, then the same shall only be paid upon fresh letters of administration, to be obtained as before directed.

Administration not to be granted to creditors of seamen and marines.

Sect. 64, for preventing frauds by pretended creditors of deceased seamen and marines, enacts, that no letters of administration shall be granted to any creditor of any deceased petty officer or seaman, &c. but that every such creditor shall receive the amount of his claim (if just) out of the assets, or so far as the same will extend for that purpose, when the just amount shall have been ascertained and approved in manner following: The creditor shall deliver to the inspector an account in writing, signed, stating the particulars of the demand and the place of his abode, and verified by

oath or affirmation before a justice of the peace; and, if any application for a certificate to obtain probate or administration shall be made, the inspector shall give notice to the applicant of the name and place of abode of the creditor, and the amount of the debt, and shall also cause notice to be given to the creditor of the place of abode of such applicant; but if no such application shall have been made at the time of the delivery of the claim, the inspector shall proceed to investigate the account of such creditor, for which purpose he may require production of all books, accounts, &c. relating to his demand, and satisfactory evidence thereof; and, if such creditor shall satisfy the inspector of the justice of the demand in part or in the whole, the same shall be allowed; but if all books, &c. shall not be produced, or a sufficient reason assigned for not producing * the same, or if the inspector shall not be satisfied of the justice of the demand, he shall disallow the same; and if such creditor shall be dissatisfied, he shall be at liberty to appeal against such decision to the said treasurer, who shall thereupon inquire into the same by the examination of the parties and their witnesses upon oath, &c. and allow or disallow the claim, in part or in the whole, as to him shall seem fit; the decision of the treasurer to be final and conclusive; no claim to be admitted or allowed, unless made within two years after the death of the party, nor unless the same shall appear to have accrued within three years next before the death.

Creditor to be paid if no executors or administrators.

Sect. 65 enacts, that if, within twelve calendar months from the delivery of the claim, no application shall have been made by any person in the character of executor or administrator, the creditor shall be entitled to receive so much as shall have been allowed to be due to him out of the moneys payable in respect of the services of the deceased, so far as they will extend to satisfy the same; and thereupon the inspector shall grant to the creditor a certificate of the allowance of such claim; and so much of such wages as shall be sufficient to satisfy the claim so allowed shall be paid or remitted to the creditor: Provided that, if any prize money, &c. shall be due to the deceased, the same shall be payable to such creditor only as follows: If the wages, &c. shall not be sufficient to discharge the claim, the proper officer in the navy pay office shall state at the foot of the certificate the amount paid to the creditor, and it shall not be lawful for the creditor to demand or receive from any per-

son any prize money, &c. due to the deceased, except as hereinafter next mentioned; (that is to say), such prize money, if in the hands of an agent, shall be paid over as in cases of unclaimed prize money, and the creditor, on the production of such certificate to the officer appointed to pay the prize money, shall be entitled to receive from him so much thereof as shall be sufficient to discharge his demand, and upon the same being satisfied, the inspector shall retain *the certificate as a voucher or document of office: Provided also, that if there shall be more creditors than one, they shall be satisfied according to the priority of the allowance of their respective claims, but so as not to deprive any creditor of any priority he may by law be entitled to by reason of any specialty, provided notice in writing of the particulars of such specialty shall have been given to the treasurer of the navy in due time.

The remaining provisions of the statutes 11 Geo 4 and 1 W. 4, c. 20, together with those of the stat. 2 & 3 W. 4, c. 40, and the stat. 4 & 5 W. 4, c. 25, respecting the administration of the effects of intestate seamen and marines, will be found in the previous chapter, relating to the probate of the wills of such persons. (*c*)

By stat. 11 Geo. 4 and 1 W. 4, c. 41, s. 5, the commissioners of the Chelsea Hospital with respect to pension or prize money, and the secretary at war, of his own proper authority with respect to pay, may authorize the agent for pensions, or other proper officer charged with the payment thereof, to pay to any person or persons who shall prove him, her, or themselves, to the satisfaction of such commissioners, with respect to pension and prize money, or of the secretary at war, with respect to pay, to be the next of kin or legal representative, or otherwise legally entitled to any pension, or prize money, or pay due to any deceased officer, non-commissioned officer, &c. such pension, &c. provided the same does not exceed 50*l.* although no administration or probate shall have been obtained.

11 Geo. 4 & 1 W. 4, c. 41.

Sums not exceeding 50*l.* in respect of pensions or pay of soldiers may be paid without administration or probate.

By stat. 26 & 27 Vict. c. 57, s. 3, this section is repealed except as to pension or prize money, and special provisions are made by sect. 15 for payment of the residue of the estate

Stat. 26 & 27 Vict. c. 57.

(*c*) *Ante*, 394 *et seq.*

of officers and soldiers where it does not exceed 100*l.* without any representation being taken out to them.

2 & 3 W. 4, c. 53. Prize money of deceased soldiers.

By stat. 2 & 3 W. 4, c. 53, s. 19, provisions are made as to the payment of prize money to the representatives of deceased soldiers.

The commissioners of Chelsea Hospital may authorize the payment of shares not exceeding 50*l.* to next of kin, &c. without administration.

* And by s. 25, the commissioners of Chelsea Hospital are empowered to authorize their treasurer or deputy treasurer to pay to any person or persons who shall prove him, her, or themselves to be the next of kin or legal representative or otherwise entitled to any share or prize money belonging to any deceased officer, &c. any such share not exceeding 50*l.* although no administration or probate shall have been obtained.

Claim of prize money by the next of kin of foreigners to be paid without administration, &c.

By s. 26 it is enacted, that, in all cases of claim for prize money made by the next of kin of foreigners, who shall have been in the pay of his majesty as non-commissioned officers or soldiers, and who shall have died intestate, it shall be lawful, when such next of kin shall reside out of his majesty's dominions, for the treasurer or deputy treasurer of the said hospital for the time being to pay such claims to such next of kin, or any person or persons duly authorized by such next of kin to receive the same, without the production of letters of administration; and in all cases where such foreign non-commissioned officers or soldiers shall have made wills, it shall be lawful for the treasurer or deputy treasurer, in like manner, to pay and satisfy such claims to the person or persons who, by inspection of the original will, or an authenticated copy thereof, shall appear to be entitled thereto, or to such person or persons as he, or she, or they shall duly authorize to receive the same, without requiring the probate.

By s. 28, a creditor taking out administration is entitled only to the payment of the sum due to him at the time.

* CHAPTER THE THIRD.

OF SPECIAL AND LIMITED ADMINISTRATIONS.

SECTION I.

Of Administration cum testamento annexo.

HITHERTO the subject has been confined to cases of complete intestacy. But it often happens that the deceased, although he makes a will, appoints no executor, or else the appointment fails; in either of which events, he is said to die *quasi intestatus*. (*a*) The appointment of executor fails, 1. Where the person appointed refuses to act. 2. Where the person appointed dies before the testator, or before he has proved the will; or where, from any of the causes specified in a former part of this work, he is incapable of acting. 3. Where the executor dies intestate, after having proved the will, but before he has administered all the personal estate of the deceased. In all these cases, as well as where no executor is appointed, the court must grant an administration, which is called administration with the will annexed; (*b*) and in the last instance it is also called administration

Instances of *quasi* intestate.

(*a*) 2 Inst. 397.

(*b*) See *ante*, bk. III. ch. IV. p. 254 *et seq.* and notes; [Suttle *v.* Turner, 8 Jones (Law), 403; Smith *v.* Wingo, 1 Rice (S. Car.), 287. In Mississippi the act of appointment of an administrator with the will annexed must state a case giving the court authority to make such an appointment. And if it does not, the appointment will be void, although the facts were sufficient to justify it. Vick *v.* Vicksburg, 2 Miss. (1 How.) 379; Griffith *v.* Wright, 18 Geo. 173. But, in Kentucky, if the circumstances exist which authorize the appointment, they may be proved by parol, though not stated in the order. Peebles *v.* Watts, 9 Dana, 102. So in Virginia, Thompson *v.* Meek, 7 Leigh, 419. The appointment of an administrator with the will annexed, while there is an executor under no disability, and who has not renounced the appointment, is voidable upon the application of the executor, made in due time. Baldwin *v.* Buford, 4 Yerger, 16; Thompson *v.* Meek, 7 Leigh, 419; Creath *v.* Brent, 3 Dana, 129; Barksdale *v.* Cobb, 16 Geo. 13. The renunciation should appear of record. Springs *v.* Irwin, 6 Ired. (Law) 27.]

de bonis non. (*c*) The office of such an administrator differs little from that of an executor; (*d*) and it is plain that the will to which it is annexed must be similarly proved, as though probate were taken of it by an executor. (*e*)

(c) Com. Dig. Administrator, B. 1. Administration *de bonis non* must also be granted, whenever an administrator dies before he has administered all his effects. See *post*, § 11. p. 473 *et seq.* [For the statute provisions respecting the appointment of an administrator with the will annexed, in Massachusetts, see Genl. Sts. c. 93, § 6; c. 101, § 1; in New York, Re Ward, 1 Redf. Sur. 254; Re Root, 1 Redf. Sur. 257. The administrator *de bonis non* is privy to the original administrator; and the administrator *de bonis non* with the will annexed is privy to the original executor. Bell J. in Taylor *v.* Barron, 35 N. H. 484, 493; Grier J. in Stacy *v.* Thrasher, 6 How. (U. S.) 59, 60; *post*, 1929, note; Shaw C. J. in Wiggin *v.* Swett, 6 Met. 194, 197. But see Alsop *v.* Mather, 8 Conn. 584; Re Small's Estate, 5 Penn. St. 258; Duncan *v.* Watson, 28 Miss. 187; Grout *v.* Chamberlin, 4 Mass. 611, 613. Where a trust is annexed to the office of executor, it must, in case of his death, be exercised by the administrator *de bonis non* with a will annexed. Wilson's Estate, 2 Penn. St. 325; Roger *v.* Meixel, 19 Penn. St. 240; Knight *v.* Loomis, 30 Maine, 209; Buttrick *v.* King, 7 Met. 20, 23; Hall *v.* Cushing, 9 Pick. 395, 408; Saunderson *v.* Stearns, 6 Mass. 37; Prescott *v.* Pitts, 9 Mass. 376; Towne *v.* Ammidown, 20 Pick. 535; Dorr *v.* Wainwright, 13 Pick. 328, 332, 333; Gibbons *v.* Riley, 7 Gill, 81; In re Van Wyck, 1 Barb. Ch. 565; Lott *v.* Meacham, 4 Florida, 144; Jones *v.* Jones, 2 Dev. Eq. 387; Blake *v.* Dexter, 12 Cush. 559; King *v.* Talbert, 36 Miss. 367; Olwine's Appeal, 4 Watts & S. 492; *post*, 961; Williams's Appeal, 7 Penn. St. 259; Hassinger's Appeal, 10 Penn. St. 454.]

(*d*) 2 Bl. Com. 535; [Jackson *v.* Jeffries, 1 A. K. Marsh. 88. The duties of an executor, resulting from the nature of his office, devolve upon an administrator with the will annexed, where the authority is not necessarily connected with a personal trust and confidence reposed in the executor by the testator. Farwell *v.* Jacobs, 4 Mass. 634; *post*, 961. But where an administrator *de bonis non cum testamento annexo* is appointed upon the death of an executor, who was also appointed by the will the trustee of a fund arising out of the estate of the testator, such administrator does not succeed to the rights or duties of trustee of such fund. Knight *v.* Loomis, 30 Maine, 204; Brush *v.* Young, 28 N. J. (Law) 237; Ross *v.* Barclay, 18 Penn. St. 179; *post*, 654, note (w^1). It has been held that the administrator with the will annexed has no authority to administer any part of the testator's estate which is not disposed of by the will. Harper *v.* Smith, 9 Geo. 461. But see *post*, 650, note (*b*); Hays *v.* Jackson, 6 Mass. 149, 152.]

(*e*) Such administration must also be granted, if one of two executors proves the will and dies, and the other renounces. See *ante*, 256; Com. Dig. Administrator, B. 1. So if a man name the executor of B. to be his executor, and die in the lifetime of B.; for until B.'s death, he is in effect intestate. Graysbook *v.* Fox, 1 Plowd. 279, 281. Or if a man name an executor to have authority after a year from his death; for during the year he is without an executor. 1 Plowd. 279, 281. And it seems that in all cases where a man makes his testament and executors, and there is a mesne time in which the executors cannot or will not execute the office, the ordinary ought in the meantime to grant administration. Graysbrook *v.* Fox, 1 Plowd. 279. [Where a will, which has been admitted to probate, has been declared void by the court having jurisdiction, administration with the will annexed, granted upon an *ex parte* application, is also void. Smith *v.* Stockbridge, 39 Md. 640.]

* It is obvious that many of the cases above contemplated are not within the statute of administration, 21 Hen. 8, c. 5, (*f*) which provides only for intestacy, and the refusal of the appointed executor. Consequently in such instances the court is left to the exercise of its discretion in the choice of an administrator, according to its own practice; (*f*[1]) and no person has such a legal right to preference as can be enforced by application to the common law courts. (*g*)

Cases not within the statute of administration:

The rule of practice in the ecclesiastical court, in a case where the grant of administration is not within the statute, was to consider which of the claimants has the greatest interest in the effects of the deceased, and decree the administration accordingly, if there are no peculiar circumstances. (*h*) Hence, in all cases where no executor is appointed, or the appointed executor fails to represent the testator, the residuary legatee, if there be one, is preferred to the next of kin, and entitled to administration *cum* * *testamento annexo*. (*i*) And so strong has been the effort of the courts that the right of administration should

Practice to grant administration to him who has the greatest interest:

residuary legatee preferred to next of kin:

(*f*) See *ante*, 409.

(*f*[1]) [See in the case of Neave's Estate. 9 Serg. & R. 186.]

(*g*) Rex *v.* Bettesworth, 2 Stra. 956; In the Goods of Southmead, 3 Curt. 28. [In a proper case for granting administration with the will annexed in Massachusetts, it is prescribed by statute, that it shall be committed to the widow of the deceased, or to his next of kin, or to such other person as would have been entitled thereto if the deceased had died intestate; with a proviso for granting letters testamentary to any person appointed executor who shall give the bond prescribed by law before letters testamentary, or of administration with the will annexed, are granted. Genl. Sts. c. 93, § 6.]

(*h*) Repington *v.* Holland, 2 Cas. temp. Lee, 254; Dobson *v.* Gracherode, 2 Cas. temp. Lee, 326; Elwes *v.* Elwes, 2 Cas. temp. Lee, 573; Wetdrill *v.* Wright, 9 Phillim. 248; Tucker *v.* Westgarth, 2 Add. 352. In fact, in all cases, whether within the statute or not (with the exception, according to the old practice, of the single instance of administration to a wife's effects, whose husband has died after her, but before her estate is administered, see *ante*, 411), the right of administration follows the right to the property. In the Goods of Gill, 1 Hagg. 341; [*ante*, 418, note (*b*), 436, note (*k*); Sweezey *v.* Willis, 1 Bradf. Sur. 495.] See *ante*, 415, as to the grant being made to the persons having an interest under the will of a married woman in preference to her husband. See, also, In the Goods of Martindale, 1 Sw. & Tr. 8.

(*i*) The residuary legatee, it is said, is the testator's choice; he is the next person in his election to the executor. Atkinson *v.* Barnard, 2 Phillim. 318. If there are several entitled to the residue, administration may be granted to any of them. Taylor *v.* Shore, T. Jones, 162; Com. Dig. Administrator, B. 6. See Dampier *v.* Colson, 2 Phillim. 54. If granted to a widow, as one of several residuary legatees, it ought, it should seem, to be limited during widowhood. In the Goods of Teed, 7 Notes of Cas. 684. [The widow and next of kin are excluded from the right of administration *cum testamento*

follow the right of property, that although in the case of the appointed executor's renunciation, the letter of the statute expressly directs the ordinary to grant administration to the next of kin, yet the spirit of the act has been held, both by common lawyers and civilians, to exclude the next of kin where there is a residuary legatee; on the ground that in such case the next of kin have no interest. (*k*) "The reason," said the court, in Thomas *v.* Butler, (*l*) "that the statute 21 Hen. 8 required that administration should be granted to the next of kin, was, upon the presumption that the intestate intended to prefer him. But now the presumption is here taken away, the *residuum* being disposed of to another; and to what purpose should the next of kin have it, when no benefit can accrue to him by it? and it is reasonable that he should have the management of the estate who is to have what remains of it after the debts and legacies paid."

even where there is no residue, or where he is only trustee:

So the residuary legatee, even when there is no present prospect of any residue, is entitled to administration in preference as well to the next of kin, (*m*) as also to legatees * and annuitants. (*n*) So he is entitled, though only residuary legatee in trust. (*o*)

but next of kin have a *primâ facie* right.

However, the next of kin has a *primâ facie* right, (*o*[1]) and therefore, where a party claims as, or derivatively from, a residuary legatee, the burden of proof lies on such party. (*p*) Hence, where the husband appointed his wife executrix and residuary legatee, and he and his wife were

annexo only when the testator disposes of his whole estate. And this distinction between a partial intestacy, and a disposition of the whole estate, is clearly taken. Rogers J. in Ellmaker's Estate, 4 Watts, 34, 38, 39; Govanne *v.* Govanne, 1 Harr. & M'H. 346.]

(*k*) Pierce *v.* Perks, 1 Sid. 281; Thomas *v.* Butler, 1 Ventr. 217; S. C. 2 Lev. 55; 3 Keb. 23, 27; 1 Gibs. Cod. 479; Linthwaite *v.* Galloway, 2 Cas. temp. Lee, 414; West *v.* Willby, 3 Phillim. 381; Taylor *v.* Diplock, 2 Phillim. 276, 277; In the Goods of Gill, 1 Hagg. 341, 342. See, also, *ante*, 437.

(*l*) 1 Ventr. 219.

(*m*) Thomas *v.* Butler, 1 Ventr. 219; Treat. on Eq. bk. 4, p. 2, c. 1, s. 6; for, being once out of the statute upon the construction of the will, there is nothing *ex post facto* can bring him within it. 1 Ventr. 219.

(*n*) Atkinson *v.* Barnard, 2 Phillim. 316.

(*o*) Hutchinson *v.* Lambert, 3 Add. 27. See, however, *contra*, as to mere trustees, Coussmaker *v.* Chamberlayne, 2 Cas. temp. Lee, 243; Boddicott *v.* Dalzeel, Ib. 294; Fawkener *v.* Jordan, Ib. 327; *post*, 465. As to substituted trustees, see Cresswell *v.* Cresswell, 2 Add. 347.

(*o*[1]) [See Williams's Appeal, 7 Penn. St. 259.]

(*p*) The next of kin, as to personalty, stands in the same position as the heir-at-law as to realty. 4 De G., M. & G. 633.

drowned in the same ship, the court granted administration to the next of kin of the husband, on the ground that the next of kin of the wife had not proved her survivorship. (*q*)

The representative of the residuary legatee has the same right.

Where the residuary legatee survives the testator, and has a *beneficial* interest, his representative has the same right to administration *cum testamento annexo*, as the residuary legatee himself, and is therefore entitled to administration in preference to the next of kin, (*r*) or to legatees. (*s*) Thus, if an executor be also residuary legatee, and die before probate, or intestate, before he has fully administered the estate, administration *cum testamento annexo* shall be granted to his personal representative, and not to the next of kin of the first testator. (*t*) Hence, also, though generally *speaking, if a *feme covert* executrix dies intestate, her husband cannot take out administration *de bonis non* to the first testator, yet if she be also residuary legatee, he may do so. (*u*) But it should seem that where the residuary legatee is a mere trustee, it is the general rule of practice, upon his death to grant the administration, not to his representative, but to such person or persons as have the beneficial interest in the residuary estate. (*x*)

Although it was the practice of the spiritual court, grounded on

(*q*) Taylor *v.* Diplock, 2 Phillim. 261; In the Goods of Selwyn, 3 Hagg. 748; In the Goods of Murray, 1 Curt. 596; Satterthwaite *v.* Powell, 1 Curt. 705; Sillick *v.* Booth, 1 Y. & Col. C. C. 121; Underwood *v.* Wing, 4 De G., M. & G. 633; Wing *v.* Angrave, 8 H. L. Cas. 183; In the Goods of Carmichael, 32 L. J., P. M. & A. 70; In the Goods of Wheeler, 31 L. J., P. M. & A. 40; [Coye *v.* Leach, 8 Met. 371; Phené's Trusts, L. R. 5 Ch. Ap. 139; 2 Kent, 434–437; Moehring *v.* Mitchell, 1 Barb. Ch. 264; Pell *v.* Ball, 1 Cheves Eq. 99.] See *post*, pt. III. bk. III. ch. II. § V. where the question of survivorship among persons whose death is occasioned by the same cause is more fully considered.

(*r*) Jones *v.* Beytagh, 3 Phillim. 635; Wetdrill *v.* Wright, 2 Phillim. 243. See, also, Thomas *v.* Baker, 1 Cas. temp. Lee, 341.

(*s*) In re Thirlwall, 6 Notes of Cas. 44.

(*t*) Ysted *v.* Stanley, Dyer, 372 *a*, *ex relatione* Doctor Drury (judge of the prerogative court); Sparke *v.* Denne, W. Jones, 225; Farrington *v.* Knightley, 1 P. Wms. 553, by Lord Parker; S. C. Prec. Chanc. 567; Wentw. Off. Ex. 82, 14th ed.; Godolph. pt. 1, c. 20, s. 2. Where the testator made his wife residuary legatee for life, and substituted his daughter after her death, and the widow proved the will, and then both she and her daughter died; it was held that the personal representative of the daughter had a right to administration *cum testamento annexo*, in preference to the representative of the mother. Wetdrill *v.* Wright, 2 Phillim. 243.

(*u*) Richardson *v.* Seise, 12 Mod. 306; Rous *v.* Noble, 2 Vern. 249.

(*x*) Hutchinson *v.* Lambert, 3 Add. 27; Conssmaker *v.* Chamberlayne, 2 Cas. temp. Lee, 243; In re Poyer, Dea. & Sw. 184; In the Goods of Ditchfield, L. R. 2 P. & D. 152.

the principle above stated, to grant administration to the residuary legatee, yet, as he had no legal right to it under the statute, the court was not *bound* (as in the case of the sole next of kin of a complete intestate) to grant it to him. Thus, where the testator appointed two executors by his will, and left the residue of his estate to his son, the executors renounced, and the son moved for a *mandamus* to obtain administration *cum testamento annexo;* but the court refused to grant the writ, on the ground that none of the statutes mentioned the residuary legatee; and Lord Hardwicke adverted to a case in chancery, before Lord Macclesfield, between Wheeler and the Archbishop of Canterbury, where it was held that this sort of administration is not within the statute. (*y*)

No *mandamus* lies to compel a grant of administration to a residuary legatee.

* If the residuary legatee declines, it is usual to grant administration *cum testamento annexo* to the next of kin. But it is clear, that when he has no interest he may be excluded, and the administration granted to a person who has an interest in the effects, *e. g.* a creditor. (*z*) In Furlonger *v.* Cox, (*a*) the deceased left a widow and a son; the widow was sole executrix and universal legatee. She renounced probate, and the son contended for the administration against a creditor; (*b*) the court held that the son was excluded, the estate being insolvent, and gave the administration to the creditor. (*c*)

If the residuary legatee declines, administration usually granted to next of kin:

but he may be excluded if he has no interest.

If there is no residuary lega-

If the executor fails to take probate, and there is no residuary legatee, the next of kin are entitled to admin-

(*y*) Rex *v.* Bettesworth, 2 Stra. 956. But where the same person is both next of kin and residuary legatee, neither law nor practice will warrant a refusal to grant administration *cum testamento annexo* to such person, when the executors renounce. Linthwaite *v.* Galloway, 2 Cas. temp. Lee, 414.

(*z*) West *v.* Willby, 3 Phillim. 381. See Mayhew *v.* Newstead, 1 Curt. 593, in which case the executor and residuary legatee having assigned his interest to trustees for the benefit of his creditors, administration with the will annexed was granted to two of the trustees, he having been first cited.

(*a*) Prerog. Jan. 1811; cited by Sir John Nicholl, in 3 Phillim. 381.

(*b*) But, unless in cases where the next of kin has no interest in the property, a creditor cannot be allowed to contest the right to administration. *Ante*, 440, note (*i*), 444. And a residuary legatee, who has renounced, may retract his renunciation and claim the administration in preference to a creditor, though the estate is alleged to be deeply insolvent. In the Goods of Waters, 2 Robert. 142; S. C. 7 Notes of Cas. 380.

(*c*) Lord Mansfield, in The Archbishop of Canterbury *v.* House, Cowp. 140, said that "no next of kin ever struggled for the administration of an insolvent estate with an honest view."

istration *cum testamento annexo*. (*d*) If the next of kin decline it, such administration may be granted to a legatee (*e*) * or to a creditor; (*f*) but notice must be given of the application of the legatee or creditor to the next of kin. (*g*)

tee, the next of kin is entitled; if the next of kin decline, it may be granted to a legatee or creditor, upon notice.

In all these cases, where a party has a prior title to a grant, he must be cited before administration is committed to any other person. (*h*) Therefore the executor, if there be one, must be cited before a grant to a residuary legatee, (*i*) a residuary legatee before a grant to a specific legatee, and so on, through all the gradations of priority. So if there is a testamentary disposition without an executor, it has been laid down that the party, in whose favor the disposition is made, must cite the next of kin, before he can have administration *cum testamento annexo*. (*k*)

What citations are necessary before grants *cum testamento annexo*.

The court will grant administration, with the will annexed, to one of two universal legatees, a decree with intimation having

(*d*) Kooystra *v.* Buyskes, 3 Phillim. 531. Administration with a will annexed, in which there was no executor nor residuary legatee, was decreed to two aunts of the deceased, legatees in the will, and daughters of the next of kin, a grandmother, she being nearly ninety years of age, and incapable. In re Hinckley, 1 Hagg. 477.

(*e*) If there be a legatee for life, and a legatee substituted, the practice is to prefer the former. But the court will depart from its practice when, were it to be followed, a question of construction of the will would, in effect, be determined, and will make such a grant as will leave the question open. Brown *v.* Nicholls, 2 Robert. 399.

(*f*) Kooystra *v.* Buyskes, 3 Phillim. 531; Snape *v.* Webb, 2 Cas. temp. Lee, 411.

(*g*) 3 Phillim. 531; Com. Dig. Administrator, B. 6. See, also, Woolley *v.* Green, 3 Phillim. 314.

(*h*) In the Goods of Barker, 1 Curt. 592; *ante*, 448, note (*x*).

(*i*) If there be two executors, and one alone has proved the will, power being reserved to the other, both the executors must be cited. In the Goods of Leach, Dea. & Sw. 294. See Le Briton *v.* Le Quesne, 2 Cas. temp. Lee, 261, as to the citation of an executor who has already proved the will in a court out of the jurisdiction, in a case where administration is required by the residuary legatee, in order to recover a debt within the jurisdiction.

(*k*) 3 Bac. Abr. 41, tit. Executors, E. 8. Accordingly, in a case where an application was made for a grant of administration with the will annexed, to the sole legatee, on an affidavit that the testator died possessed of no other property than that specifically described in the will, Sir Cresswell Cresswell held that the next of kin ought to have been cited, but appears to have given the applicant his option of taking administration limited to the property disposed of by the will. In the Goods of Watson, 1 Sw. & Tr. 110. But on a subsequent occasion when this case was cited, the learned judge said that it was an exceptional case, and that the general rule was against such a grant, which should not be made unless some very strong reason be given. In the Goods of Watts, 1 Sw. & Tr. 538.

issued in the name of the other, who is since *dead. (*l*) So administration, with the will annexed, in which there was no executor, may be granted to one of two legatees, a decree with intimation having issued in their joint names against a residuary legatee. (*m*)

Administration to attorney to executor:

When the executor resides out of the jurisdiction, administration *cum testamento annexo* may be granted to another person under a letter of attorney from the executor for his use and benefit. (*n*) It should seem that a will thus proved by the attorney of the executor is the same thing as if actually proved by himself. And, consequently, the chain of representation is not broken by his death, if he has himself appointed an executor. (*o*) Again, the letter of attorney is revocable; and when the executor revokes it and desires probate, the court is bound to grant it to him. (*p*)

its effect:

it is revocable.

Consequence of the return of the executor.

On one occasion, administration, with the will annexed, had been granted for the use and benefit of the executor, then at sea, to his attorney. The executor having returned to England, and being desirous of probate, and the administration with the will annexed having been brought in by the attorney (with the usual affidavit, "that no action at law, or suit in equity, had been brought by or against him as administrator"), had been sworn as executor; and he prayed that the administration should be declared to have *ceased and expired*, and that probate should be granted to him. The application, in respect to the letters of administration, was objected to in the registry, on the ground that in some similar cases the administration had been expressly revoked. In support of the motion, it was urged that the administration, having been rightly granted, ought not to be revoked. A revocation which was unnecessary might possibly be injurious; for it might render some of the administrator's acts *void; and would certainly be inconvenient; for the probate would be considered at the stamp office as an original, and consequently probate duty required to be paid as for an original grant, and the duty, already paid on the administration, could only be recovered upon a special application to the

(*l*) Law *v.* Campbell, 1 Hagg. 55.

(*m*) Pickering *v.* Pickering, 1 Hagg. 480. See *ante*, 440.

(*n*) See *ante*, 438. [See Texidor's Estate, 2 Bradf. Sur. 105.]

(*o*) In the Goods of Bayard, 1 Robert. 768; S. C. 7 Notes of Cas. 117.

(*p*) Pipon *v.* Wallis, 1 Cas. temp. Lee, 402.

commissioners, supported by affidavit; whereas, if the administration were declared to have *ceased and expired*, the probate would pass at the stamp office upon a free stamp. The court (Sir John Nicholl) declared the administration *cum testamento annexo* to have *ceased and expired;* and directed that, in future, grants, *durante absentiâ*, to attorneys, should be limited "for the use and benefit of resident at , and until the executor (or the party entitled to the administration) should duly apply for, and obtain, probate or administration." (*q*)

Consequence of the death of the executor.

On the death of the executor the letters of administration cease to be of any force; and therefore the administrator cannot make a good title, if he sells leasehold property of the deceased, unless he can warrant to the purchaser that the executor is alive. (*r*)

The executor is not allowed to take administration *cum testamento annexo*.

It may here be observed, that a person who is entitled to probate as executor cannot be allowed to take out administration *cum testamento annexo* (*r*[1]) (notwithstanding the inconvenient effect which the taking probate may in some cases have, by reason of continuing the chain of representation to some other party whose executor the testator happens to be). For if a person be entitled to a grant in a superior character, the court will not make that grant to him in an inferior character. (*s*) Accordingly, by rule 50, P. R. (Non-contentious Business), "No person who renounces probate of a will or * letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the same deceased in another character." (*t*)

A person entitled to the grant in a superior character not to take it in an inferior.

Form of letters of administration *cum testamento annexo*.

The form of the grant of letters of administration *cum testamento annexo* varies from the grant of general letters of administration as follows:

(*q*) In the Goods of Cassidy, 4 Hagg. 360; Webb *v.* Kirby, 7 De G., M. & G. 381. As to the effect of the *death* of the executor, see Suwerkrop *v.* Day, 8 Ad. & El. 624; *post*, 510.

(*r*) Webb *v.* Kirby, 7 De G., M. & G. 376, reversing the decision of the V. C., 3 Sm. & G. 333. See, also, Suwerkrop *v.* Day, 8 Ad. & El. 624; *post*, 510.

(*r*[1]) [But an executor, whose appointment is avoided by his being an attesting witness, may, in Missouri, be appointed administrator with the will annexed. Murphy *v.* Murphy, 24 Missou. 526.]

(*s*) In the Goods of Bullock, 1 Robert. 273; In the Goods of Richardson, 1 Sw. & Tr. 515; In the Goods of Morrison, 2 Sw. & Tr. 129; [*ante*, 286, note (*k*).]

(*t*) See In the Goods of Loftus, 3 Sw. & Tr. 307, as to the construction of this rule; [*ante*, 286, note (*k*).]

"In her Majesty's Court of Probate.
"The Principal Registry.

"Be it known, that A. B. late of in the county of , deceased, who died on the day of , at , made and duly executed his last will and testament, [or will and codicils thereto] and did therein name [*or* did not therein name any] executor [*or as the case may be*]. And be it further known, that on the day of 18 , letters of administration with the said will annexed of all and singular the personal estate and effects of the said deceased were granted by her majesty's court of probate to C. D. [*insert the character in which the grant is taken*], he having been first sworn well and faithfully to administer the same by paying the just debts of the said deceased, and the legacies contained in his will [*or* will and codicils], and distributing the residue of his estate according to law, and to exhibit a true and perfect inventory of all and singular the said personal estate and effects, and to render a just and true account thereof whenever required by law so to do.

"(Signed) E. F.,
(L. S.) "Registrar." (t^1)

(t^1) [Letters of administration with the will annexed can be granted only by the court of the county in which the will was proved and letters testamentary granted. Eyster's Estate, 5 Watts, 132. See People *v.* White, 11 Ill. 341. An administrator with the will annexed is subject to the provisions of law applicable to other administrators, except so far as the distribution of the estate is directed by will. Ex parte Brown, 2 Bradf. Sur. 22. As to the bond required of an executor with the will annexed, in New York, see Ex parte Brown, 2 Bradf. Sur. 22. A special administrator who is appointed administrator with the will annexed, will be responsible for the estate in his hands, as such special administrator, until he has given the security required of him as administrator with the will annexed. Re Fisher, 15 Wis. 511. A bond in the form usually given by the general administrator of an intestate estate, and containing all the statute provisions applicable to the administration of such an estate, is valid and sufficient to bind an administrator with the will annexed, and his sureties, to the faithful discharge of his official duties, when given as the condition of his appointment to that office; although the condition of the bond recites, in describing the deceased, that he died intestate, and it is provided in said bond that the principal obligor shall administer the estate according to law. Judge of Probate *v.* Claggett, 36 N. H. 381. See Hartzell *v.* Commonwealth, 42 Penn. St. 453. But see Small *v.* Commonwealth, 8 Penn. St. 101. See *post*, 654, note (w^1).]

SECTION II.

Of Administration de bonis non.

This subject may be treated with reference, 1st, to the death of an executor; 2dly, to the death of an administrator.

* 1. With respect to the consequences of the death of an executor. (t^2) If a sole executor happens to die, without having proved the will, the executorship, as there has before been occasion to observe, (u) is not transmissible to his executor, but is wholly determined, and administration *cum testamento annexo* must be committed to the person entitled, according to the rules pointed out in the preceding section.

1. Consequences of the death of an executor:

When the administration is granted under such circumstances, although the executor may have administered in part by disposing of the testator's effects, &c. yet the administration shall not be *de bonis non administratis*, but an immediate administration; because, although the acts done by the executor are good, (v) the administering is an act *in pais*, of which the court of probate cannot take notice. (w)

If one of several executors dies before or after probate, no interest is transmissible to his own executor, but the whole representation survives to his companion. (x) Where such surviving executor, or where a sole executor, dies after probate, having made a will, appointing his own executor, the entire representation of the original testator will be transmitted to him. (y) But where such surviving executor, or sole executor, dies after probate, intestate, then no interest is transmissible to his own administrator; (z) but administration of another sort becomes necessary, which is called administration *de bonis non*, that is, of the goods of the original testator left unadministered by the former executor. (a)

where sole or surviving executor dies after probate intestate, there must be administration *de bonis non*:

(t^2) [See Finn *v.* Hempstead, 24 Ark. 111; Re Fisher, 15 Wis. 511; *post*, 473, note (k^1), 474, note (o^1); Genl. Sts. Mass. c. 101, § 1; *ante*, 254, note (b).]

(u) *Ante*, 255, 310.

(v) See *ante*, 303

(w) Wankford *v.* Wankford, 1 Salk. 308, by Holt C. J.

(x) *Ante*, 256.

(y) *Ante*, 254, and note (b), 256. The rule is the same, though the original probate was limited. In the Goods of Beer, 2 Robert. 349.

(z) *Ante*, 254.

(a) *Ante*, 254, and note (b); Tingrey *v.* Brown, 1 Bos. & Pull. 310; [Alexander *v.* Stewart, 8 Gill & J. 226.]

so where the executor appoints his own executor if the original will was not proved in this country:

So if the original testator dies abroad, or in the colonies, and his executor proves the will there, and then dies, having appointed his own executor, who proves the latter * will in the probate court here, it has been held that the executor of the executor does not represent the first testator. But that in order to constitute such a personal representative here, administration *de bonis non* must be obtained in the probate court in this country. (*b*)

so where one of several executors proves, and the rest renounce, and he who has proved dies.

Again, before the court of probate act (1857), 20 & 21 Vict. c. 77, if there were several executors, and one alone proved the will, and the rest renounced, upon the death of him who had proved, no interest was transmissible to his executor; but the representation survived to the co-executors, who might retract their former renunciation, and assume the executorship; (*c*) but if they persisted in refusing to act, the sort of administration just mentioned became necessary.

Stat. 20 & 21 Vict. c. 77, s. 79.

But now by the 79th section of that statute, "where any person after the commencement of this act renounces probate of the will of which he is appointed executor or one of the executors, the right of such person, in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor." (*d*)

Who is entitled to administration *de bonis non cum testamento annexo.*

This administrator *de bonis non* will, when appointed, be the only representative of the party originally deceased. (d^1) Such administration will evidently be committed *cum testamento annexo*, and will be granted to the person entitled according to the general principles already developed in cases of administration *cum testamento annexo*. (d^2) In many instances, it is obvious, he will be a different person from the representative of the deceased executor; but if the executor were also beneficially residuary legatee, his represen-

(*b*) Twyford *v.* Trail, 7 Sim. 92; *ante*, 290. See, also, In the Goods of Gaynor, L. R. 1 P. & D. 723.

(c) Arnold *v.* Blencowe, 1 Cox, 426; *ante*, 256, 285.

(*d*) See *ante*, 286, 287.

(d^1) [Such an administrator takes his title from the deceased, and not from the former executor or administrator. Comm. of Foreign Missions Appeal, 27 Conn. 344.]

(d^2) [See Russell *v.* Hoar, 3 Met. 187.]

tative * will likewise be entitled to the administration *de bonis non* to the original testator. (*e*)

In a modern case, administration *durante minoritate* was in the first instance granted to the mother of an infant, a part residuary legatee, on the renunciation of the executor. The infant died. By his death the administration ceased, and the mother became entitled, as widow, to the lapsed residue jointly with another infant. Under these circumstances, administration *de bonis non*, with the will annexed, was decreed to her. (*f*)

Administration *de bonis non* not necessary when there is an administration *durante minoritate* of an executor of an executor.

It has been said, upon the authority of Limmer *v.* Every, as reported by Croke, (*g*) that where an executor dies, having appointed an executor, who is a minor, and an administrator *durante minoritate* is appointed, he has no authority to intermeddle with the effects of the original testator, but an administration *de bonis non* must be granted. (*h*) However, as the case is reported by Leonard, (*i*) the point decided was merely that such an administrator should sue as administrator of the first testator. And in a later case, (*j*) it was held, on an application for a prohibition, that although an administrator of an executor is not an administrator to the first testator, yet an administrator *durante minore ætate* is *in loco executoris*, and may be sued as the executor of an executor may. (*k*)

2dly. With respect to the consequences of the death of an administrator, or of one entitled to administration. (*k*) It has al-

(*e*) See *ante*, 464.

(*f*) Akers *v.* Dupuy, 1 Hagg. 473.

(*g*) Cro. Eliz. 211.

(*h*) 3 Bac. Abr. 13 Exors. B. 1; Toller, 118.

(*i*) 4 Leon. 58, *nomine* Limver *v.* Evorie.

(*j*) Anon. 1 Freem. 288.

(*k*) See, also, Norton *v.* Molineux, Hob. 246; and Mr. Smirke's note, in his edition of Freeman, p. 288.

(*k*[1]) [Although administration shall not be originally granted in Massachusetts after the expiration of twenty years from the death of the testator or intestate except in special cases, yet administration *de bonis non* may be granted after the expiration of twenty years from the death of the former administrator. Bancroft *v.* Andrews, 6 Cush. 493; Pinney *v.* McGregory, 102 Mass. 190; Kempton *v.* Swift, 2 Met. 70; Holmes, petitioner, 33 Maine, 577. See Murphy *v.* Menard, 14 Texas, 62. A restriction upon administration *de bonis non* in this state is, that it must appear to the judge of probate that there is personal estate to the amount of twenty dollars or upwards, or unpaid debts amounting to as much, or something remaining to be performed in execution of the will. Genl. Sts. c. 101, § 1; Pinney *v.* McGregory, 102 Mass. 186, 190; Chapin *v.* Hastings, 2 Pick. 361. As to Alabama, see Watson *v.* Collins, 1 Ala. Sel. Cas. 515. The court in which the original administration was granted alone has jurisdiction to grant administration *de bonis non*. Ex parte Lyons, 2 Leigh, 761.]

ready been shown, that if a party who, as next of kin to the intestate at the time of his death, was entitled to administration, dies before letters of administration are obtained, his representative is entitled to the grant in preference * to one who has no beneficial interest in the effects, although he may have become next of kin at the time the grant is required. (*l*)

2. Consequences of the death of an administrator, or of one entitled to administration:

Where administration has been granted to two and one dies, the survivor will be sole administrator, (*m*) for it is not like a letter of attorney to two, where by the death of one, the authority ceases, but it is an office analogous to that of executor, which survives. (*n*) Upon the death of such surviving administrator, or of a sole administrator, in order to effect a representation of the first intestate, the court, whether the administrator died testate or intestate, must appoint an administrator *de bonis non*; (*n*[1]) for an administrator is merely the officer of the court, prescribed to it by act of parliament, in whom the deceased has reposed no trust; and therefore, on the death of the administrator, no authority can be transmitted by him to his executor or administrator, but it results to the court to appoint another officer. (*o*)

of one of several administrators:

of a surviving or sole administrator.

It remains to be considered who, upon the death of the administrator, is entitled to be appointed administrator *de bonis non* to the original intestate. (*o*[1])

Who is entitled to administration *de bonis non* on the death of the original administrator:

The ecclesiastical judges have on several occasions laid down, that in all that regards the obligation of the statutes of administration on the court, in the grant of ad-

(*l*) *Ante*, 436, 437.

(*m*) Hudson *v.* Hudson, Cas. temp. Talb. 127, decided by Lord Talbot, after hearing civilians. Eyre *v.* Lady Shaftsbury, 2 P. Wms. 121; Com. Dig. Administrator, B. 7; Jacomb *v.* Harwood, 2 Ves. sen. 268.

(*n*) Adam *v.* Buckland, 2 Vern. 514; 3 Bac. Abr. 56, tit. Executors, G.

(*n*[1]) [Taylor *v.* Brooks, 4 Dev. & Bat. (Law) 139.]

(*o*) 2 Bl. Com. 506; [Carroll *v.* Connet, 2 J. J. Marsh. 195; Taylor *v.* Brooks, 4 Dev. & Bat. 139; Navigation Co. *v.* Green, 3 [illegible].434. To render a grant of administration *de bonis non* valid, the office must be vacant at the time, by the death, resignation, or removal of the preceding administrator. Rambo *v.* Wyatt, 32 Ala. 363; Matthews *v.* Douthitt, 27 Ala. 273.]

(*o*[1]) [See Chandler *v.* Hudson, 11 Texas, 32. The statutes of Massachusetts provide in such case that "the probate court shall grant letters of administration, with the will annexed or otherwise, as the case may require, to some suitable person to administer the goods and estate of the deceased not already administered." Genl. Sts. c. 101, § 1. For a construction of this provision, see Russell *v.* Hoar, 3 Met. 190, 191; Wiggin *v.* Swett, 6 Met. 197, 198.]

ministration no distinction exists between an original and a *de bonis non* administration. (*p*) And in Kindleside *v.* Cleaver, the common law judges delegates expressed the same opinion. (*q*) Accordingly, upon the death of an original * administrator, a person, who was next of kin at the time of the death of the intestate, has been regarded as entitled, under the statute of Hen. 8, to the *de bonis non* grant, in preference to the representative of the original administrator, or to the representative of any other next of kin at the time of the death; and hence, in the case where a husband takes out administration to his wife, and dies, the spiritual courts for a long time considered themselves bound by the statute (in contravention of convenience, and of the general principle that the right of administration shall follow the right of property), to commit administration *de bonis non* of the wife, if required, to the next of kin of the wife at the time of her death, as having an absolute statutable right; although the beneficial interest in her effects be in the representatives of the husband. (*r*) But the practice has lately been altered in this respect. And the rule now established, on the principle that the grant ought to follow the interest, is, that the administration will be granted to the representatives of the husband, unless it can be shown that the next of kin of the wife are entitled to the beneficial interest. (*s*)

Again, it has been held that the statutes only regard *the next of kin at the time of the death* of the intestate, and not the next of kin at the time a second grant is wanted; and therefore, when the next of kin, who were so at the time of the deceased, are dead, the court have power, independent of the statute, to grant administration *de bonis non*, at their discretion, according to their own rules. (*t*) In the guidance of which discretion, the established principle is (as in the case of administration *cum testamento annexo*), that if there are no peculiar circumstances, the administra-

(*p*) Dr. Bettesworth, in Kindleside *v.* Cleaver, 1 Hagg. 345; S. C. 2 Hagg. Appendix, 169; Dr. Hay in Walton *v.* Jacobson, 1 Hagg. 346.

(*q*) See 2 Hagg. Appendix, 170.

(*r*) Kindleside *v.* Cleaver, 1 Hagg. 345; S. C. 2 Hagg. Appendix, 169. See *ante*, 411, 412. Yet instances may be found, where, notwithstanding the statute, the court have denied administration to the next of kin, on the ground of his having no interest. See Young *v.* Pierce, 1 Freem. 496; *ante*, 436.

(*s*) Fielder *v.* Hanger, 3 Hagg. 769; In the Goods of Pountney, 4 Hagg. 290; [Partington *v.* Atty. Gen. L. R. 4 H. L. 100;] *ante*, 413.

(*t*) Cardale *v.* Harvey, 1 Cas. temp. Lee, 179.

tion shall be * committed to him who has the greatest interest in the effects of the original intestate. (*u*) Thus, in Savage *v.* Blythe, (*v*) the intestate died, leaving a brother and several nephews and nieces. Administration was granted to the brother, and at the end of the year he distributed, taking the securities of the deceased upon himself. He afterwards died, leaving the securities due to the original deceased outstanding; and having made a will, and appointed an executor. A decree was taken out against the nephews to show cause why administration *de bonis non* should not be granted to the executor of the brother administrator. The nephews appeared, and prayed administration as next of kin under the statute. But Sir Wm. Wynne held that the statutable right was confined to the next of kin at the time of the death, and granted the administration *de bonis non* to the executor of the deceased administrator, on the ground that the interest was clearly in him. In the subseqnent case of Almes *v.* Almes, (*x*) the same judge again granted similar administration, under nearly the same circumstances, upon the same grounds; and mentioned the case of Lovegrove *v.* Lewis, (*y*) decided by Sir George Hay, and affirmed by the delegates, where the administration was granted to the executor of the original administrator, to the exclusion of those who were next of kin at the time of the grant. (*z*) So in the instance of administration *de bonis non* to the effects of the wife, after the death of the husband administrator, if the persons who, at the time of her death, were her next of kin, are dead, it has always been held that the court may exercise its discretion. (*a*)

Administration *de bonis non* granted to the executor of deceased administrator having the greatest interest in the effects.

The proposition, however, that if all who were next of kin at the time of the death of the intestate are dead, then the representative of such next of kin, being entitled to the * beneficial interest, is also entitled to administration *de bonis non*, must, it appears, be understood with this limitation, viz, that a person originally in distribution is preferred to the representative of the next of kin. (*b*)

(*u*) But the court is not *obliged* to grant to the largest interest. 1 Cas. temp. Lee, 177.

(*v*) 2 Hagg. Appendix, 150.

(*x*) 2 Hagg. Appendix, 155.

(*y*) S. C. 2 Hagg. App. 152, note (*a*).

(*z*) See, also, In the Goods of Middleton, 2 Hagg. 60.

(*a*) By Sir John Nicholl, In the Goods of Gill, 1 Hagg. 344.

(*b*) See the Appendix to 2 Hagg. 157. But this rule, in the discretion of the court,

It has already been observed, that upon the death of a creditor administrator, a party who was next of kin at the time of the death of the intestate may come in and claim administration *de bonis non.* (*c*) And though all the next of kin at the time of the death are dead, it should seem that no grant of administration *de bonis non*, however limited in its object, can be obtained after the termination of the creditor administration, without citing those who are next of kin at the time the grant is required. Thus, in Skeffington *v.* White, (*d*) the intestate died in 1790, leaving two sisters entitled in distribution. They renounced, and administration was decreed in 1791, to a creditor, who administered the estate till 1806, when he died. The sisters did not come in and take administration *de bonis non;* and from that time no further representation was taken out till 1827, when an administration *de bonis non* was granted, *without citing the then next of kin* (the son of one of the sisters, who were both dead), limited to assign a certain leasehold property of the deceased, not severed in his lifetime, but mortgaged during the original creditor administration. In March, 1828, Sir Lumley Skeffington, the then next of kin, in whom all the beneficial interest in the deceased's estate was vested, obtained a decree to show cause why the latter administration should not be revoked, on the ground of his not having been cited when the limited grant was made, and on a suggestion that such grant had been surreptitiously obtained, * and that there was a surplus belonging to the deceased's estate. Sir John Nicholl thought the citation under the circumstances was not necessary, but that Sir Lumley was barred by time, by events, and by his own *laches;* and that there was no ground for revoking the grant. However, on appeal to the delegates, the urt pronounced for the appellant, directed a monition to issue to call in the limited administration, and condemned the respondent in costs. (*e*)

Citation of next of kin before grant of administration *de bonis non.*

The following is the prescribed form of a grant of letters *de bonis non:*

may be varied by granting the administration to the next of kin. In the Goods of Carr, L. R. 1 P. & D. 291. According to the general practice, a party having a direct interest is preferred to those entitled in a representative character. In the Goods of Middleton, 2 Hagg. 61.

(*c*) *Ante*, 444.

(*d*) 1 Hagg. 699.

(*e*) 2 Hagg. 626.

"In her Majesty's Court of Probate.
"The Principal Registry.

Form of letters of administration *de bonis non.*

"Be it known, that A. B. late of , in the county of , deceased, died on 18 , at , intestate, and that since his death, to wit, in the month of , 18 , letters of administration of all and singular his personal estate and effects were committed and granted by to C. D. [*insert the court from which the grant issued, and the relationship or character of administrator*] (which letters of administration now remain of record in), who, after taking such administration upon him, intermeddled in the personal estate and effects of the said deceased, and afterwards died, to wit, on , leaving part thereof unadministered, and that on the day of , 18 , letters of administration of the said personal estate and effects so left unadministered (e^1) were granted by her majesty's court of probate to , he having been first sworn well and faithfully to administer the same, by paying the just debts of the said intestate, and distributing the residue of his estate and effects according to law, (e^2) and to exhibit a true and perfect inventory of the said personal estate and effects so left unadministered, and to render a just and true account thereof, whenever required by law so to do.

"(Signed) E. F.,
"Registrar."

(e^1) [See *post*, 915, note (e).]

(e^2) [See Brattle *v.* Converse, 1 Root, 174; Brattle *v.* Gustine, 1 Root, 425; Scott *v.* Fox, 14 Md. 388; Hendricks *v.* Snodgrass, 1 Miss. (Walk.) 86. An administrator *de bonis non* may properly be appointed even where the original administrator has reduced all the assets of the estate to money. Donaldson *v.* Raborg, 26 Md. 312. If an executor has made payments on account of the estate of his testator beyond the amount of funds in his hands, and dies before reimbursing himself, and the amount due has been ascertained upon a settlement of his account by his administrator in the probate court, and an administrator *de bonis non* of the testator has been appointed, who has no funds except such as have been received from the avails of real estate sold under license from the judge of probate, the remedy to obtain from these funds payment of the amount so found due to the executor is to cite in the administrator *de bonis non* to render his account, and to apply to the judge of probate for an order to the administrator *de bonis non* to pay the account; and a refusal to comply with such order would furnish cause of suit upon the bond of the administrator *de bonis non*. Munroe *v.* Holmes, 13 Allen, 109.]

* SECTION III.

Of Limited Administrations.

Besides the administrations already discussed, which extend to the whole personal estate of the deceased, and terminate only with the life of the grantee, it is competent to the court to grant *limited* administrations, which are confined to a particular extent of time, or to a specified subject-matter. It will be the object of the present and three following sections, to consider this species of grant by the probate court.

Rule 29, P. R. Consent or citation of persons entitled to general grant.

By rule 29, P. R. "Limited administrations are not to be granted unless every person entitled to the general grant has consented or renounced, or has been cited and failed to appear, except under the direction of the judge."

Rule 30. A person entitled to general grant not to take a limited one.

By rule 30, "No person entitled to a general grant of administration of the personal estate and effects of the deceased will be permitted to take a limited grant except under the direction of the judge."

Administration durante minore ætate.

If the person appointed sole executor, or he to whom, in case of intestacy, the right to administration has devolved under the statutes, be within age, a peculiar sort of administration must be granted, which is called an administration *durante minore ætate.* (e^3) In the former case, it is obviously a species of administration *cum testamento annexo.*

When necessary:

If there are several executors, and one of them is of full age, no administration of this kind ought to be granted; because he who is of full age may execute the will. (f) * But

(e^3) [Wallis *v.* Wallis, 1 Wins. (N. Car.) 78. Provision is made for this case, by statute, in Massachusetts, Genl. Sts. c. 93, § 7. An executor during whose nonage an administrator *durante minore ætate* has been appointed, is a privy to such administrator. Bell J. in Taylor *v.* Barron, 35 N. H. 493.]

(f) Pigot & Gascoigne's case, Brownl. 64; Foxwist *v.* Tremain, 1 Mod. 47, by Twisden J.; 4 Burn E. L. 384, Phillimore's ed.; *ante*, 232. There are some authorities to the contrary. See Colborne *v.* Wright, 2 Lev. 240; Bac. Abr. Executors, B. 1. [In Massachusetts, where, besides the person under age, there is another executor who accepts the trust, the estate is to be administered by such other executor until the minor arrives at full age, when, upon giving bond, as required by law, he may

it has been held differently in the case of several next of kin in equal degree, entitled under an intestacy. In Cartright's case, (*g*) the intestate died leaving four grandchildren, whereof one was of age and the other three were minors; and the administration was contested betwixt her that was of age and the mother and guardian of the other three; and this case was argued at Serjeant's Inn, before the two chief justices and the chief baron, *et al.* who granted it to the mother, as guardian to the three *durante minore ætate;* though it was strongly urged, that she that was of age being capable, and the others incapable, she ought to be preferred. But, on the other hand, it was laid down, that since the new statute 22 & 23 Car. 2, c. 10, which entitled them all to a distribution, the interest of the three preponderated, and therefore that was to be regarded; and they compared it to the case of a residuary legatee who shall be preferred before the next of kin. (*h*)

This sort of administration has been frequently held not to be within the statute of 21 Hen. 8, c. 5. And consequently, it is discretionary in the court to grant it to such person as it shall think fit. (*i*) Thus, in the case of Rex *v.* Bettesworth, (*k*) a *mandamus* was moved for, to be directed to the judge of the prerogative court, to grant administration to one Smith, during the minority of his two infant grandchildren. The judge had approved of him as a proper person, but insisted on his giving security to distribute the effects in equal proportions among the creditors. The court were of opinion that the judge had a discretionary power in granting administration *durante minore ætate*, and therefore that in this case he might insist upon reasonable or equitable terms, or otherwise refuse administration to the claimant. But they said if a *mandamus* had been moved for, * to grant administration generally, they would have granted it. (*l*)

no *mandamus* lies to grant it to a particular person.

be admitted as joint executor with the former. Genl. Sts. c. 93, § 7.]

(*g*) 1 Freem. 258; *ante*, 426.

(*h*) See *ante*, 426.

(*i*) Briers *v.* Goddard, Hob. 250; Thomas *v.* Butler, Ventr. 219; West *v.* Willby, 3 Phillim. 379; [Rogers J. in Ellmaker's Estate, 4 Watts, 34, 39. See Pitcher *v.* Armat, 5 How. (Miss.) 288; Williams's Appeal, 7 Penn. St. 260; Beiber's Appeal, 11 Penn. St. 162; McClellan's Appeal, 16 Penn. St. 116.]

(*k*) 1 Barnard. 370, 425; S. C. Fitzgib. 163; 2 Stra. 892, by the name of Smith's case.

(*l*) The discretionary power of the spiritual court is also recognized in the statute 38 Geo. 3, c. 87, s. 6. See *post*, 485.

Practice of the spiritual court to grant administration to the guardian:

In the exercise of this discretion it was the practice of the spiritual court to grant the administration to the guardian whom that court had a right by law to appoint for a personal estate. (*m*) With respect to the appointment of guardian a distinction exists in the court of probate between an infant and a minor. The former is so denominated, if under seven years of age, the latter from seven to twenty-one. (*n*) The court *ex officio* assigns a guardian to an infant; (*o*) the minor himself may nominate his guardian, who is then admitted in that character by the judge; (*p*) but if the minor makes an improper choice, the court will control it. (*q*) According to the practice of the prerogative court, * the guardianship was granted to the next of kin of the child, unless sufficient objection to him was shown. (*r*)

distinction between infant and minor:

If a wife be the only next of kin, and a minor, she may elect her husband her guardian, to take the administration for her use and benefit, during her minority; but the grant ceases on her coming of age, when a new administration may be committed to her. (*s*)

(*m*) In the Goods of Weir, 2 Sw. & Tr. 451. See, also, Brotherton *v.* Harris, 2 Cas. temp. Lee, 131. In this case it was held that the guardian appointed by the ecclesiastical court was to be preferred to the guardian appointed by the court of chancery. But see note (70) to Co. Lit. 88 *b*, by Hargrave, in which the right of the ecclesiastical court to appoint a guardian for the personal estate is doubted. On a late occasion, administration, for the use and benefit of minor children of a Frenchman deceased, was granted to their guardian appointed by the French authorities. In the Goods of Sartoris, 1 Curt. 910. It has lately been held that a testamentary guardian of minor children is entitled to a grant of the administration for their use and benefit preferably to a guardian elected by the children. In the Goods of Morris, 2 Sw. & Tr. 360. The guardian of an infant, sole next of kin of an intestate, is entitled to take administration of his effects, in preference to creditors. John *v.* Bradbury, L. R. 1 P. & D. 243. As to giving justifying security in such a case, see Ib.

(*n*) Toller, 100.

(*o*) Sir G. Lee was of opinion that he could not assign a guardian to an infant in *ventre de sa mere*. Walker *v.* Carless, 2 Cas. temp. Lee, 560.

(*p*) Rich *v.* Chamberlayne, 1 Cas. temp. Lee, 134; Fawkner *v.* Jordan, 2 Cas. temp. Lee, 327; Ozeland *v.* Pole, Prer. Hill. T. 1787; 4 Burn E. L. 284, note (5), Tyrwhitt's ed.

(*q*) 2 Cas. temp. Lee, 330. This is mentioned by Lee J. in Rex *v.* Bettesworth, Fitzg. 164, Mich. 4 Geo. 2, as being then the course of the spiritual court.

(*r*) Toller, 100; In the Goods of Ewing, 1 Hagg. 381. But the court may, in its discretion, pass by the next of kin. In the Goods of Ewing, 1 Hagg. 381; *post*, 483, note (*y*); Quick *v.* Quick, 33 L. J., P. M. & A. 177. On one occasion a creditor was appointed guardian to minors (the only children of F. P.), who had no known relations, for the purpose of taking out administration to the estate of E. P., who had died intestate and insolvent. In the Goods of Peck, 1 Sw. & Tr. 141.

(*s*) Toller, 92.

But there are many instances where the court has granted the administration to persons not guardians of the minor, and refused to grant it to the person nominated by them. Thus in Lovell & Brady *v.* Cox, (*t*) Lovell and Brady were appointed trustees by the deceased, and his heir, Anne Cox, was executrix and residuary legatee. She was a minor, and the father claimed the administration *pendente minoritate*. The court held that it had a discretionary power, refused it to him, and gave it to the trustees. (*u*) So the administration may be granted to creditors, in exclusion of the guardian of the minor, if the estate is insufficient to pay the debts. And in many other cases it has been laid down that the court is not bound by the choice of the minor. (*v*) Thus, where a grandfather, to whom, as the next of kin, the administration *durante minoritate* would in the ordinary course have passed, was turned * eighty, it was granted to an uncle, he giving full justifying security. (*x*)

the guardian sometimes excluded:

In Havers *v.* Havers, (*y*) Lord Hardwicke C. said that administration *durante minore ætate* ought not to have been granted to a person who was very poor, though the guardian and next of kin of the infant.

Rules P. R. (Non-contentious Business) as to grants to guardians.

The old practice above stated has been applied, and in some respects varied, by the rules P. R. (Non-contentious Business), as follows:

Rule 33.

By rule 33, "Grants of administration may be made to guardians of minors and infants for their use and benefit, and elections by minors of their next of kin or next friend, as the case may be, will be required; but proxies accepting such guardianships and assignments of guardians to minors will be dispensed with."

Rule 34.

34. "In cases of infants (*i. e.* under the age of seven years) not having a testamentary guardian, or a guardian appointed by the high court of chancery, a guardian must be assigned by order of the judge, or of one of the registrars; the registrar's order is to be founded on an affidavit, showing that the

(*t*) Prerog. cited by Sir John Nicholl in West *v.* Willby, 3 Phillim. 379.

(*u*) See, also, Appleby *v.* Appleby, 1 Cas. temp. Lee, 135, where administration *cum testamento annexo* was granted to a grandmother during the minority of an executor, she being also testamentary trustee, in preference to the mother, whom the minor had chosen guardian. See, also, Hughes *v.* Ricards, 2 Cas. temp. Lee, 543.

(*v*) West *v.* Willby, 3 Phillim. 374.

(*x*) In the Goods of Ewing, 1 Hagg. 381.

(*y*) Barnard. Chan. Cas. 23.

proposed guardian is either *de facto* next of kin of the infants, or that their next of kin *de facto* has renounced his or her right to the guardianship, and is consenting to the assignment of the proposed guardian, and that such proposed guardian is ready to undertake the guardianship." (*z*)

35. "Where there are both minors and infants, the guardians elected by the minors may act for the infants without being specially assigned to them, by order of the judge or a registrar, provided that the object in view is to take a grant. If the object be to renounce a grant, the guardian must be specially assigned to the infants by order of the judge or of a registrar." Rule 35.

36. "In all cases where grants of administration are to be * made for the use and benefit of minors or infants, the administrators are to exhibit a declaration on oath of the personal estate and effects of the deceased, except when the effects are sworn under the value of twenty pounds, or when the administrators are the guardians appointed by the high court of chancery, or other competent court, or are the testamentary guardians of the minors or infants." Rule 36.

In a modern case in the prerogative court, the residuary legatee was a minor, married to a husband who was also a minor, both being subjects of, and resident in Portugal. But it appeared that the husband, by reason of his holding a commission in the army, and being married, by the law of Portugal, was considered of full age, and that by her marriage, her disabilities, as a minor, ceased. Under these circumstances, administration with the will annexed, limited to the receipt of certain dividends in the English funds, was granted to the wife. (*a*) Administration granted to a minor, a foreigner, entitled by the law of his own country.

Where an intestate left a widow and infant son, and administration was granted to the widow, who soon after became *non compos*, and the estate was small and unable to bear the expense of a commission of lunacy, and there were debts owing to it, which were in danger of being lost, if there was no person to receive them; Sir George Lee, without revoking the administration granted to the widow, assigned (upon the renunciation and consent of the grandmother) Administration during the incapacity of a widow and minority of her son.

(*z*) See, further, as to the appointment of guardian *ad litem*, Hancock *v.* Peaty, L. R. 1 P. & D. 335.

(*a*) In the Goods of the Countess Da Cunha, 1 Hagg. 237. But see *contra*, In the Goods of Orleans, 2 Sw. & Tr. 253; *ante*, 450.

the infant's aunt to be his guardian, and granted administration to her also, for the use and benefit of the widow and infant, during the incapacity of the widow, and the minority of the infant, if the widow should not sooner recover her senses. And the learned judge directed the administration to be drawn up in a special form, reciting the above particulars. (*b*)

When administration *durante minore ætate* shall be determined.

It has already been pointed out (*c*) that formerly an infant executor was considered capable of the office, on attaining *the age of seventeen. But now by statute 38 Geo. 3, c. 87, s. 6, (*d*) after reciting that inconvenience arose from granting probate to infants under the age of twenty-one, it is enacted, "That where an infant is *sole* executor, administration with the will annexed shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the full age of twenty-one years, at which period, and not before, probate of the will shall be granted to him."

And by the seventh section it is enacted, "That the person to whom such administration shall be granted shall have the same powers vested in him as an administrator now hath by virtue of an administration granted to him *durante minore ætate* of the next of kin."

Before this act there was a distinction between administration granted during the minority of an infant executor and an infant next of kin; inasmuch as in the latter case the administration has always been held to continue in force till the next of kin attained the age of twenty-one. (*e*)

It seems agreed, that if administration be granted during the minority of several infants, it determines upon the coming of age of any one of them. (*f*) Thus if there be * several infant exec-

(*b*) 1 Cas. temp. Lee, 625.

(*c*) *Ante*, 231, note (*u*).

(*d*) Extended to Ireland by 58 Geo. 3, c. 81, ss. 1, 2.

(*e*) Freke *v.* Thomas, 1 Ld. Raym. 667; 4 Burn E. L. 384, Phillimore's ed. The distinction was justified on the ground that the authority of an administrator is derived from stat. 31 Edw. 3, c. 11, which admits only of a legal construction, and therefore he must be of a legal age before he is competent; while the executor, on the other hand, comes in by the act of the party, and that he should be capable at seventeen was in conformity to other provisions of the spiritual law. Besides, the statute of distributions requires administrators to give a bond, which minors are incapable of doing. A *dictum* of Lord Hardwicke's in Lee *v.* D'Aranda, 3 Atk. 422, is at variance with this distinction; but there seems to be some error in the report.

(*f*) Touchst. 490; Bacon Abr. Exors.

utors, he who first attains the age of twenty-one shall prove the will, and may execute it. (*g*)

It was resolved, according to Lord Coke, by the justices of the common pleas in Prince's case, (*h*) that if administration be committed during the minority of an executrix, and she take husband of full age, then the administration shall cease. But this has since been doubted, in the case of Jones *v.* Lord Strafford, (*i*) where Lord King C. and Raymond C. J. strongly inclined against this opinion as reported in Prince's case, the same not being taken notice of by other contemporary reporters, as 2 And. 132, Cro. Eliz. 718, 719, and 3 Leon. 278, in all which books Prince's case is reported. Besides which it was extrajudicially expressed, the question in the case being only whether such a special administrator could assign over a term for years which belonged to the testator. And it is remarkable that the author of the office of executor, after mentioning the proposition as stated in Prince's case, proceeds, "Yet I do a little marvel at these opinions, considering that these things are managed in the spiritual court, and by that law (the law spiritual) which intermeddles not with the husband in the wife's case; now by that law, and not our common law, comes in this limit of seventeen years. And I have seen it otherwise reported, in and touching the last point." (*j*)

If administration be granted during the minority of several infants, one of whom dies before he comes of age, this will not determine the administration. (*k*)

Scire facias: who shall have it when the minority is ended.

It seems to be clearly settled, says Chief Baron Gilbert, (*l*) *that if an administrator *durante minore ætate* of an executor brings an action and recovers, and then his time determines, the executor may have *scire facias* (*m*)

B. 3; Taylor *v.* Watts, 1 Freem. 425; S. C. *nom.* Joynes *v.* Watt, T. Jones, 48; 3 Keb. 607, 643; Willy *v.* Poulton, Moseley, 99.

(*g*) 4 Burn E. L. 385, Phillimore's ed.

(*h*) 5 Co. 29 *b*.

(*i*) 3 P. Wms. 88.

(*j*) Page 392, 14th ed.

(*k*) Anon. Brownl. 47; Jones *v.* Strafford, 3 P. Wms. 89, overruling the opinion in Brudnel's case, 5 Co. 9 *a*.

(*l*) Bac. Abr. tit. Exors. B. 1, 3, vol. 3, p. 18, citing 1 Roll. Abr. 888, 889; Beamond *v.* Long, Cro. Car. 227; Bearblock *v.* Read, 2 Brownl. 83; Anon. Godb. 104; Hatton *v.* Mascue, 1 Keb. 750; Coke *v.* Hodges, 1 Vern. 25. See, also, Major *v.* Peck, 1 Lutw. 342, *per curiam;* Anon. 3 Leon. 278; Kempe *v.* Lawrence, Owen, 134; but *vide* King *v.* Death, Brownl. 57, *contra*.

(*m*) [Bell J. in Taylor *v.* Barron, 35 N. H. 493.] As to the proceedings now substituted in lieu of *scire facias*, by the common law procedure act (1852), see *post*, pt. II. bk. III. ch. IV.

upon that judgment. Also it has been holden, that if such administrator obtains judgment he may bring *scire facias* against the bail, and they cannot object that the infant is of full age; for the recognizance being to the administrator himself by name, though he be administrator *durante minore ætate*, yet he may have *scire facias* against the bail. (*n*)

Suits in equity, whether determined by the minor's coming of age.

In the case of Jones *v.* Basset, (*o*) it seems to have been laid down, that a suit in equity is put an end to by the infant's coming of age, and that the infant must begin anew; but that where the administrator *durante minore ætate* has proceeded to a decree and account, the infant will be allowed to go on. (*p*)

But according to the modern practice, upon the determination of an administration *pendente minore ætate*, a suit commenced by the temporary administrator may be added to, and continued by supplemental bill. (*q*) For in this case there is no change of interest which can affect the question between the parties, but only a change of the person in whose name the suit must be prosecuted; and if there has been no decree, the suit may proceed, after the supplemental bill has been filed in the same manner as if the original plaintiff had continued such, except that the defendants must answer the supplemental bill, and either *admit or put in issue the title of the new plaintiff. But if a decree has been obtained before the event on which such a supplemental bill becomes necessary, though the decree be only a decree *nisi*, there must be a decree on the supplemental bill, declaring that the plaintiff in that bill is entitled to stand in the place of the plaintiff in the original bill, and to have the benefit of the proceedings upon it, and to prosecute the decree, and take the steps necessary to render it effectual. (*r*)

The infant on coming of age

It was held that if the administrator *durante minore ætate* brought an action, and while it was pending the infant came of age, he could not bring a writ by journeys

(*n*) Bac. Abr. *ubi supra*; Emilies *v.* Weeks, 2 Keb. 877; Embrin *v.* Mompesson, 2 Lev. 37. But, by Hale C. J. in this case, if after the infant come of age, he had sued out execution upon the principal judgment, it might have been a question, whether that ought to be sued out by him or the infant.

(*o*) Prec. Chanc. 174.

(*p*) See, also, Coke *v.* Hodges, 1 Vern. 24.

(*q*) Stubbs *v.* Leigh, 1 Cox, 133; Cary's Rep. 31, ed. 1820; Mitf. Pl. 64, 4th ed.

(*r*) Mitf. Pl. 64, 4th ed.; [Bell J. in Taylor *v.* Barron, 35 N. H. 493.]

could not bring journeys accounts.

accounts; because in no case could such a suit be but by the same person, not only in representation, but strictly and truly the same person. (*s*)

Effect of termination of minority on execution issued by administrator.

With respect to the effect of the determination of such an administration upon executions issued by the administrator during his office, a case occurred in Mich. Term, 28 & 29 Eliz., (*t*) where an administrator *durante minore ætate* of an infant executor had judgment in an action of debt brought by him for money due to the testator, and the defendant being taken in execution, the infant executor came of full age. It was moved that he might be discharged out of custody, because the authority of the administrator was determined, and he could not acknowledge satisfaction or make acquittances, &c. But it was held by Windham and Rhodes, justices, that the recovery and judgment were still in force, though the party might be relieved by an *audita querela*. (*u*)

What acts an administrator, *durante*, &c. may do.

Formerly an opinion prevailed, that an administrator * *durante minore ætate* could not sue; for he was considered as a mere servant or bailiff. (*x*) But it is now established, not only that he may bring actions to recover the debts due to the deceased, (*y*) but also that he may bring trover for his goods; because he has more than the bare custody of them, for he has the property itself. (*z*) And it is laid down in a modern book of authority, (*a*) that an administrator during the minority of one entitled to administration has for the time all the power and authority of an absolute administrator. (*b*)

So though an administrator *durante minore ætate* has but a limited and special property in the estate of the deceased, (*c*) and no interest or benefit in the testator's or intestate's estate, but in right of the infant, (*d*) yet he may do all acts which are incum-

(*s*) Elstobb *v.* Thoronghgood, 1 Salk. 393; S. C. 1 Ld. Raym. 283; Kinsey *v.* Heywood, 1 Ld. Raym. 433. See, as to the nature of the writ of journeys accounts, *post*, pt. v. bk. i. ch. i.

(*t*) Anon. Godb. 104; 3 Leon. 278.

(*u*) In most cases where the remedy of *audita querela* was formerly resorted to, the court will now relieve in a summary way on motion.

(*x*) Anon. Owen, 35; Anon. 3 Leon. 278; Thackston *v.* Hulmlocke, 2 Keb. 30.

(*y*) Piggot's case, 5 Co. 29 *a*; Finche's case, 6 Co. 67 *b*; Com. Dig. Admon. F.

(*z*) Sethe *v.* Scthe, Roll. Abr. Exors. M. pl. 2; Com. Dig. Admon. F.

(*a*) Com. Dig. Admon. F.

(*b*) See, also, Roll. Abr. Exors. M. pl. 1.

(*c*) Roll. Abr. Exors. M. pl. 5.

(*d*) Grandison *v.* Dover, Skinn. 155; Bac. Abr. Exors. B. 1. In the civil law he is considered but in the nature of a curator. Bac. Abr. Exors. B. 1.

bent on an executor, and which are for the advantage of the infant and estate of the deceased; (*e*) and therefore he may sell *bona peritura* as a bailiff may, such as fat cattle, grain, or anything else which may be the worse for keeping; and he may sell goods for the payment of debts. (*f*) So he may assent to a legacy, if there are assets for the payment of debts. (*g*) Again, he may receive debts due to the deceased, and he may discharge and acquit them. (*h*) So he may be sued for the debts due from the deceased; and if he give his bond for any of such debts, he * may retain goods to the value; (*i*) and if an action be brought against him, and the administration determine pending the action, he ought to retain assets to satisfy the debt which attached on him by the action. (*k*) Likewise he may retain for his own debt. (*l*)

But he cannot do anything to the prejudice of the infant, and therefore he cannot sell the goods of the deceased any farther than they are necessary for payment of debts, nor can he otherwise sell a term for years during the minority of the infant. (*m*)

In Sir Moyle Finch's case (*n*) a distinction was taken, that if the administration is granted specially, *ad opus et commodum, &c. et non aliter nec alio modo*, there such an administrator cannot grant a lease; but where the administration is committed generally, he shall not only have an action to recover debts and duties and be liable to all actions, but also he may make leases, (*o*) which

(*e*) Bac. Abr. Exors. B. 1; Roll. Abr. Exors. M.

(*f*) Bac. Abr. Exors. B. 1, 2; Prince's case, 5 Co. 29 *b*; S. C. Roll. Abr. Exors. M. pl. 5; S. C. *nomine* Price *v.* Simpson, Cro. Eliz. 719; 2 Anders. 132; Com. Dig. Admon. F.

(*g*) Bac. Abr. Exors. B. 1, 2; Prince's case, 5 Co. 29 *a*; Anon. 1 Freem. 288.

(*h*) Com. Dig. Admon. F.

(*i*) Briers *v.* Goddard, Hob. 250; Com. Dig. Admon. F.

(*k*) Sparkes *v.* Crofts, Comberb. 465, by Lord Holt. But it has been doubted whether the action would not abate. Ford *v.* Glanville, Moore, 462; S. C. Goldsb. 136; S. C. cit. Lutw. 342; *post*, 492.

(*l*) Roskelly *v.* Godolphin, T. Raym. 483; Com. Dig. Admon. F.

(*m*) Bac. Abr. tit. Exors. B. 1, 2.

(*n*) 6 Co. 67 *b*.

(*o*) See, also, Bac. Abr. Leases, I. 7. The distinction is thus stated in Touchstone, p. 490: "The administrator *durante minore ætate* is sometimes general, *i. e.* when his administration is granted unto him without any words of limitation; and sometimes he is special, *i. e.* when his administration is granted to him, *ad opus et usum* of the infant only. In the first case, he hath as large a power as another administrator hath; and therefore he may assent to a legacy, albeit there be not assets to pay debts; he may sell any of the goods or chattels of the deceased, or give them away, or the like, as another administrator may do. But in the last case, it is otherwise; for such a special administrator can do little more than the ordinary himself; and therefore he may not sell any of the goods or chattels of the deceased, except it be in case where they are like to perish,

will be good till the infant attains his age. (*p*) And it is observed in * Wentworth's Office of an Executor, (*q*) that "if the testator himself making an infant executor, doth also appoint another to be his *executor* during his nonage, expressing it to be only *for the benefit and behoof of the infant* executor, I doubt whether this temporary executor stands any whit restrained from what pertains to the power of absolute executor; but there may be, perhaps, a difference between him to whom the owner of the goods commits the government of them, though but for a time and in a special manner, and the administrator so especially made by the ordinary."

If an administrator *durante minore ætate* brings an action, he must aver in the declaration that the infant is still under age (*i. e.* in all cases since the stat. 38 Geo. 3, c. 87, s. 16, that he is within the age of twenty-one years); because it is a matter within his conusance, and which entitles him to the action. (*r*) However, the defendant must take advantage of this omission by way of plea or demurrer, and cannot object to it after he has joined issue with the plaintiff on another point, which admits the continuance of his authority. (*s*)

In an action by an administrator *durante*, &c. it must be averred that the infant is within age.

So a general averment that the infant is "under age," without saying under what age, has been held sufficient after verdict, (*t*) and to be cured by pleading over. (*u*) And since the common law procedure act (1852), it should seem that an objection to such an averment could not be sustained at all. It is true that in the case of Beal *v.* Simpson, (*x*) the court seemed to consider, that such an allegation with respect to an infant executor would be bad on general demurrer. But it must be recollected, that when that case was decided, the administration determined on an infant executor attaining the age of seventeen; and Treby C. J. observed that "under age" shall be intended under twenty-one. (*y*)

for funeral expenses or for payment of debts, nor may he assent to a legacy where there is not assets to pay debts," &c.

(*p*) Bac. Abr. tit. Leases, I. 7. And some hold that such a lease would be good after, till the executor avoided it by actual entry. Ib. 6 Co. 67 *b*.

(*q*) P. 393, 14th ed.

(*r*) Piggot's case, 5 Co. 29 *a*; Walthall *v.* Aldrich, Cro. Jac. 590; Slater *v.* May, 6 Mod. 304.

(*s*) Bac. Abr. Exors. B. 1, 2.

(*t*) Wells *v.* Some, Cro. Car. 240; Owen *v.* Holden, 2 Sid. 60.

(*u*) Beal *v.* Simpson, 1 Ld. Raym. 408.

(*x*) 1 Ld. Raym. 408.

(*y*) 1 Ld. Raym. 410.

Secus, in an action *against* him.

* But if an action be brought *against* such an administrator, the plaintiff in his declaration need not aver that the infant is still under age; for this is a matter more properly within the conusance of the defendant, and, if his power be determined, he ought to show it. (*z*)

Plea, by such administrator, if charged as administrator generally.

It is a good plea in abatement, where a defendant is charged as administrator generally, that administration was granted to him *durante minore ætate* only. But such a plea must aver that the infant is still living and under age; for though the defendant was a special administrator at first, yet if that special administration were determined, as by the death of the infant, he might be administrator generally, as the declaration supposes. (*a*)

Plea *puis darrein continuance* that the infant has come of age.

In Major *v.* Peck, (*b*) it was pleaded to an action by an administrator *durante*, &c. that since the last continuance the infant came of age; the plaintiff demurred, and the defendant joined in the demurrer; but it was never entered by the plaintiff for argument; and this case is the authority cited in Comyn's Digest, (*c*) after stating that such a plea is good. In Ford *v.* Glanville, (*d*) where the action was *against* the administrator *durante*, &c. the court was in great doubt, whether the suit abated by the infant's coming of age pending the action. (*e*)

Liability of such an administrator after administration determined; to creditors:

It has been laid down, that if an executor *durante minore ætate* has duly administered the assets, and paid over the surplus to the executor of full age, he is not chargeable to creditors, and he may show this matter under a general plea of *plene administravit*; (*f*) but that if he has committed a * *devastavit* he will be liable to creditors; (*g*) even though he should obtain a release from the infant, when of full age. (*h*)

(*z*) Carver *v.* Haselrig, Hob. 251; Walthall *v.* Aldrich, Cro. Jac. 590; Croft *v.* Walbanke, Yelv. 128; Beal *v.* Simpson, 1 Ld. Raym. 409, by Powell J.

(*a*) Sparkes *v.* Crofts, 1 Ld. Raym. 265; S. C. Comberb. 465; Carth. 432; Bac. Abr. Exors. B. 1, 3.

(*b*) 1 Lutw. 342.

(*c*) Tit. Abatement, H. 40.

(*d*) Moore, 462.

(*e*) In the report of the same case in Goldsborough, p. 136, it is said to have been held a good plea. See, also, S. C. cited accordingly in Lutw. 342.

(*f*) Anon. 1 Freem. 150. See, also. Brooking *v.* Jennings, 1 Mod. 174.

(*g*) Bull. N. P. 145, citing Palmer *v.* Litherland, Latch, 160; Packman's case, 6 Co. 19 *b*. See, also, Chandler *v.* Thompson, Hob. 266; Lawson *v.* Crofts, 1 Sid. 57.

(*h*) Anon. 1 Freem. 150; Com. Dig. Admon. F.

However, it is stated by Lord C. B. Gilbert, (*i*) that such an administrator is not chargeable at the suit of a creditor after the infant comes of age; but such creditor may sue the infant, who has his remedy against the executor. (*k*) And it is said by Lord Hardwicke, in Fotherby *v.* Pate, (*l*) that though an administrator *durante minore ætate* represents the deceased while his administration subsists, yet when it is determined, he has nothing more to do, nor can he be called to account but by the executor; and that whatever he may do during his administration, he is not liable to any other person.

His lordship proceeded to observe, that after such an administrator has possessed himself of effects, if he is brought before the court, without the executor, he may demur for that cause; but as the court would allow a party to follow assets into any hands, if it were shown by proper charges that he had not accounted to the infant, but fraudulently and by collusion detained any part, there was no doubt but that such a bill might be maintained against an administrator *durante minore ætate.* (*m*)

It seems clear that an administrator *durante minore ætate*, who has wasted the goods of the deceased, cannot be charged by a creditor as executor *de son tort*, after the infant has attained his majority; because the administrator at the time had lawful power to administer. (*n*)

In Taylor *v.* Newton, (*o*) an administration had been * granted to a guardian *pendente minoritate* of a widow, and on her coming of age she renounced for herself and her only child, an infant, and administration was granted to a creditor, to whom the guardian refused to account; whereupon he was called on by the creditor to give in an inventory and account. The guardian appeared under a protestation, because his administration was expired, and his counsel insisted that he was not liable to account, now his administration was expired. But Sir George Lee decreed him to give in an inventory and account by a day specified, and condemned him in costs.

* to a subsequent administrator:

With respect to the liability of such an administrator to the in-

(*i*) Bac. Abr. Exors. B. 1, 2.

(*k*) See, also, acc. Brooking *v.* Jennings, 1 Mod. 175, by Vaughan C. J.

(*l*) 3 Atk. 603.

(*m*) 3 Atk. 605.

(*n*) Palmer *v.* Litherland, Latch, 160, by Doddridge and Joncs, JJ.; Lawson *v.* Crofts, 1 Sid. 57.

(*o*) 1 Cas. temp. Lee, 15.

fant, after he has come of age, it is laid down, that if the administrator wastes the assets, the proper way for the infant to charge him is by action on the case. (*p*) Also by some opinions the infant may bring detinue against him for those goods which he still continues in his possession, or he might oblige him to account in the spiritual court, (*q*) but cannot bring a writ of account against him at law. (*r*)

to the infant when of age.

If an administration *durante minore ætate* be repealed, and another made administrator *durante minore ætate*, and the second administrator brings the first administrator to account, and after releases to him, yet the infant at full age may compel the first administrator to account again to him, and the first account to the second administrator, and his release shall not be any bar to it. (*s*)

It has been held that if a man obtains judgment against an administrator *durante minore ætate*, and afterwards the executor or administrator comes of age, a *scire facias* (*t*) lies against him, upon the judgment. (*u*)

Liability of infant on judgment against administrator.

* Although an administrator of an executor is not administrator to the first testator, yet the administrator *durante minore ætate* of the executor of an executor is *loco executoris*, and the representative of the first testator. (*v*) Therefore, in an action by a creditor of the original testator, such an administrator is properly charged as the administrator *durante minore ætate* of the second executor, and not as the administrator *de bonis non* of the original deceased. (*w*) And he might formerly be sued in the spiritual court for a legacy bequeathed by the latter. (*x*)

Administrator *durante minoritate* of executor of executor.

(*p*) Bac. Abr. Executors, B. 1, 2; Lawson *v.* Croft, 1 Sid. 57.

(*q*) 1 Anders. 34; Com. Dig. Administration, F.; Bac. Abr. Exors. B. 1, 2.

(*r*) 1 Anders. 34; Bac. Abr. Exors. B. 1, 2.

(*s*) Roll. Abr. Exors. M. pl. 3.

(*t*) As to the proceedings now substituted in lieu of *scire facias* by the common law procedure act (1852), see *post*, pt. II. bk. III. ch. IX.

(*u*) Sparkes *v.* Crofts, 1 Ld. Raym. 265. [In Taylor *v.* Barron, 35 N. H. 484, 493, Bell J. said: "We regard it as the law in this state, that successive administrators and executors are privies in law. The executor during whose nonage an administrator *durante minore ætate* has been appointed, is a privy to such administrator. He is bound by a judgment rendered against him, and may take advantage by *scire facias* of judgments in his favor."]

(*v*) Anon. 1 Freem. 288; *ante*, 469.

(*w*) Norton *v.* Molyneux, Hob. 246.

(*x*) Anon. 1 Freem. 288.

SECTION IV.

Of Administration pendente lite.

In case of a controversy in the spiritual court concerning the right of administration to an intestate, it seems to have been always admitted, that it was competent to the ordinary to appoint an administrator *pendente lite*. (x^1) Yet where the controversy before the ordinary respected a will, it was once considered that a grant of this species of administration was utterly void. (y) But since the case of Walker *v.* Woolaston, decided in K. B., on error from C. P., Trin. T. 1731, (z) it has been settled, that the court has the power to grant administration *pendente lite* as well touching an executorship as the right to administration. (a)

And now by the 70th section of the court of probate act, 1857 (20 & 21 Vict. c. 77), it is enacted, that "pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling or revoking any probate or any grant of administration, the court of probate may appoint * an administrator of the personal estate of such deceased person; and the administrator so appointed shall have all the rights and powers of a general administrator, other than the right of distributing the residue of such personal estate, and every such administrator shall be subject to the immediate control of the court and act under its direction." (b)

20 & 21 Vict. c. 77, s. 70. Court may grant administration *pendente lite*.

(x^1) [See Walker *v.* Dougherty, 14 Geo. 653; Sarle *v.* Court of Probate, 7 R. I. 270. Such an administrator generally gives bonds. See Re Colvin, 3 Md. Ch. 278; Genl. Sts. Mass. c. 94, § 7.]

(y) Robin's case, Moore, 636; Smyth *v.* Smyth, 3 Keb. 54; Frederick *v.* Hook, Carth. 153.

(z) 2 P. Wms. 589.

(a) S. P. Wills *v.* Rich, 2 Atk. 286; Maskeline *v.* Harrison, 2 Cas. temp. Lee, 258.

(b) See In the Goods of Dawes, L. R. 2 P. & D. 147; [Gresham *v.* Pyron, 17 Geo. 263.] See, also, Charlton *v.* Hindmarsh, 1 Sw. & Tr. 519, where the court directed that the administrator should not discharge claims on the deceased's estate until they had passed before the registrar. See, also, Wright *v.* Rogers, L. R. 2 P. & D. 179; Hitchen *v.* Birks, 10 Law Rep. Eq. Cas. 471; Tichborne *v.* Tichborne, L. R. 2 P. & D. 41. [By statute in Massachusetts, the probate court may appoint a special administrator to collect and preserve the effects of the deceased, when by reason of a suit concerning the proof of a will, or from other cause, there is delay in granting letters testamentary or of administration; and in case of an appeal from the decree appointing such special administrator, he shall nevertheless proceed in the execution of his duties until it is otherwise ordered by the supreme court of probate. Genl. Sts. c. 94, § 6. Such administrator is required to give

21 & 22 Vict. c. 95, s. 22, to apply to appeals.

And by stat. 21 & 22 Vict. c. 95, s. 22, "all the provisions contained in the court of probate act respecting grants of administration pending suit shall be deemed to apply to the case of appeals to the house of lords under the said act."

20 & 21 Vict. c. 77, s. 71. Receiver of real estate *pendente lite.*

Further, by the court of probate act, 1857, s. 71, it is enacted, that "it shall be lawful for the court of probate to appoint any administrator appointed as aforesaid, or any other person, to be receiver of the real estate of any deceased person pending any suit in the court touching the validity of any will of such deceased person by which his real estate may be affected; and such receiver shall have such power to receive all rents and profits of such real estate, and such powers of letting and managing such real estate, as the court may direct. (*c*)

21 & 22 Vict. c. 95, s. 21.

The court of probate may require security from the receiver of real estate.

By stat. 21 & 22 Vict. c. 95, s. 21, "It shall be lawful for the court of probate to require security by bond in such form as by any rules and orders shall from time to time be directed, with or without sureties, from any receiver of the real estate of any deceased person appointed by the said court, under section seventy-one of 'The Court of Probate Act,' and the court may, on application made on motion or in a summary way, order one of the registrars of the court to assign the same to some person to be named by such order; and such person, his executors or administrators, shall thereupon * be entitled to sue on the said security, or put

bonds. § 7. His duty is to collect all the goods, chattels, and credits of the deceased and preserve them for the executor or administrator when appointed, and for that purpose he may commence and maintain suits, and may sell such perishable and other goods as the judge shall order to be sold. If he is appointed by reason of a suit concerning the probate of a will, or delay for any cause in granting letters testamentary, the judge may authorize him to take charge of the real estate, collect the rents, and do all things needful for the preservation thereof, and as a charge thereon. § 8. He may by leave of the probate court pay from the personal estate in his hands, the expenses of the last sickness and funeral of the deceased. § 11. He shall not be liable to an action by any creditor of the deceased. § 13. His powers shall cease upon granting letters testamentary or of administration. § 12. As to Missouri, see Rogers *v.* Dively, 51 Misson. 193. Letters of general administration, granted during the pendency of a controversy respecting the probate of a will, are invalid. They cannot be supported as a grant of administration *pendente lite.* Slade *v.* Washburn, 3 Ired. (N. Car.) Law, 557. See Patton's Appeal, 31 Penn. St. 465.]

(c) See Grant *v.* Grant, L. R. 1 P. & D. 654.

the same in force in his or their own name or names, both at law and in equity, as if the same had been originally given to him instead of to the judge of the said court, and shall be entitled to to recover thereon, as trustee for all persons interested, the full amount due in virtue thereof."

Of what the court must be satisfied before granting administration *pendente lite*.

Before granting administration *pendente lite* the court must be satisfied as to the necessity (*d*) of such an administrator, (*e*) and also as to the fitness of the proposed administrator; or must be placed in a condition to determine between the two (its most usual office upon such occasions), an administrator, that is, being proposed by either party. (*f*)

The later practice of the prerogative court was to appoint an administrator *pendente lite* in all cases where the court of chancery would appoint a receiver. (*g*) And now by the court of probate act (s. 70), (*h*) it is enacted that "pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, the court of probate may appoint an administrator of the personal estate of such deceased person."

The administrator must be an indifferent person:

On the other hand, it is the practice of the court to decline putting a litigant party in possession of the property, by granting administration pending suit to him, always granting it, where requisite, to a nominee presumed to be indifferent between the contending parties. (*i*)

* Administrators *pendente lite* are the appointees of the court,

(*d*) And accordingly the court will not appoint an administrator *pendente lite* where there is a person named in the will as executor, whose appointment is not questioned, and who can discharge the duties of such an administrator. Mortimer *v.* Paull, L. R. 2 P. & D. 85.

(*e*) Ib.; Young *v.* Brown, 1 Hagg. 54; Sutton *v.* Smith, 1 Cas. temp. Lee, 207; Maskeline *v.* Harrison, 2 Cas. temp. Lee, 258; Godrich *v.* Jones, 2 Curt. 453; Bellew *v.* Bellew, 11 Jur. N. S. 588; S. C. 34 L. J., P. M. & A. 125.

(*f*) 1 Add. 329.

(*g*) Bellew *v.* Bellew, 34 L. J., P. M. & A. 125; S. C. 11 Jur. N. S. 588.

(*h*) *Ante*, 495.

(*i*) 1 Add. 330; Young *v.* Brown, 1 Hagg. 54; Stratton *v.* Stratton, 2 Cas. temp. Lee, 49. However, in Colvin *v.* Fraser, 2 Hagg. 613, administration *pendente lite*, and limited to certain property, was granted *by consent* to one of the litigant parties. See, also, De Chatelain *v.* Pontigny, 1 Sw. & Tr. 34. See, further, as to the practice relating to the preference or rejection of nominees, Hellier *v.* Hellier, 1 Cas. temp. Lee, 381; Bond *v.* Bond, Ib. 333, 354. In the Queen's Proctor *v.* Williams, 2 Sw. & Tr. 353, a person who had been receiver in chancery of the same estates was, by consent, appointed administrator *pendente lite*.

and are not to be merely considered as the nominees or agents of the several parties on whose recommendation they are selected. (*k*) Therefore, in an administration *pendente lite*, limited to recover certain sums, and granted jointly to the nominees of the two parties in the suit, the court refused to dispense with such administrators entering into a joint bond. (*l*)

is not to be considered as a mere nominee of the parties.

By stat. 20 & 21 Vict. c. 77, s. 72, "the court of probate may direct that administrators and receivers appointed pending suits involving matters and causes testamentary shall receive out of the personal and real estate of the deceased, such reasonable remuneration as the court think fit." (*l*[1])

20 & 21 Vict. c. 77, s. 72.

Remuneration to administrators *pendente lite* and receivers.

Although doubts were entertained on the subject before the case of Walker *v.* Woollaston, (*m*) it was settled, that the administrator *pendente lite* might maintain actions for recovering debts due to the deceased. (*n*) So where a person, whether he is heir-at-law or next of kin, or any other man whatsoever, kept possession of the testator's leasehold estate, such an administrator was held entitled to bring ejectments for the recovery of the possession. (*o*) But the nature of the authority conferred by such letters of administration was, before the passing of the court of probate act, * merely to collect the effects; (*p*) and his power did not extend either to vest or distribute them. (*q*) Therefore, even to enable him to lodge money

Power of administrator *pendente lite:*

(*k*) Stanley *v.* Bernes, 1 Hagg. 221.

(*l*) Ib.

(*l*[1]) [Like provision is made in Massachusetts by Genl. Sts. c. 94, § 8.]

(*m*) 2 P. Wms. 576; S. C. 2 Stra. 917; Fitzgib. 202, 257; 1 Barnard. B. R. 423, 467; 2 Barnard. 14, 62.

(*n*) Ib.; Knight *v.* Duplessis, 1 Ves. sen. 325; Ball *v.* Oliver, 2 Ves. & B. 97, 98; Gallivan *v.* Evans, 1 Ball & Beat. 192; [*ante*, 496, note (*b*); Re Colvin, 3 Md. Ch. 278.]

(*o*) Wills *v.* Rich, 2 Atk. 286; Jones *v.* Goodrich, 10 Sim. 328; [Re Colvin, 3 Md. Ch. 278.]

(*p*) Adam *v.* Shaw, 1 Sch. & Lef. 254. See, also, the observations of Sir H. Jenner Fust in Godrich *v.* Jones, 2 Curt. 457.

(*q*) 1 Ball & Beat. 192. [An administrator *pendente lite* is an officer of the court, whose duty is limited to filing an inventory, taking care of the assets, and collecting and paying debts. His authority does not extend to payment of the legacies or making distribution of the estate. Rogers J. in Ellmaker's Estate, 4 Watts, 34, 36; Commonwealth *v.* Mateer, 16 Serg. & R. 416. When the suit is ended, an administrator *pendente lite* must pay over all that he has received in his character of administrator, to the persons pronounced by the court to be entitled; and from that time his functions are completely at an end, and the court is bound to take care that he discharges the duty committed to him, so far as that he de-

in court, which he was not called upon to do, it was necessary for him to file a bill. (*r*) And he had no authority to pay legacies; though if paid *bonâ fide* he would be allowed for them. (*s*) But now it will be seen that the court of probate act (s. 70) expressly enacts that he shall have all the rights and powers of a general administrator, other than the right of distributing the residue. (*t*)

Such an administrator is not liable to interest upon a balance in his hands, during the pendency of the suit in the probate court. (*u*)

During a litigation in the ecclesiastical court for probate or administration, a court of equity would entertain a bill for the mere preservation of the property of the deceased, till the litigation was determined, and appoint a receiver, although the court of probate, by granting an administration *pendente lite*, might provide for the collection of the effects. (*v*) And a court of equity would appoint a receiver, * as well when the litigation in the ecclesiastical court was to recall administration or probate already granted, as in a case where no administration had been granted before the application to the court of chancery. (*x*) The mere circumstance, however, that there had been a suit instituted

A receiver would be appointed by the court of chancery, notwithstanding an administration *pendente lite* might be also obtained.

liver over the assets to the rightful administrator. Rogers J. in Ellmaker's Estate, 4 Watts, 36, 37; Gibson C. J. in Hinkle *v.* Eichelberger, 2 Penn. St. 483, 484. His authority ceases with the suit. Cole *v.* Wooden, 18 N. J. (Law) 15.]

(*r*) Gallivan *v.* Evans, 1 Ball & Beat. 192.

(*s*) Adair *v.* Shaw, 1 Sch. & Lef. 254. He has no business to construe the will; he is only to hand over the assets to the person entitled, or to dispose of them pursuant to the directions of a court of equity. Ib. 255, 256.

(*t*) See *ante*, 495.

(*u*) 1 Ball & Beat. 191.

(*v*) Mitf. Pl. 136, 145, 4th ed.; King *v.* King, 6 Ves. 172; Edmunds *v.* Bird, 1 Ves. & B. 542; Atkinson *v.* Henshaw, 2 Ves. & B. 85; Ball *v.* Oliver, 2 Ves. & B. 96; Watkins *v.* Brent, 1 My. & Cr. 102 (overruling the distinction taken by Lord Erskine in Richards *v.* Chave, 12 Ves. 462); Wood *v.* Hitchings, 2 Beav. 289. Such a suit need not be brought to a hearing. Anderson *v.* Gnichard, 9 Hare, 275. In fact it never is brought to a hearing. But after the litigation is over in the probate court, the practice is to discharge the receiver and dispose of the costs. And if it appears that there was no reasonable ground for instituting the suit at all, the court will order the defendant to pay all the costs, though a receiver has been appointed. Barton *v.* Rock, 22 Beav. 81; S. C. Ib. 376. A question may arise, whether the practice of courts of equity as to the appointment of receivers should be altered by reason of the extension of the power of the court of probate by the 70th and 71st sections, *ante*, 496.

(*x*) Rutherford *v.* Douglas, 1 Sim. & Stu. 111, note (*d*) to Dew *v.* Clarke; Ball *v.* Oliver, 2 Ves. & B. 96. Where no probate or administration had been granted, it was of course to appoint a re-

in the ecclesiastical court to recall the administration or probate already granted, did not give the court of chancery jurisdiction to interfere. For if that were so, it is evident that in order to obtain a receiver it would have been only necessary to institute a suit in the ecclesiastical court. (*y*) But the court of chancery would look into the case to see whether, on the whole, such a case was made as justified the interference of that court. And if it appeared, from all the circumstances, that there was no executor or administrator in existence with the right and power to act as such, and that there was substantially a *lis pendens* in the ecclesiastical court, a receiver might be appointed, notwithstanding there was no ground laid for interference in respect of any improper conduct of the parties. (*z*) The * general principle was stated to be that where there was a legal title to receive, the court ought not to interfere unless where the legal title was abused, or there was proof that it was in danger of being so. (*a*) A receiver might be granted as well where the property was in the hands of the executor named in the will which was in litigation, as where it was outstanding and likely to be lost. But it had to be shown that the amount and disposition of the property was such as to justify the court in burdening the estate with the expense of a receiver. (*b*)

In Marr *v.* Littlewood (*c*) Lord Cottenham granted a receiver, at the instance of an executor, pending a suit in the ecclesiastical court to have the probate annulled; the defendant, who was the party impeaching the will and setting up an intestacy, having by her own acts prevented the executor from getting in the assets.

But the bill for the receiver could not seek discovery in refer-

ceiver, pending a *bonâ fide* litigation in the ecclesiastical court to determine the right to probate or administration; unless a special case could be made for refusing such appointment. Rendall *v.* Rendall, 1 Hare, 152; Barton *v.* Rock, 22 Beav. 376, 377. It must have sufficiently appeared that there was a litigation pending in the ecclesiastical court. Jones *v.* Frost, 3 Madd. 1; S. C. 1 Jac. 454; 2 My. & Cr. 457, 458.

(*y*) Watkins *v.* Brent, 1 My. & Cr. 97. See, also, Knight *v.* Duplessis, 1 Ves. sen. 324; and a MS. case argued on demurrer, 13th June, 1812, cited in 1 Madd. Chanc. 225, note (1), 2d ed.; Dew *v.* Clarke, 1 Sim. & Stu. 114; Rendall *v.* Rendall, 1 Hare, 152; Connor *v.* Connor, 15 Sim. 598; Newton *v.* Ricketts, 10 Beav. 525; Hitchin *v.* Birks, L. R. 10 Eq. Cas. 471.

(*z*) 1 My. & Cr. 97; Rendall *v.* Rendall, 1 Hare, 152.

(*a*) Devey *v.* Thornton, 9 Hare, 229, by Turner V. C. But see, also, Dimes *v.* Steinberg, 2 Sm. & G. 75.

(*b*) Whitworth *v.* Whyddon, 2 Mac. & G. 52.

(*c*) 2 My. & Cr. 454.

ence to the merits on that litigation; for a plaintiff cannot by one bill obtain specific relief and also a discovery on a matter distinct from that specific relief. (*d*) So when the bill for the receiver went on to pray that upon the administrator being appointed and brought before the court, the rights of the parties might be declared, and the estate administered, a demurrer to the latter part of the relief prayed was allowed. (*e*)

Where pending a contest in the ecclesiastical court between the plaintiff and defendant, as to the validity of two wills, the plaintiff filed a bill for a receiver of the testatrix's estate, and to set aside an assignment made by her to the defendant, the court refused to appoint a receiver of the * property comprised in the assignment, that being claimed by the defendant independently of either will. (*f*)

SECTION V.

Of Administration durante absentiâ.

If the executor named in the will, or the next of kin, be out of the kingdom, the ecclesiastical courts have, as they always have had, the power, *before probate obtained*, or letters of administration issued, of granting to another a limited administration *durante absentiâ*. (*g*) In the case of Clare *v.* Hedges, 3 W. & M., (*h*) the court held clearly that such administration was grantable by law, and that it might be a great convenience to do so; for if the next of kin be beyond sea, and such administration could not be granted, the debts due to the intestate might be lost. So in Slater *v.* May, 3 Ann., (*i*) where an action was brought by an administrator *cum testamento annexo*, *durante absentiâ* of the executor, Lord Holt said that it was reasonable there should be such an administrator, and that this administration stood upon the same reason as an administration *durante minore ætate* of an executor, viz, that there should be a person to

At common law before probate:

(*d*) Wood *v.* Hitchings, 3 Beav. 503.

(*e*) De Feucheres *v.* Dawes, 5 Beav. 110. As to the costs of the bill for the receiver, see Frowd *v.* Baker, 4 Beav. 76.

(*f*) Jones *v.* Goodrich, 10 Sim. 327.

(*g*) See 3 Bac. Abr. 56, tit. Exors. G.

(*h*) 1 Lutw. 342; S. C. (misreported) 4 Mod. 14; S. C. cited from MS. in Walker *v.* Woollaston, 2 P. Wms. 579.

(*i*) 2 Ld. Raym. 1071; S. C. 2 Salk. 42; 6 Mod. 304. See *ante*, 438, as to administration to the attorney of the next of kin; and *ante*, 468, as to administration to the attorney of the executor.

manage the estate of the testator till the person appointed by him is able. The absence of the executor, or next of kin, to justify such an administration must, it seems, be an absence out of the realm. (*k*)

power of such administrator:

Such an administrator is such a legal representative as to entitle him to assign the leaseholds or other property of the * deceased, (*l*) and his power differs in this respect from that of an administrator *durante minore ætate*. (*m*)

after probate by stat. 38 Geo. 3, c. 87.

But *when probate was once granted*, and the executor had gone abroad, the ecclesiastical courts did not feel themselves authorized to grant new administration on the ground that the executor had left the kingdom. (*m*[1]) Nor could a court of equity interfere by appointing a receiver; because, although when once a person capable of sustaining the character of legal representative had been brought into court, equity could, in the case of his insolvency or misconduct, appoint another person to manage the affairs of the testator, and compel his legal representative to permit such person to sue in his name; yet, if the executor went abroad, a court of equity could entertain no suit, there being no person to stand in the situation of the testator. (*n*) The consequence of this defect of the authority of the spiritual court was that there was no person existing within the jurisdiction of the courts of law or equity duly authorized to appear and collect the debts. To remedy this inconvenience, the statute 38 Geo. 3, c. 87 (usually called Mr. Simeon's act), was passed, whereby after reciting the laws now existing are not sufficient to enforce a speedy distribution of the assets of deceased persons, where the executor to whom probate of the will hath been granted is out of the jurisdiction of his majesty's courts of law and equity, it is enacted, "that at the expiration of twelve calendar months (*o*) from the death of any testator, if the executors or executor, (*p*) to whom probate

If, at the expiration of twelve months from a testator's decease, the executor to whom probate is granted shall not reside within the jurisdiction of his majesty's

(*k*) Ib. [See Willing *v.* Perot, 5 Rawle, 264; Brodie *v.* Bickley, 2 Rawle, 431.]

(*l*) Webb *v.* Kirby, 3 Sm. & G. 333; 7 De G., M. & G. 376.

(*m*) See *ante*, 469.

(*m*[1]) [Griffith *v.* Frazier, 8 Cranch, 9.]

(*n*) 3 Bos. & Pull. 30.

(*o*) The words "at the expiration of twelve months" have been held, when compared with the words given in the form of the affidavit in sect. 2, and the grant of administration in the 3d section, to mean at or after the expiration of that period. In the Goods of Ruddy, L. R. 2 P. & D. 330.

(*p*) It will be observed that the statute

of the will shall have * been granted, are or is then residing out of the jurisdiction of his majesty's courts of law and equity, it shall be lawful for the ecclesiastical court, which hath granted probate of such will, upon the application of any creditor, next of kin or legatee, grounded on affidavit hereinafter mentioned, to grant such special administration as hereinafter is also mentioned; which administration shall be written or printed upon paper or parchment, stamped only with one five shilling stamp, and shall pay no further or other duty to his majesty, his heirs, or successors."

courts, a creditor, &c. may obtain special administration on a 5*s.* stamp.

Sect. 2. "And be it further enacted, that the party applying to the spiritual court to grant such administration as aforesaid shall make an affidavit in the following words, or to the purport and effect following:

The party applying to make the following affidavit.

I, A. B. of do swear that there is due and owing to me upon bond or simple contract (or upon account unsettled, as the case may happen to be, in which latter case he shall swear to the best of his belief only), from the estate and effects of deceased, the sum of and that C. D. the only executor capable of acting, and to whom probate hath been granted, hath departed this kingdom, and is now out of the jurisdiction of his majesty's courts of law and equity, and that this deponent is desirous of exhibiting a bill in equity in his majesty's court of for the purpose of being paid his demand out of the assets of the said testator."

[N. B. — It is plain that, since the passing of the court of probate act, s. 18 (*post*, 508, 509), this form has ceased to be appropriate. And it should seem that it will now be sufficient for the administrator to take the common administrator's oath (*ante*, 453) *mutatis mutandis.*]

Sect. 3. "And be it further enacted, that the administration * to be granted pursuant to this act shall be in the form hereinafter mentioned (that is to say):

Administration to be granted in the following form.

by Divine Providence, archbishop of Canterbury, pri-

applies to *executors* only, and therefore administration could not be granted during the absence from the country of an administrator *cum testamento annexo*. In the Goods of Harrison, 2 Robert. 184. But now by the court of probate act, 1857 (20 & 21 Vict. c. 77, s. 74), the above statute "shall apply in like manner to all cases where letters of administration have been granted, and the person to whom such administration shall have been granted shall be out of the jurisdiction of her majesty's courts of law and equity."

mate of all England, and metropolitan, to our well-beloved in Christ greeting: Whereas it hath been alleged before the worshipful doctor of laws, surrogate of doctor of laws, master, keeper, or commissary of our prerogative court of Canterbury, lawfully constituted, by you the said that did, whilst living, and of sound mind, memory, and understanding, make and duly execute his last will and testament in writing, and did therefore nominate, constitute, and appoint his executors (or sole executor), who in the month of proved the said will by the authority of our said court, and now reside (or resides) out of this kingdom and out of the jurisdiction of his majesty's courts of law and equity (as in and by an affidavit duly made and sworn to by and brought into and left in the registry of our said court, reference being thereunto had will more fully and at large appear); and whereas the surrogate aforesaid, having duly considered the premises, did at the petition of the said decree letters of administration of all and singular the goods, chattels, and credits of the said deceased, to be committed and granted to you the said named by or on behalf of the said a creditor (legatee or one of the next of kin) of the said deceased (as the case may be) limited for the purpose, to become and be made a party to a bill or bills to be exhibited against you in any of his majesty's courts of equity, and to carry the decree or decrees (*q*) of any of the said court or courts into effect, but no further or otherwise (justice so requiring); and we being * desirous that the said goods, chattels, and credits, may be well and faithfully administered, applied, and disposed of according to law, do therefore by these presents grant full power and authority to you in whose fidelity we confide to administer and faithfully dispose of the said goods, chattels, and credits, according to the tenor and effect of the said will, limited as aforesaid, so far as such goods, chattels, and credits of the deceased will thereto extend, and the law requires, you having been already sworn well and faithfully to administer the same; and to make a true and perfect inventory of all and singular the said goods, chattels, and credits, so far as the same may come to your

38 Geo. 3, c. 87.

(*q*) In Warburton *v.* Hill, 5 Sim. 532, which was a suit against the bank of England, and an administrator appointed under the statute, Sir L. Shadwell V. C. on motion *before decree*, ordered stock standing in the testator's name to be transferred to the accountant general.

hands, and to exhibit the same into the registry of our said prerogative court of Canterbury on or before the next ensuing, and also to render a just and true account thereof; and we do by these presents ordain and constitute you administrator of all and singular the goods, chattels, and credits of the said deceased, limited as aforesaid, but no further or otherwise.

Given at London, the day of in the year of our Lord and in the year of our translation."

[N. B. — The language of the grant above prescribed is to be altered so as to make it apply to grants made in the court of probate under the court of probate act. See *post*, 508, 509.]

Sect. 4. "And be it further enacted, that it shall be lawful for the court of equity in which such suit shall be depending, to appoint (if it shall be needful) any persons or person to collect in any outstanding debts or effects due to such estate, and to give discharges for the same, such persons or person giving security in the usual manner duly to account for the same."

Court of equity may appoint persons to collect outstanding debts:

Sect. 5. "And be it further enacted, that it shall be lawful for the accountant general of the high court of chancery, or for the secretary or deputy secretary of the Governor and Company of the Bank of England, to transfer, * and for the Governor and Company of the Bank of England to suffer a transfer to be made of any stock belonging to the estate of such deceased person into the name of the accountant general, in trust for such purposes as the court shall direct, in any suit in which the person to whom such administration hath been granted shall be or may have been a party: Provided, nevertheless, that if the executors or executor, capable of acting as such, shall return to, and reside within, the jurisdiction of any of the said courts pending such suit, such executors or executor shall be made party to such suit, and the costs incurred, by granting such administration, and by proceeding in such suit against such administrator, shall be paid by such person or persons, or out of such fund as the court where such suit is depending shall direct."

Stock belonging to the estate of the deceased may be transferred into the name of the accountant general in chancery, in trust for such purposes as the court shall direct in any suit.

Executor returning to reside within jurisdiction of the court to be made a party in such suit.

Though this statute is only entitled, "An act for the better administration of assets where the executor to whom probate has

been granted is *out of the realm*," it was held, in the ecclesiastical court, by Sir W. Wynne, that it is equally applicable to the case of an executor resident out of the jurisdiction, and out of the reach of the process of his majesty's courts of law and equity, as for instance, the case of an executor residing in Scotland, as to that of an executor resident out of the realm. (*r*) In a subsequent stage of the same cause, Lord Eldon, chancellor, though he held that the authority of the administrator could not be disputed in a court of equity (in which opinion he was followed by Sir W. Grant, master of the rolls), seemed to doubt the propriety of the grant of administration under such circumstances. Yet no objection was taken on that score by the very able advocate who argued the case when in the common pleas. (*s*) And administration has subsequently been granted in the prerogative court under precisely similar circumstances. (*t*)

The statute applies, where executor is out of the reach of process:

* However it may be to be lamented that the statute was not made more extensive, it is clear that it applies only to cases where there are proceedings in chancery. In all other instances, the court of probate could only grant administration *durante absentiâ*, on the ground that there was no legal representative. Thus, in a case where the executor, having obtained probate, was resident at the Cape of Good Hope, and had no agent in this country; the court was moved for a grant of administration limited to the administrator being made party to the renewal of a lease of which the testator died possessed, renewable every fourteen years, but which renewal could not be effected without a personal representative to him. It was submitted that the case was within the spirit of the 38 Geo. 3, c. 87. But Sir John Nicholl, regretting the hardship of the case, rejected the application. (*u*)

The statute applies only to cases where there are proceedings in chancery.

But this has been remedied by the stat. 21 & 22 Vict. c. 95, s. 18, by which it is enacted, that the provisions of an act passed in the 38th year of Geo. 3, c. 87, and of the court of probate act, shall be extended to all executors and administrators residing out of the jurisdiction of her majesty's courts of law

Stat. 21 & 22 Vict. c. 95, s. 18.

(*r*) Hannay *v.* Taynton, 2 Add. 505.
(*s*) Mr. Serjt. Bayley, 3 Bos. & Pull. 26.
(*t*) In the Goods of Jouett, 2 Add. 54.
(*u*) In the Goods of Davies, 2 Hagg. 79. The learned judge suggested a remedy, viz, a power of attorney from the executor at the Cape.

and equity, whether it be or be not intended to institute proceedings in the court of chancery, and to all grants made before and subsequently to the passing of the last mentioned act, and it shall be lawful to alter the language of the grant prescribed by the first named statute, so as to make it apply to grants made in the court of probate under the said last mentioned act. (*v*)

Effect of the return of the executor.

* When the probate court in the exercise of its ordinary jurisdiction grants administration during the absence of an executor or next of kin, before probate, or administration taken out by him, such administration is at an end the moment he returns. (*x*) But under the statute of 38 Geo. 3, the administrator is not appointed for a limited period, but for a limited purpose, viz, to become and be made party to a bill or bills in equity, and to carry the decree or decrees into effect. The suit so instituted is not, therefore, to fall to the ground, and be at an end, by the return of the executor, but it is to go on, he being made a party in the usual course; and then the temporary administrator may account, have his costs, and be discharged. (*y*)

It was held in Clare *v.* Hedges, (*z*) that in the case of a common law administration *durante absentiâ*, if any of the debtors of the deceased paid his debt to the temporary administrator, though it was after the return of the executor or next of kin, yet if the debtor had no notice of such return, it was a good payment.

Effect of the death of the executor.

When an administrator has been appointed under the statute (38 Geo. 3), if the executor dies, the administration does not thereby come to an end, nor the authority of the administrator determine. This point was decided in the court of common pleas, by Rook and Chambre, justices, Lord

(*v*) Under these acts a limited grant of administration with the will annexed was made to the personal representative of a legatee, as being within the spirit if not the letter of the statute of Geo. 3. In the Goods of Collier, 2 Sw. & Tr. 444. See, also, In the Goods of Hampson, 35 L. J., P. M. & A. 1; S. C. 11 Jur. N. S. 911, where a similar grant was made to a trustee substituted by the court of chancery for an executor who had gone abroad. Where the applicant is residuary legatee, whose interest is undetermined, the grant will be made under 38 Geo. 3, c. 87, but where a particular sum is set aside for and actually payable to the applicant, the grant can be made under the 18th section of 21 & 22 Vict. c. 95. In the Goods of Ruddy, L. R. 2 P. & D. 330.

(*x*) *Secus*, as an administration granted, *durante absentiâ*, to the attorney of an executor. In the Goods of Cassidy, 4 Hagg. 360; *ante*, 469. The power of such an administrator is wholly determined by the death of the executor. Webb *v.* Kirby, 2 De G., M. & G. 377; *ante*, 469, 503.

(*y*) Rainsford *v.* Taynton, 7 Ves. 466.

(*z*) 1 Lutw. 342; S. C. cited from MS. in Walker *v.* Woollaston, 2 P. Wms. 579.

Alvanley C. J. *dissentiente*. (*a*) There is no provision made in the statute for the death of the executor; but the *proper course upon such an event seems to be, that in case of his dying intestate, some person should take out general administration to the original testator, or if the former executor made a will appointing an executor capable of acting, such executor should obtain probate, so as to represent the original testator; and then such administrator or executor, being considered within the true meaning, though not the strict letter of the statute, may apply to be made a party to the suit in equity; and the court of equity will then put an end to the authority of the special administrator in the same way as if the original executor had returned to this country. (*b*)

In Suwerkrop *v.* Day, (*c*) an action was brought to recover a sum of money, for the interest of a debt which had been due to one Hubert Fox, in his lifetime, from the defendant, and was paid, but without the interest, in December, 1833. Fox, who was a merchant in Demerara, died in May, 1830, and left one Owen Kernan his executor. Kernan, who was then in Demerara, sent a power of attorney to Allan McDonald, in England, to enable him to prove the will there. Administration with the will annexed was granted to McDonald for Kernan's benefit; and he acted in settling the affairs. Kernan died in Demerara, in August, 1831, not having administered all the effects of Fox, and left one Hewlings and one McDowall his executors. In September, 1833, Hewlings being then abroad, and McDowall being dead, administration with the will annexed to the goods of Kernan was granted to the plaintiff, as Hewlings' attorney, for the use and benefit of Hewlings. The like administration with the will annexed was also granted him to the goods not administered of Fox. Allan McDonald was living when the action was brought. There was evidence that the defendant had, by letter and otherwise, admitted Kernan, in his lifetime, to have a claim for principal and interest, as *executor of Fox. The action was brought by the plaintiff, describing himself as administrator with the will annexed, of Hubert Fox, of the goods left unadministered by Owen Kernan, who was executor of Hubert Fox, and who was alleged to have proved the will by Allan McDonald, his attorney, to whom, as such attorney, administration

(*a*) Taynton *v.* Hannay, 3 Bos. & Pull. 26.

(*b*) Rainsford *v.* Taynton, 7 Ves. 460; and see the judgment of Chambre J. in 3 Bos. & Pull. 34.

(*c*) 8 Ad. & El. 624; 3 N. & P. 670.

with the will annexed, for the benefit of the said Owen Kernan, was granted, which Owen Kernan was since deceased, having left McDowall and Hewlings, his executors; and that on McDowall's death, the plaintiff took administration, with the will of Hubert Fox annexed, for the benefit of Hewlings. The first count of the declaration stated that the defendant was indebted to Owen Kernan, as executor as aforesaid, for interest of money forborne by him as such executor, and laid the promise to Owen Kernan, as such executor. The second count stated that the defendant was indebted to the plaintiff, as such administrator, for interest of money forborne by him as such administrator, and laid the promise to the plaintiff as such administrator. Profert was made of the letters of administration both to McDonald and to the plaintiff. The first plea traversed the being indebted to Owen Kernan as such executor. The second traversed the promise to Owen Kernan. The third traversed the promise to the plaintiff. The question in the cause was, what was the legal effect of these different letters of administration? The court of king's bench was of opinion that, by the first grant, Allan McDonald became the legal representative of Hubert Fox during the life of Owen Kernan, or, at all events, until he should himself take out probate, which he never did; but that on the death of Owen Kernan, that grant was *ipso facto* at an end, and the subsequent grant to the plaintiff was good; and that the consequence was, that the plaintiff was entitled to recover on the second count all interest accruing subsequent to the grant to him; but that the defendant was entitled to a verdict on both the issues on the first count, because the defendant never was indebted to Owen Kernan as executor, for interest, nor promised him as executor.

How administrator *durante absentiâ* must declare.

* In the case of an action brought by an administrator *durante absentiâ* appointed independently of the statute, the declaration must aver that the executor at the time of the grant of administration was absent, and that his absence continues. If there is an averment of his absence, without saying where, the court will intend it to be an absence beyond sea. (*h*)

(*h*) Slater *v.* May, Ld. Raym. 1071. In Hodge *v.* Clare, as reported in 4 Mod. 14, upon an objection that the continuance of absence was not averred, it is said to have been ruled that the declaration was good, and the defendant ought to plead it, if the executor had returned. But it appeared in Slater *v.* May, that the roll of Hodge *v.*

Admissions of executor not evidence against the administrator *durante minoritate.*

In an action on a policy of insurance, brought by an administrator appointed under the statute, evidence was tendered by the defendants of declarations made by the executor, whilst he was executor and before the proceedings had taken place for having the present plaintiff appointed special administrator. But Lord Denman refused to receive the evidence, saying that the acts of the original executor, done by him in that capacity, might be admissible in evidence against the plaintiff, who had succeeded *durante absentiâ* to the office of executor; but that, in his opinion, the mere declarations of the executor did not stand on the same footing. (*i*)

* SECTION VI.

Of other Temporary and Limited Administrations.

Temporary administrations:

There are several other instances of temporary administrations, granted as well *cum testamento annexo* as in cases of complete intestacy.

cum testamento annexo:

It has already appeared that an executor may be appointed with limitations as to the time when he shall begin his office, as where a man is appointed to be executor at the expiration of five years from the death of the testator. (*k*)

in case of an executor limited as to time:

So the testator may appoint the executor of A. to be his executor; and then if he die before A. he has no executor till A. die. (*l*)

In these cases, if the testator does not appoint a person to act before the period limited for the commencement of the office, the court must commit administration limited until there be an executor. (*m*) It is plain that this will be an administration *cum testamento annexo*, and the appointment made according to the rules connected with that sort of grant. (*n*)

Clare was searched and there was a full averment that the executor was *in partibus transmarinis;* so that in truth the objection, instead of having been overruled, could not possibly have been made. On which occasion, Holt C. J. said: "See the inconveniencies of these scrambling reports; they will make us appear to posterity for a parcel of blockheads."

(*i*) Rush *v.* Peacock, 2 Moo. & Rob. 162.

(*k*) *Ante*, 249.

(*l*) *Ante*, 249.

(*m*) Godolph. pt. 2, c. 30, s. 5.

(*n*) See *ante*, 461 *et seq.*

So it may be necessary to decree a limited administration till the will of the deceased can be produced in order to be admitted to probate. Thus where the deceased, a few days before his death, stated that he had made his will whilst in India; and that the same was then remaining there; administration was applied for "limited for the purpose of receiving and investing the interest and dividends due or to become due on certain stock of the deceased, and for receiving and investing the amount of an India bill, and for otherwise protecting the property of the deceased," "until the last will and testament of the said deceased, or an authentic copy thereof, should be transmitted to this country." Sir John Nicholl, on the consent of all parties apparently *interested, granted the administration, and the learned judge observed, that the deceased could not be sworn to have died intestate, having, according to his own declaration, left a will in India. An administration *pendente lite* was out of the question, as no suit in the spiritual court was or ever might be pending. Nor could there be an administration as *durante absentiâ* or *minoritate* of an executor; for *non constat* who the executor was. At the same time a long interval must elapse before the will would be forwarded from India, in which interval it was material there should be some one to protect and manage the property; and, therefore, the court complied with the application. (*o*)

administration limited till a will be transmitted to England:

The circumstances attending the administration of the effects of Sir Theophilus John Metcalfe, in the course of which the administration just mentioned was granted, afford some further examples, in subsequent stages, of limited administrations, which it may be perhaps advisable to introduce here. The administration, limited as above stated, was decreed in December, 1822, to two persons, Edward Larkin and William Monson, Esqrs., and it ceased and determined shortly afterwards, a copy of the said will having been actually forwarded to this country.

The deceased, by his will, appointed his brother (Sir Charles Theophilus Metcalfe) of Hydrabad, Charles Magniac, and George Sanders, Esqrs., both of Canton, and the said Edward Larkin, Esq., his executors, and his daughter, Eliza Metcalfe, a minor, aged about sixteen years at the time of his death, residuary legatee.

In March, 1823, a bill was filed in the high court of chancery,

(*o*) In the Goods of Metcalfe, 1 Add. 343.

wherein the said minor, by David Howell (party in the cause), was plaintiff, and the said Edward Larkin and William Monson were defendants; and, by an order made in the said cause, Mr. Howell was appointed guardian of the person and property of the minor, until she attained her age of twenty-one years.

* In the month of March, 1824, letters of administration (with the said copy of the will annexed) of the goods of the deceased were granted, by authority of the prerogative court, to the said David Howell, "limited to the purpose only of transferring all sums of money due and payable to the deceased, from the Governor and Company of the Bank of England, from the London Dock Company, from the Company of Merchants trading to the East Indies, and from the Globe Insurance Company respectively, to the name of the accountant general of the court of chancery." (*p*)

limited to transfer into the name of accountant general:

But this last administration also ceased and determined, viz, on the arrival of Mr. Magniac, one of the executors, in this country. Mr. Magniac, however, subsequently died here, but without having taken upon himself the probate, or having, in any manner, interfered in the trusts of the said will; and of the other executors, two were still in India, and the third, Mr. Larkin, had renounced the probate and execution of the will.

Under these circumstances, a decree was extracted at the instance of the said David Howell, Esq., calling upon the executors in India to accept or refuse probate of the copy of the said will aforesaid, otherwise to show cause why letters of administration (with such copy annexed) of the goods of the deceased should not be committed and granted to the said David Howell, Esq., as the guardian of the said Eliza Metcalfe, and for her use and benefit, "limited until she should attain her age of twenty-one; or until the original will and codicil should be transmitted to this country; or until the arrival here of the said executors both or either of them. (*q*)

limited till arrival of executors:

* The decree was returned into court, duly executed by a service on one of the pillars of the Royal Exchange, &c. and no appear-

(*p*) Howell *v.* Metcalfe, 2 Add. 348.

(*q*) See, also, 1 Gibs. Cod. 574, where it is said that though there be no suit or controversy depending touching the executorship, and though there be an executor, yet if he does not come in, the ordinary may grant a temporary administration, until the executor comes in and proves the will.

ance being given, and the facts, as above stated, being duly verified by exhibits and affidavits, the court was moved, in the first instance, to decree administration according to the tenor of the said decree; but in the event, either of its declining so to do, or of its requiring, in that case, that the securities should justify, then, to decree letters of administration to the said David Howell, Esq., limited for the purpose only of "receiving and collecting the outstanding personal estate and effects of the deceased, and from time to time, when so received, of investing the same in the name of the accountant general of the court of chancery; and, further, for the purpose of duly administering the estate and effects of the deceased, according to trusts of the said will, by and under the directions of the said high court of chancery."

The court, as not thinking itself authorized to dispense with the securities justifying, in the event of its decreeing administration according to the tenor of the decree, was pleased to decree letters of administration, &c. to Mr. Howell, limited, as prayed, in the other alternative, on his exhibiting an inventory, and giving the usual security. (*r*)

The administration so decreed was not extracted, owing to certain circumstances which it is not necessary here to detail, but the grant was abandoned; Mr. Howell, however, as *prochein amy* of the minor, Miss Metcalfe, had filed a bill in chancery against two of the surviving executors of the will of the deceased, and proceedings in that suit were stayed by there being no legal representative of the deceased to be made a party to the suit. Accordingly, on the first session of Easter term, 1825, the court on this statement, duly verified, was moved (and was pleased) to decree letters of administration of the goods, &c. of the deceased, to a nominee of Mr. Howell, "limited to the purpose only of * answering to the said suit in the court of chancery;" which limited administration was afterwards extracted. (*s*)

limited to answer a suit in chancery:

Where a will, proved to have been in existence after the testator's death, is accidentally lost, and the contents unknown, the court will grant administration limited until the original will be found and brought into the registry. (*t*)

limited till a lost will be found:

(*r*) 2 Add. 351.
(*s*) 2 Add. 351, note (*a*).
(*t*) In the Goods of Campbell, 2 Hagg. 555.

limited during the incapacity of the executor or administrator or next of kin, &c.

If the executor be disabled from acting, as if he becomes lunatic, or incapable of legal acts, then, on the principle of necessity, there shall be a grant of a temporary administration with the will annexed. (*u*) Where a sole executor or administrator becomes a lunatic, it is the ordinary practice of the court to make a limited grant to his committee, for his use and benefit, during his lunacy. (*v*) By the consent, given or implied, of the committee of the lunatic, administration with the will annexed may be committed to a residuary legatee, during the lunacy of the executor. (*x*)

It was also the practice of the ecclesiastical court to grant administration for the use and benefit of a lunatic, though the person alleged to be so has not been found a lunatic by inquisition. When such a case occurred, the ecclesiastical court required affidavits, stating the fact of lunacy, and that no inquisition has been had, and, of course, no committee appointed. The court then granted administration to the next of kin of the lunatic, for the use and benefit of the lunatic pending the lunacy, and it required sureties in double the amount of the property, and such sureties must have justified. (*y*)

* Where administration had been granted of an intestate's effects to a creditor for the use and benefit of the widow, a lunatic, on the renunciation of her children; on the death of the creditor, leaving goods unadministered, the widow surviving and still lunatic, the court refused to grant administration *de bonis non* to a son of the deceased, who had retracted his renunciation; but granted it to him for the use and benefit of the widow, during her lunacy, he

(*u*) Hills *v.* Mills, 1 Salk. 36; Toller, 99; Anon. 1 Cas. temp. Lee, 625; 2 Robert. 134; S. C. 7 Notes of Cas. 305; *ante*, 484. These are termed in 1 Oughton, tit. 219, s. 1, note (*a*), "*Literæ administrationis durante corporis aut animi vitio.*"

(*v*) In the Goods of Phillips, 2 Add. 336, note (*b*).

(*x*) In the Goods of Milnes, 3 Add. 55.

(*y*) See Ex parte Evelyn, 2 My. & K. 4, where the practice was laid down, as above stated, by Lord Brougham C., from a communication made to him by Dr Lushington. See, also, Evans *v.* Tyler, 2 Robert. 134; S. C. 7 Notes of Cas. 305, 306. Administration of the effects of a Jew was granted to the secretary of the great synagogue, for the use and benefit of the next of kin (a Jewess) who was of unsound mind, during her lunacy, her next of kin having been first cited. In the Goods of Joseph, 1 Curt. 907. In a modern case administration with the will annexed *de bonis non* was granted to the executors of a sister, the administratrix, deceased, for the use and benefit of the surviving sister, the sole next of kin, during her imbecility, without citing her next of kin. In the Goods of Southmead, 3 Curt. 28.

giving justifying security to the amount of the goods unadministered. (*z*)

In another case, (*a*) the deceased died intestate in October, 1826, leaving his widow and several children him surviving. In the following November administration was granted to his widow, who, in November, 1832, became a lunatic. In May, 1836, the court was prayed to revoke the administration granted to the widow, and to grant an administration to the son of the deceased. The court declined to revoke the administration; but granted administration to the son, limited during the lunacy of the widow, the letters of administration theretofore granted to her being first brought in and impounded in the registry, in order to be redelivered out in case of her recovery.

If an executor, who is also residuary legatee in trust, be incapable, and no committee is appointed, the *cestui que trust* may obtain administration under certain circumstances. (*b*) In a modern case, one of two executors had renounced, and the other was a lunatic under confinement, and there was no * committee of her person and estate. The court refused to grant administration to the residuary legatee, the daughter, during the lunacy of her mother, without the sureties in the bond justifying; no reason being given for the renunciation of the co-executor, nor any obstacle assigned to the formal appointment of a committee, to whom the administration for the use of the widow would regularly be granted. (*c*)

Case of one of several administrators becoming lunatic.

Until the year 1824, In the Goods of Phillips, (*d*) no case of an application to the court to supply a defect in the legal representation of a party deceased, occasioned by the lunacy of one of his several administrators, is believed to have occurred. In that case one of three administrators, *cum testamento annexo*, was found to be a lunatic under a commission from the court of chancery, and committees had been appointed. There were standing in the name of the deceased, in the books of the bank of England, certain sums, his property; but of which neither the interest could be received nor the principal stock transferred, as directed by the will, in

(*z*) In the Good of Penny, 4 Notes of Cas. 659.

(*a*) In the Goods of Binckes, 1 Curt. 286.

(*b*) In the Goods of Crump, 3 Phillim. 497.

(*c*) In the Goods of Hardstone, 1 Hagg. 487.

(*d*) 2 Add. 335.

consequence of such lunacy. (*e*) Under these circumstances, the court directed that upon the letters of administration already granted being brought in by the two sane administrators and the committees of the third, letters of administration *de bonis non*, &c. should, by consent of the said committees, issue *de novo* to the two former administrators only. (*f*) On the authority of this decision, the court ordered, in a case where one of two joint administrators had become imbecile and incapable of acting, that the joint letters of administration, having been brought into the registry, should be revoked, and special letters of administration granted to the sane administrator, without justifying securities. (*g*) On * another occasion, (*h*) the deceased had appointed two executors, and probate had been granted to one, with a power reserved of making the like grant to the other. The executor who had obtained the grant became a lunatic, and a transfer of the deceased's stock at the bank could not, in consequence, be obtained. A double probate was taken by the other executor, and the court was prayed to revoke the probate granted to the lunatic, it having become inoperative. The court directed both probates to be brought in and then revoked them, and granted a fresh probate to the other executor, and therein reserved a power of making a like grant to the lunatic executor, when he should become of sound mind and apply for the same.

There may also be a grant of administration limited to certain specific effects of the deceased; and the general administration may be committed to a different person. But it should seem that this sort of grant is entirely exceptional, and should not be made unless a very strong reason be given. (*i*)

Administration limited to a particular subject:

Two administrations may well subsist together when there is no executor. But it should be observed that, regularly, no administration of any sort can be granted when there is

if there is an executor there

(*e*) See *post*, pt. v. bk. II. ch. II. as to the provisions of the stat. 1 W. 4, c. 60 (An act for amending the laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees, &c.).

(*f*) 2 Add. 336.

(*g*) In the Goods of Newton, Curt. 428.

(*h*) In the Goods of Marshall, 1 Curt. 297.

(*i*) In the Goods of Watts, 1 Sw. & Tr. 538; In the Goods of Somerset, L. R. 1 P. & D. 350. See, for an instance where such a grant is proper, In the Goods of Dodgson, 1 Sw. & Tr. 259; [Jordan *v.* Polk, 1 Sneed, 430; McNairy *v.* Bell, 6 Yerger, 302.]

an executor appointed; for he is *universi juris hæres* to his testator. Therefore, where A. made his will, and appointed B. his executor, and by deed gave part of his estate to C.; and C. obtained in the prerogative court a limited administration to the deed only; the judges delegate set aside the grant of this administration on appeal. (*j*) can be no administrator:

It frequently happens that the personal administration of a party deceased is broken, and its revival is necessary merely for the performance of a single act. In such cases, * administration *de bonis non* will be granted, limited to that particular object. For instance, when the representatives of a trustee, in whom a term of years or charge was vested, are dead, a limited administration to another trustee is requisite for the purpose of making an assignment, and will be granted limited accordingly. (*k*) So where a testator leaves the dividends on certain stock in the public funds to a legatee for life, and, after his decease, the whole property to another, and makes the legatee for life executor, who dies intestate, administration *de bonis non*, with the will annexed, may be obtained by the representative of the substituted legatee, limited to the sum in the funds and the dividends due thereon since the death of the legatee for life. (*l*) So administration with a will annexed was granted to the joint nominees of two charitable institutions to whom legacies, expectant on life interests, had been bequeathed, but limited to a fund appropriated for payment of the legacies; the parties entitled to a general grant having been cited and not appearing. (*m*) administration limited to assign a trust term: to a particular legacy:

(*j*) Coswall *v.* Morgan, 2 Cas. temp. Lec, 571; but see *post*, 526.

(*k*) In cases where the original trustee died testate, it was not the practice of the prerogative office to annex the will to an administration granted for this purpose. In the Goods of Fenton, 3 Add. 36, note (*a*). It is not sufficient, in order to make out a title to the term, to refer to deeds deducing such title in affidavits. The deeds themselves must be brought into the registry. In the Goods of Keene, 1 Sw. & Tr. 265.

(*l*) In the Goods of Steadman, 2 Hagg. 59. But see In the Goods of Watts, 1 Sw. & Tr. 539; *ante*, 520. On one occasion, it appeared that a party had remitted from India a bill of exchange payable to the order of the deceased. The bill was accepted, but previous to its arrival the deceased died intestate, and his widow and children renounced administration. A grant was applied for to the nominee of the remitter of the bill, limited to receive and give a discharge to a third party for it. But the court refused the motion, on the ground that it was in fact an application for a limited administration to be granted to the nominee *of a debtor*. In the Goods of Lord Rivers, 4 Hagg. 355.

(*m*) In the Goods of Biou, 3 Curt. 739. Where there are several parties interested

Limited to proceedings in chancery:

* Again, an administration may be granted, limited to substantiate proceedings in chancery. (*n*)

Where a pressing necessity for carrying on proceedings in chancery is shown, the court will grant administration limited to filing a bill in equity. (*o*)

Again, if a debt by a covenant or obligation binding the heir of the debtor, is demanded in equity against the real assets in the hands of a devisee, under the statute 3 & 4 W. & M. c. 11 (repealed and reënacted with additional provisions by stat. 1 W. 4, c. 47), the personal representative of the deceased debtor is generally a necessary party to the suit, as a court of equity will first apply the personal in exoneration of the real assets. (*p*) And when there has been no general personal representative, a special representative by an administration limited to the subject of the suit has been required. (*q*) In other cases where a demand is made against a fund entitled to exoneration by general personal assets, if there are any such, a like limited administrator is frequently required to be brought before the court. This seems to be required rather to satisfy the court that there are no such assets to satisfy the demand; for although the limited administrator can collect no such assets by the authority under which he must act, yet as the person entitled to general administration must be cited in the ecclesiastical court, before such limited administration can be obtained, and as the limited administration would be determined by a subsequent grant of general administration, it must be presumed that there are no such assets to be collected, or a general administration would be obtained. (*r*)

So where a claim on property in dispute would vest in the * personal representative of a deceased person, and there is no general personal representative of that person, an administration limited to the subject of the suit may be necessary to enable the court to proceed to a decision on the claim. And when a right is clearly vested, as a trust term, which is required to be assigned,

in the fund, the grant will be limited to the interest of the *cestui que trust* making the application, unless the other *cestuis que trust* assent to the grant extending to their respective interests. Pegg *v.* Chamberlain, 1 Sw. & Tr. 527.

(*n*) In the Goods of the Elector of Hesse, 1 Hagg. 93; Harris *v.* Milburn, 2 Hagg. 62; Maclean *v.* Dawson, 1 Sw. & Tr. 425; Hawarden *v.* Dunlop, 2 Sw. & Tr. 614.

(*o*) Woolley *v.* Gordon, 3 Phillim. 315; In the Goods of Dodgson, 1 Sw. & Tr. 259.

(*p*) See Mitford Plead. 176, 4th ed.; *post*, pt. IV. bk. I. ch. II. § I.

(*q*) Mitf. Plead. 177, 4th ed.

(*r*) Ib.

an administration of the effects of the deceased trustee limited to the trust term is necessary to warrant the decree of the court for assignment of the term. (*s*)

But where a testatrix had a power of appointment, and a general probate of her will of 1829, and codicil thereto, had been granted, the delegates, reversing a decree of the prerogative, held that the court of probate could not also grant an administration with a will of 1815, and codicils annexed, limited to become a party to proceedings in equity, touching the execution of the power by such wills; but must itself decide whether the will of 1815 was, under the circumstances, revoked by the will of 1829, and thereupon grant, either a probate of the will and codicil of 1829 alone, or a probate of those papers and the will of 1815 and its codicils, as together containing the will. (*t*)

It may be here observed, that in these cases the court will not grant a *general* administration, but only an administration limited for the purpose of substantiating and carrying on the proceedings in chancery. On one occasion (*u*) a defendant in a suit in equity having died intestate, Sir H. Jenner Fust refused to make a *general* grant of administration to a nominee of the plaintiffs in the suit, though the vice chancellor (Sir L. Shadwell) had held (*x*) that an administration limited to substantiate proceedings (which had been previously granted) was insufficient, and had directed the cause to stand over to * enable the plaintiff to cure the objection by obtaining a general grant.

the estate of the deceased is properly represented in a suit in chancery by an administrator limited to substantiate proceedings in equity:

But this decision of the vice chancellor was afterwards overruled by Lord Cottenham, on a careful conisderation of the authorities; (*y*) and it appears to be now settled, that if the grantee of such limited letters is made a party to the suit, the estate of the deceased is properly represented, so as to enable the court to proceed in the cause; and a decree obtained against such an administrator will be binding on any future grantee of general letters of administration. (*z*)

(*s*) Mitf. Plead. 178.

(*t*) Hughes *v.* Turner, 4 Hagg. 30. See, also, Brenchley *v.* Lynn, 2 Robert. 441; accord. *ante*, 391, 392. See, also, 176, 177.

(*u*) In the Goods of Chanter, 1 Robert. 273

(*x*) Davis *v.* Chanter, 14 Sim. 212.

(*y*) 2 Phill. C. C. 545.

(*z*) See accord. Faulkner *v.* Daniel, 3 Hare, 199, 208; Ellice *v.* Goodson, 2 Coll. 4. But an *administrator ad litem* of a married woman does not sufficiently represent her separate estate, to enable the

power, &c. of such an administrator:

With respect to the power and interest of such administrators, a question arose in the case of Brant *v.* King, (*a*) before Sir Launcelot Shadwell V. C. March 31, 1829. In that case a bill had been filed by persons claiming certain bank annuities standing in the name of a trustee, who, pending the suit, died abroad, not leaving any personal representative in this country. Administration was therefore granted by the prerogative court of Canterbury, to a person residing in England, "limited for the purpose only to attend, supply, substantiate, and confirm the proceedings already had or that may be had in the cause in the high court of chancery, or any other cause which may be commenced, touching the matters at issue in the cause, and until a final decree shall be made therein, and the decree carried into execution, and the execution thereof fully completed." (*b*) On the petition of the plaintiff, the vice chancellor made an order that the bank of England should pay to the limited administrator (who had been made a party to the suit by *supplemental bill) the dividends in arrear, and that he should pay thereout the costs of obtaining the administration and of the order; and that the limited administrator should transfer (and the bank permit the transfer) the stock to the accountant general in trust in this case. Mr. Horne, for the bank, suggested a doubt whether an order for payment and transfer could be made in the case of a limited administrator, it not having been the practice of the bank to pay dividends to, or permit a transfer by, such an administrator. But the vice chancellor thought the application proper, and made the order, observing, that otherwise a limited administration would be useless. (*c*)

court to decide how far that estate is liable in respect of her acts as trustee. Shipton *v.* Rawlins, 4 De G. & Sm. 477. [An administrator regularly appointed succeeds to all the rights of a special administrator; as, by suit to collect a note given to the special administrator and belonging to the estate. Cowles *v.* Hays, 71 N. Car. 230; Ellmaker's Estate, 4 Watts, 36, 37. But the bond of a special administrator cannot be treated as binding upon him and his sureties, if he should be afterwards appointed administrator with the will annexed, without the formal written consent of the sureties. Re Fisher, 15 Wis. 511.]

(*a*) *Ex relatione* Mr. Wilson, of counsel in the cause.

(*b*) This appears to be the usual form of letters of administration limited to substantiate proceedings in chancery. See 2 Phill. C. C. 549, 550.

(*c*) This case was cited and recognized by Lord Cottenham in Davis *v.* Chanter, 2 Phill. C. C. 551. But Vice Chancellor Shadwell himself appears to have expressed more than once a different opinion on the subject. See Moores *v.* Choat, 8

In cases of such limited administration, the parties entitled to the general grant may take out a *cæterorum* representation. (*d*)

cæterorum representation.

Further, such limited administrations in strictness ought not to be granted without either the *regular* renunciation (*e*) of the party entitled, according to the practice of the court, to the general grant; or a citation of such party "to accept or refuse." But under peculiar circumstances this seems to have been sometimes dispensed with. (*f*) However, on one occasion, (*g*) where a testator died in 1823, and no *step was taken to prove his will till 1846, and in the mean time an administration had been obtained limited to his interest in the remainders of two terms, on an allegation that he was dead intestate, without citation of, or renunciation by, the parties entitled to the general grant; the court refused a *cæterorum* probate to the sole executrix, and stopped the practice of making such grants of administration for the assignment of terms without citation.

Citation of party entitled to the general administration before limited grant.

In a modern case, (*h*) the testator died in March, 1827, having made a will, appointing two executors, and leaving his only two children, daughters, both married, his residuary legatees. A suit in chancery against the deceased abated by his death. From time to time search was made on the part of the suitor in chancery, if any will had been proved, or administration taken, but without success; and in October, 1827, his solicitor wrote to the husbands of the daughters, inquiring whether they would take out administration, and apprising them of the necessity of obtaining a personal representative to the deceased's estate. Similar communications had been made to the solicitor and nephew of the testator; apprising them also of an intended application to the court; but no answers were returned. A decree with intimation

Sim. 508; Clough *v.* Dixon, 10 Sim. 564; Croft *v.* Waterton, 13 Sim. 653; Davis *v.* Chanter, 14 Sim. 212. See, also, Williams *v.* Allen, 32 Beav. 650.

(*d*) Harris *v.* Milburn, 2 Hagg. 62. But see In the Goods of Currey, 5 Notes of Cas, 54; *infra*.

(*e*) In the Goods of Fenton, 3 Add. 35, where a renunciation was considered insufficient, because unaccompanied by the original will of the deceased.

(*f*) Skeffington *v.* White, 1 Hagg. 699; In the Goods of Steadman, 2 Hagg. 59. But see Skeffington *v.* White, 2 Hagg. 626; *ante*, 477, 478. See, also, In the Goods of Watts, 1 Sw. & Tr. 538.

(*g*) In the Goods of Currey, 5 Notes of Cas. 54.

(*h*) Harris *v.* Milburn, 2 Hagg. 63.

was then extracted, calling upon the daughters to show cause why an administration should not be granted to a nominee of the suitor in chancery, limited to substantiate proceedings there. Every reasonable effort was made to serve the decree on the daughters, but the husband of one would not permit access to his wife, and would give no information as to the other sister, whose residence could not be discovered. In December, 1827, the limited administration was decreed, and the proceedings in chancery were revived. In Easter term, 1828, the executors, who at last proved the will, called in the administration, on the ground that the decree was not personally served. But the court, on petition, directed it to be redelivered out, and condemned the executors in costs; observing that the regular course * would have been to take probate *cæterorum*, and if there was any fear of collusion, the executors might have intervened in the chancery suit.

Administration limited to a particular place.

Finally, an administration limited to the effects of the deceased in one country or place may be committed to one administrator, and an administration limited to those in another country or place to another. (*i*)

It might happen, under the old practice, that a man dying possessed of goods in two provinces made his will of the goods only in one of them, and died intestate as to the goods in the other province; and in such case administration might have been granted as to the goods whereof he died intestate. (*k*)

So a case might occur, where a trustee died, leaving the whole of his beneficial property in the province of one archbishop, and trust property in the province of the other, and his executors in consequence declined to prove in the latter; under such circumstances, administration with the will annexed might have been granted to the party beneficially entitled under the trust, limited to his interest in the trust property. (*l*) On one occasion (*m*) administration was obtained in the prerogative court of Canterbury, limited to assign a mortgage term in a property situate within the diocese of Bath and Wells, the will of the deceased having been originally proved in the prerogative, but the executor

(*i*) Bac. Abr. Executor, C. 4; Toller, 106.

(*k*) Godolph. pt. 2, c. 30, s. 5. See *ante*, 526.

(*l*) In the Goods of Ferrier, 1 Hagg. 241; Le Briton *v.* Le Quesne, 2 Cas. temp. Lee, 261.

(*m*) In the Goods of Powell, 3 Hagg. 195. See Fowler *v.* Richards, 5 Russ. 39.

of his executor having obtained probate in the diocesan court of Gloucester. (*n*)

In a modern case, (*o*) the original will having been proved in an inferior jurisdiction, where the deceased died within the province of Canterbury, the prerogative court of that province granted a limited administration to assign a satisfied * term situate in another of his own dioceses; and, on the ground that the grant of the probate would not be revoked by the present one, nor the other property of the deceased, nor his representatives, be thereby disturbed, the court refused to enforce a monition to the inferior judge to transmit the will.

(*n*) See, also, In the Goods of Wells, 2 Robert. 356.

(*o*) Crosley *v.* Archdeacon of Sudbury, 3 Hagg. 197.

*CHAPTER THE FOURTH.

OF THE ADMINISTRATION BOND TO THE ORDINARY.

In this chapter it is proposed to consider the security required of an administrator, upon administration being committed to him. (a^1)

(a^1) [In most of the American States, executors, as well as administrators, are required to give bonds for the faithful discharge of their duties. In Massachusetts, "Every executor, before entering upon the execution of his trust," is required to "give bond with sufficient surety or sureties in such sum as the judge of the probate court shall order, payable to said judge and his successor, with condition" that he shall make and return to the probate court an inventory of the real and personal estate of the testator, that he shall "administer according to law," and the will of the testator, his personal estate, "and the proceeds of all his real estate that may be sold for the payment of his debts or legacies," &c. and render on oath an account of his administration. Genl. Sts. c. 93, § 2. See Hall *v.* Cushing, 9 Pick. 395; Baldwin *v.* Standish, 7 Cush. 207, 208; *post*, 546, note (*o*). Executors must give bonds in New Hampshire. Genl. Sts. N. H. c. 176, §§ 1, 12; Judge of Probate *v.* Adams, 49 N. H. 150, 152. So in Alabama, Cleveland *v.* Chandler, 3 Stew. 489; and in Virginia, Fairfax *v.* Fairfax, 7 Grattan, 36. So in Connecticut, Holbrook *v.* Bentley, 32 Conn. 502. So in Maine, Pettingill *v.* Pettingill, 60 Maine, 411. Neither co-executors nor co-administrators are required by law to enter into a joint obligation. Each may file a separate bond. But if they unite in a joint bond, its effect is to make them both liable to the judge of probate as the trustee for creditors and others interested in the estate, to the extent of the assets which came to their joint possession. Ames J. in Ames *v.* Armstrong, 106 Mass. 15, 19; Sts. Mass. 1874, c. 366; Hannum *v.* Day, 105 Mass. 39; Green *v.* Hanbury, 2 Brock. 403; Lidderdale *v.* Robinson, 2 Brock. 159; Brazier *v.* Clark, 5 Pick. 96; Boyd *v.* Boyd, 1 Watts, 368; Towne *v.* Ammidown, 20 Pick. 535; Sparhawk *v.* Buell, 9 Vt. 31; Clarke *v.* State, 6 Gill & J. 288; Little *v.* Knox, 15 Ala. 576. And they are jointly liable as principals to indemnify the surety who has been compelled to answer for the default of one of them. Dobyns *v.* McGovern, 15 Missou. 662. But a surety in a joint administration bond of joint administrators, is not liable to one administrator for default of the other. Haell *v.* Blanchard, 4 Desaus. 21. When two or more are appointed executors, none shall intermeddle or act as such but those who give bond as prescribed. Genl. Sts. Mass. c. 93, § 2. The representatives of one joint executor are not responsible for the maladministration of the survivor happening after the decease of the former, although the co-executors gave a joint and several bond with sureties for the faithful execution of their duties. Towne *v.* Ammidown, 20 Pick. 535; Brazier *v.* Clark, 5 Pick. 96. But see Dobyns *v.* McGovern, 15 Missou. 662. There are certain cases in which the executor may be exempted from giving a surety or sureties on his

The statute 21 Hen. 8, c. 5, s. 3, directs the ordinary to grant administration, "taking surety of him or them to whom shall be

bond; See Genl. Sts. Mass. c. 93, § 5; Wells *v.* Child, 12 Allen, 330; Abercrombie *v.* Sheldon, 8 Allen, 532; Ames *v.* Armstrong, 106 Mass. 15; Bowman *v.* Wooton, 8 B. Mon. 67; one of which cases is where the testator has ordered or requested such exemption, in respect of the person named as executor; but this request becomes inoperative on the failure or refusal of such person to accept the trust, and has no application to other executors or administrators. Langley *v.* Harris, 23 Texas, 564; Fairfax *v.* Fairfax, 7 Grattan, 36. But even in case the testator has requested exemption from giving bond, the court may for cause require a bond to be given. Clark *v.* Niles, 42 Miss. 460; Atwell *v.* Helm, 7 Bush (Ky.), 504. A new bond may be required, where the original bond appears to be inadequate. Genl. Sts. Mass. c. 101, § 15; Wells J. in Hannum *v.* Day, 105 Mass. 38; Gray C. J. in National Bank of Troy *v.* Stanton, 116 Mass. 438. Sureties in a bond may be discharged from responsibility on it, where it is reasonable and proper. Genl. Sts. Mass. c. 101, § 16. The power to act as executor and to administer the estate, is dependent on giving bond, where a bond is required; and this power is suspended until the bond is given. The appointment cannot rightfully be adjudged void because the bond is not given. But a failure to give the bond would furnish good cause to revoke the appointment. But a removal of the executor would not be justified unless the circumstances indicated intentional wrong or gross negligence. Bell C. J. in Morgan *v.* Dodge, 44 N. H. 261, 262; Wingate *v.* Wooton, 5 Sm. & M. 245. See Parker C. J. in Piequet, appellant, 5 Pick. 76; Hoar J. in Abercrombie *v.* Sheldon, 8 Allen, 532, 534, 535; Baldwin *v.* Standish, 7 Cush. 207. When the administration is suspended by the failure of the executor to give the proper bonds, the claims of creditors are not barred by neglect to present them, or to commence suits upon them while the suspension continues. Morgan *v.* Dodge, 44 N. H. 255. A bond without surety given by an executor, and approved by the judge of probate, without notice to creditors, is not such a bond as is required by the statutes of Massachusetts; and the statute of limitations in favor of executors will not begin to run from the filing of such a bond. Abercrombie *v.* Sheldon, 8 Allen, 532. When a will has been approved in the probate court, and the executor has given bond, the bond is not vacated, but only suspended in its operation, by a subsequent appeal from the probate of the will, during the pendency of the appeal. Dunham *v.* Dunham, 16 Gray, 577. It is provided by statute in Massachusetts that "if it appears to the judge that the bond prescribed to be given by executors as above, is not necessary for the protection of any person interested in the estate, he may permit an executor who is residuary legatee, instead of giving such bond, to give bond in a sum and with sureties to the satisfaction of the judge, with condition to pay all debts and legacies of the testator, and such sums as may be allowed by the probate court for necessaries to the widow or minor children; and in such case the executor shall not be required to return an inventory." Genl. Sts. c. 93, § 3. See Holden *v.* Fletcher, 6 Cush. 235, 237, 238; Alger *v.* Colwell, 2 Gray, 404; Conant *v.* Stratton, 107 Mass. 474. An executor and residuary legatee, by giving bond to pay debts and legacies, conclusively admits assets sufficient to pay debts and legacies. Colwell *v.* Alger, 5 Gray, 67; Jones *v.* Richardson, 5 Met. 247; Clarke *v.* Tufts, 5 Pick. 337; Stebbins *v.* Smith, 4 Pick. 97. See Duvall *v.* Snowden, 7 Gill & J. 430. As to the risk of giving bond of this character, see Bell C. J. in Morgan *v.* Dodge, 44 N. H. 262. As to the effect of giving such bond, on the administration of the estate, and in vesting the property in the residuary legatee, see Hey-

made such commission:" and the statute 22 & 23 Car. 2, c. 10, s. 1, further provides, that "all ordinaries, as well as the judges of the prerogative courts of Canterbury and York for the time being, as all other ordinaries and ecclesiastical judges, and every of them, having power to commit administration of the goods of persons dying intestate, shall and may upon their respective granting and committing of administrations of the goods of persons dying intestate, after the first day of June, 1671, of the respective person or persons to whom any administration is to be committed, take sufficient bonds with two or more able sureties, (*a*) respect being had to the value of the estate, in the name of the ordinary, with the condition in form and manner following, *mutatis mutandis*, viz.

Bond to the ordinary by administrator under stat. 22 & 23 Car. 2.

conditioned:

"The condition of this obligation is such, that if the within-bounden, A. B., administrator of all and singular the goods, chattels and credits of C. D., deceased, do make or cause to be made a true and perfect inventory of all and sin-

to make a true inventory, &c.:

dock *v.* Duncan, 43 N. H. 101, and cases cited. Co-executors with the residuary legatee must in such cases give the ordinary bond. Heydock *v.* Duncan, 43 N. H. 95. When an administrator with the will annexed is residuary legatee, he may give the bond above prescribed, and with like effect as though he was named executor in the will, by Mass. st. 1870, c. 285. The executor, or administrator with the will annexed, who is residuary legatee, and, as such, has given bond to pay debts and legacies as above, may be required to give a new bond in a larger sum, as well as any other executor or administrator; and, upon his refusal or neglect to do so, may be removed from office and an administrator *de bonis non* with the will annexed appointed. Gray C. J. in National Bank of Troy *v.* Stanton, 116 Mass. 438; Genl. Sts. Mass. c. 101, §§ 2, 15, 17. In New York an executor is not in general required to give bonds, unless the will require him to do so. Sullivan's Estate, 1 Tuck. (N. Y.) Sur. 94. But there are some exceptions. See Wood *v.* Wood, 4 Paige, 299; Holmes *v.* Cock, 2 Barb. Ch. 426; Mandeville *v.* Mandeville, 8 Paige, 478; *ante*, 237, note (*z*). But an administrator with the will annexed must give bonds under the law requiring them of general administrators. Ex parte Brown, 2 Bradf. Sur. 22. See Small *v.* Commonwealth, 8 Penn. St. 101. As to Pennsylvania, see Johnson's Appeal, 12 Serg. & R. 317; McKennan's Appeal, 27 Penn. St. 237; Re Wilson's Estate, 2 Penn. St. 325. In Pennsylvania an executor may be required to give bonds when he has mismanaged the estate, although he may be entirely solvent. See McKennan's Estate, 27 Penn. St. 325. If an executor gives bonds by order of the court of probate upon an application charging him with mismanagement of the funds, the legatees acquire a vested interest in the bond, the power of the court over it ceases, and it cannot be released, or another substituted in its stead, without consent of the legatees. Commonwealth *v.* Rogers, 53 Penn. St. 470.]

(*a*) By the practice of the prerogative court of Canterbury, a husband, taking administration to his deceased wife, entered into bond with one surety. In the Goods of Noel, 4 Hagg. 208. [More than one surety is required to a probate bond in New Hampshire. Tappan *v.* Tappan, 42 N. H. 400. See Bradley *v.* Commonwealth, 31 Penn. St. 522.]

gular the goods, chattels, and credits of the said deceased which have or shall come to the hands, possession, or * knowledge of him the said A. B., or into the hands and possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of court, at or before the day of next ensuing:

"And the same goods, chattels, and credits, and all other the goods, chattels, and credits of the said deceased at the time of his death, which, at any time after, shall come to the hands or possession of the said A. B., or into the hands and possession of any other person or persons for him, do well and truly administer according to law.

to administer well and truly:

"And further do make, or cause to be made, a true and just account of his said administration at or before the day of : and all the rest and residue of the said goods, chattels, and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed of by the judge or judges for the time being of the said court, shall deliver and pay unto such person or persons respectively as the said judge or judges by his or their decree or sentence, pursuant to the true intent and meaning of this act, shall limit and appoint: (a^2)

to make a true and just account of his administration:

to deliver and pay the residue as the judge shall appoint:

"And if it shall hereafter appear, that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the said A. B. within bounden, being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court: then this obligation to be void and of none effect, or else to remain in full force and virtue.

and to deliver the letters, if a will shall appear.

"Which bonds are hereby declared and enacted to be good to all intents and purposes, and pleadable in any courts of justice."

But by the 80th section of the court of probate act (20 & 21 Vict. c. 77), so much of the above statutes "as requires * any surety, bond, or other security to be taken

Repealed by court of probate act, s. 80.

(a^2) [See Judge of Probate *v.* Adams, 49 N. H. 150, 152; Judge of Probate *v.* Lane, 51 N. H. 342; Hough *v.* Bailey, 32 Conn. 290, 291; Keeney *v.* Globe Mill Co. 39 Conn. 149, 150.]

from a person to whom administration shall be committed, shall be repealed."

Sect. 81. Persons to whom grants of administration shall be made shall give bond to the judge.

And by sect. 81, "Every person to whom any grant of administration shall be committed shall give bond to the judge of the court of probate to inure for the benefit of the judge for the time being, and, if the court of probate or (in the case of a grant from a district registrar) the district registrar shall require, with one or more surety or sureties, (a^3) conditioned for duly collecting, getting in, and administering the personal estate of the deceased, which bond shall be in such form as the judge shall from time to time by any general or special order direct; (a^4) provided, that it shall not be necessary for the solicitor for the affairs of the treasury or the solicitor of the duchy of Lancaster applying for or obtaining administration to the use and benefit of her majesty to give any such bond as aforesaid." (b)

Sect. 82. Penalty on bond.

By sect. 82, "Such bond shall be in a penalty of double the amount under which the estate and effects of the deceased shall be sworn, unless the court or district registrar, as the case may be, shall in any case think fit to direct the same to be reduced, (c) in which case it shall be lawful for the court or district registrar so to do; and the court or district registrar may also direct that more bonds than one shall be given, (d) so as to limit the liability of any surety to such amount as the court or district registrar shall think reasonable." (d^1)

*By sect. 83, "The court may, on application, made on mo-

(a^3) [See *ante*, 529, note (a).]

(a^4) [No bond, required to be given to the judge of the probate court, or filed in the probate office in Massachusetts, will be sufficient, unless examined and approved by the judge, and his approval thereof under his official signature is written thereon. Genl. Sts. c. 101, § 12. So in Maine, Mathews *v.* Patterson, 42 Maine, 257; Austin *v.* Austin, 50 Maine, 74. It seems to be otherwise in Missouri, James *v.* Dixon, 21 Missou. 538.]

(b) See stat. 15 Vict. c. 3; *ante*, 434.

(c) See In the Goods of Gent, 1 Sw. & Tr. 54; In the Goods of Stackpoole, 2 Sw. & Tr. 316; In the Goods of Fozard, 3 Sw. & Tr. 173; In the Goods of Powis, 34 L. J., P. M. & A. 55, as to the exercise of the discretion of the court in this respect; [Atkinson *v.* Christian, 3 Grattan, 448.]

(d) See In the Goods of Weir, 1 Sw. & Tr. 506, where a sum of money had been received by the administrator which made it necessary to re-swear the amount for which administration was taken out, and the court, under this section, directed an additional bond, which would, together with the original one, be double the amount under which the estate was to be re-sworn.

(d^1) [See *post*, 546, note (o).]

tion or petition in a summary way, (*e*) and on being satisfied that the condition of any such bond has been broken, order one of the registrars of the court to assign the same to some person to be named in such order, and such person, his executors or administrators, shall thereupon be entitled to sue on the said bond, in his own name, both at law and in equity, as if the same had been originally given to him instead of to the judge of the court, and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond."

Sect. 83. Power of court to assign bond.

The form of the bond required by the rule (P. R. form No. 16), made in pursuance of the 81st section, is as follows: (*e*[1])

Form of bond made in pursuance of 81st sect.

"Know all men by these presents, that we, A. B. of C. D. of and E. F. of are jointly and severally bound unto G. H. the judge of her majesty's court of probate, in the sum of pounds of good and lawful money of Great Britain, to be paid to the said G. H. or to the judge of the said court for the time being, for which payment well and truly to be made, we bind ourselves and of us for the whole, our heirs, executors, and administrators firmly by these presents. Sealed with our seals. Dated the day of in the year of our Lord one thousand eight hundred and .

"The condition of this obligation is such, that if the above named A. B. [*or* K. B. wife of the above named A. B.], the [*as the case may be*] of I. J. late of deceased, who died on the day of and the intended administrator of all and singular the personal estate and effects of the said deceased do, when lawfully called on in that behalf, make or cause to be made a true and perfect inventory of all and singular the personal estate and effects of the said deceased which have or shall come to hands, possession, * or knowledge, or into the hands and possession of any other person, for , and the same so made do exhibit or cause to be exhibited into the principal registry of her majesty's court of probate, *whenever required by*

(*e*) See In the Goods of Jones, 3 Sw. & Tr. 28; Baker *v.* Brooks, Ib. 32.

(*e*[1]) [As to the form of bond for an administrator with the will annexed, see Judge of Probate *v.* Claggett, 36 N. H. 381; Small *v.* Commonwealth, 8 Penn. St. 101; *ante*, 470, note (*t*[1]); for an administrator *de bonis non*, Hartzell *v.* Commonwealth, 42 Penn. St. 453. See Farley *v.* McConnell, 7 Lansing, 428.]

law so to do, and the same personal estate and effects, and all other the personal estate and effects of the said deceased at the time of death, which at any time after shall come to the hands or possession of the said or into the hands or possession of any other person or persons for , do well and truly administer according to law (that is to say), do pay the debts which did owe at decease, and further do make or cause to be made a just and true account of said administration whenever required by law so to do; and all the rest and residue of the said personal estate and effects do deliver and pay unto such person or persons as shall be entitled thereto under the act of parliament, intituled "An act for the better settling of intestates' estates;" and if it shall hereafter appear that any last will and testament was made by the said deceased, and the executor or executors or other persons therein named do exhibit the same into the said court, making request to have it allowed and approved accordingly, if the said being thereunto required, do render and deliver the said letters of administration (approbation of such testament being first had and made) in the said court, (e^2) then this obligation to be void and of none effect, or else to remain in full force and virtue. (e^3)

"A. B. (L. S.)
"C. D. (L. S.)
"E. F. (L. S.)

(e^2) [See Hunt *v.* Hamilton, 9 Dana, 90.]

(e^3) [In Massachusetts "every administrator, before entering upon the execution of his trust," is required to "give bond, with sufficient sureties in such sum as the judge of the probate court shall order, payable to said judge and his successors with conditions" substantially like those stated in the text, with the addition that the administrator shall inventory the real estate of the deceased, and administer the proceeds of all his real estate that may be sold for the payment of his debts, and render his administration account on oath. Genl. Sts. c. 94, § 2. See Henshaw *v.* Blood, 1 Mass. 35; Bennett *v.* Overing, 16 Gray, 267; Picquet, appellant, 5 Pick. 65; Judge of Probate *v.* Adams, 49 N. H. 153. It is generally required by the statutes of all the American States, that a person appointed administrator, before receiving his letters of administration, shall give bonds with sureties for the faithful performance of the trust; in some states the bond is to be taken in the name of the state, in others in the name of the judge of probate, or of the probate court. See Miltenberger *v.* Commonwealth, 14 Penn. St. 71; Johnson *v.* Fuquay, 1 Dana, 514; Judge of Probate *v.* Adams, 49 N. H. 150, 152; 2 R. S. of N. Y. 71, § 42; State *v.* Cox, 2 H. & Gill, 279. The office of administrator is not filled until the bond is given. Feltz *v.* Clark, 4 Humph. 79; O'Neal *v.* Tisdale, 12 Texas, 40. But the failure of the administrator to give bond does not render the grant of administration absolutely void. Ex parte Maxwell, 37 Ala. 262; Cameron *v.* Cameron, 15 Wis. 1. As to the effect of deviations from the prescribed form of bond, see Walker *v.*

"Signed, sealed, and delivered by the within named A. B., C. D., and E. F., in the presence of

"O. P., a clerk in the principal registry of her majesty's court of probate,

[Or a commissioner]."

In the case of Sandrey *v.* Michell, (*f*) the court of * queen's bench appears to have been of opinion that the court of probate act has made no alteration in the law beyond this, that it enables a creditor on having the bond assigned to him, to sue in his own name. It is, therefore, deemed expedient to exhibit at large the practice as established under the old law. But it must be observed that the condition of the bond, according to the new form prescribed by the court, under the stat. 20 & 21 Vict. c. 77, s. 81, differs in several material respects, which

Practice under the old law:

Crosland, 3 Rich. Eq. 23; Roberts *v.* Calvin, 3 Grattan, 358; Williamson *v.* Williamson, 3 Sm. & M. 715; Luster *v.* Middlecoff, 8 Grattan, 54; Cohea *v.* State, 34 Miss. 179; Small *v.* Commonwealth, 8 Penn. St. 101; The Ordinary *v.* Cooley, 30 N. J. (Law) 179; Carrol *v.* Connet, 2 J. J. Marsh. 195; Mears *v.* Commonwealth, 8 Watts, 223; Cowling *v.* Justices, 6 Rand. 349; Frazier *v.* Frazier, 2 Leigh, 242; Morrow *v.* Peyton, 8 Leigh, 54. A probate bond executed by a principal and two sureties, was altered by increasing the penal sum with the consent of the principal but without the knowledge of the sureties, and was then executed by two additional sureties, who did not know of the alteration, and was approved by the judge of probate; the bond was held to be binding on the principal but not on the sureties; not binding on the first two because the alteration had discharged them, and not binding on the last two, because they had signed upon the understanding that they were bound only with the first two. Howe *v.* Peabody, 2 Gray, 556. An administration bond, executed by sureties, but not by the administrator, is not binding on the sureties. Wood *v.* Washburne, 2 Pick. 24. When there are several administrators, one joint and several bond executed by all of them with proper sureties is sufficient. Kirby *v.* Turner, Hopk. 309. In Pennsylvania two or more sureties are required to an administration bond by statute, and it has been decided that an administration bond in which there is but one surety is *ipso facto* void. M'Williams *v.* Hopkins, 4 Rawle, 382. But see Mears *v.* Commonwealth, 8 Watts, 225. See, also, Bradley *v.* Commonwealth, 31 Penn. St. 522. The statute of Pennsylvania also provides that letters of administration shall be void, and the register granting the same liable for all damages, in cases where they are issued without bond and sureties. Act March 15, 1832, § 27. More than one surety is required to a probate bond in New Hampshire. Tappan *v.* Tappan, 24 N. H. 400. If one of two administrators, who have executed a joint administration bond, commits a *devastavit*, the other is chargeable only as surety and *pari passu* with the other sureties in the bond. Morrow *v.* Peyton, 8 Leigh, 54. As to the sureties in such a bond, they are not liable to one administrator for the default of the other. Hoell *v.* Blanchard, 4 Desaus. 21. An insolvent administrator may recover against his own sureties for the benefit of the creditors of the estate. Anon. cited by Gibson C. J. in Wolfinger *v.* Forsman, 6 Penn. St. 294.]

(*f*) 3 B. & S. 405.

there will be occasion to point out, (*g*) from the condition of the bond given under the statute of Charles.

Application to the court in order to the bond being put in suit:

If the bond given to the ordinary under the statute of Charles had been forfeited, the ecclesiastical court, under the old law, must have been prayed, at the instance of the parties desirous of putting the bond in suit in a court of law, (g^1) to order the bond "to be attended with" for that purpose. (g^2)

(*g*) *Post*, 540, note (*e*); Ib. note (*g*); Sandrey *v.* Michell, *post*, 541.

(g^1) [As to the interest which entitles a person to put the bond in suit, see Dunnell *v.* The Municipal Court of the City of Providence, 9 R. I. 189, in which it is held that sureties on an executor's bond have no interest in the estate which entitles them to bring suit on it upon the failure of the executor to perform its condition.]

(g^2) [In Massachusetts the bond given by executors or administrators for the discharge of their trust may be put in suit by any creditor of the deceased for his own benefit, when he has recovered judgment for his debt against the executors or administrators, and they have neglected upon demand made by the creditor to pay the same, or show sufficient goods or estate of the deceased to be taken on execution for that purpose. Genl. Sts. c. 101, § 19. See Paine *v.* Stone, 10 Pick. 75; Coffin *v.* Jones, 5 Pick. 61. If the estate is insolvent, a suit on the bond may be brought by a creditor, when the amount due to him has been ascertained by the decree of distribution, if the executor or administrator neglects to pay the same when demanded. § 20. So a suit may be so brought by a person who is next of kin, to receive his share of the personal estate, upon neglect after demand. § 21. When it appears to the probate court, on the representation of any person interested in an estate, that the executor or administrator has failed to perform his duty in any other particular, the court may authorize any creditor, next of kin, legatee, or other person aggrieved by such maladministration to bring an action on the bond. § 22. So the register of probate may authorize suit. § 24. Provision is also made that every suit on an administration bond shall be brought in the supreme judicial court held for the county in which the bond is taken, and the mode in which, and the uses for which, the execution shall be awarded are minutely prescribed. § 28. See Conant *v.* Stratton, 107 Mass. 474; Judge of Probate *v.* Lane, 51 N. H. 342. A remedy is also provided for a new breach of the condition of the bond, or a claim for further damages, by a writ of *scire facias* on the original judgment. § 30. The cases named in §§ 19, 20, and 21 above, are the only cases in which the probate bond may be sued by a person for his own benefit without applying to the judge of probate for his consent. See Newcomb *v.* Williams, 9 Met. 536, 537; Fay *v.* Taylor, 2 Gray, 154, 158; Robbins *v.* Hayward, 16 Mass. 524; Loring *v.* Kendall, 1 Gray, 305, 316. The provisions of the Massachusetts statutes respecting executors' and administrators' bonds are summarized and commented on by Shaw C. J. in Loring *v.* Kendall, 1 Gray, 305, 312, 313, where he says, "A probate bond, under the law of Massachusetts, is a security and obligation, of a peculiar character, given by an officer charged by law with a duty and trust of a various and miscellaneous character, usually given in a round sum, with condition to perform the duties of such trust. This condition, though expressed in few words, from its very generality embraces a variety of acts, to continue for a series of years, in which a great variety of persons may have interests, as creditors, legatees, distributees, annuitants, wards, minors, married women, and others. It is given to the judge of probate, not in his personal, but in his official

In the modern case of the Archbishop of Canterbury *v.* Tubb, (*h*) an attempt was made to put the bond in suit, without having ob-

capacity, as trustee for all persons beneficially interested, and on his decease it passes to his successors in office, not to his personal representatives. It is obviously, therefore, a continuing obligation, of which there may be various and successive breaches. When put in suit, it must be in the name of the judge of probate; one judgment is rendered for the entire penalty, and execution may be awarded according to circumstances, and upon particular breaches averred and proved, in favor of certain individuals, as judgment creditors, creditors whose debts have been allowed under a commission of insolvency and payment of a dividend decreed thereon, or distributees whose claims are ascertained by a probate decree of distribution, or in favor of the judge of probate himself, for the general benefit. In case these various awards of execution do not exhaust the whole penalty, the judgment for the residue stands as a security for any other breach, which may at any time afterwards occur, to be sued for by a *scire facias*, either for the benefit of a party entitled to claim in his own right, or by the judge of probate, as trustee for others. The administrator himself may be subject to various suits, by action or *scire facias;* but the only liability of the surety is on the bond, and the only cause of action upon that liability is the action to be commenced and prosecuted in the name of the judge of probate." "We have already said that a probate bond is an obligation of a peculiar character. We may add, it is not only provided for by the statute, but its legal effect, the mode in which it is to be used and prosecuted, the rights of parties to be secured by it, are all regulated by the statute. It is filed in the probate office for the benefit of all persons interested; suits may be brought upon it by certain creditors and distributees, whose claims have been liquidated by judicial decision, without application to the judge of probate. In all other cases, application is to be made by a party interested, to the judge of probate, for leave to sue the bond; if granted, such applicant indorses the writ, and becomes personally liable for costs if he fail in the suit. The suit must be brought originally in the supreme judicial court, and in the same county, in the probate court of which, the bond is taken. Either, then, the bond before suit, or the judgment for the penalty rendered afterwards, stands open and accessible to all persons, for whose benefit the law directs it to be taken, and for whom it is to stand for a security. Each of such parties may have a writ of *scire facias* in his own name, to recover part of said penal sum to his own use. Such a bond, therefore, has very few of the characteristics of a writing obligatory at common law, either as to parties, legal operation, or remedies, the objects to be obtained, or the mode of obtaining them." P. 316. See Newcomb *v.* Williams, 9 Met. 525; Bennett *v.* Russell, 2 Allen, 537, 538–540. Such a bond is not provable in bankruptcy against one of the sureties before a breach of the condition of the bond; nor, it seems, before judgment in an action brought for such breach. Loring *v.* Kendall, *supra.* The leave of the judge of probate to bring an action on the bond of an executor or administrator, under § 22 above stated, can be granted only by decree in writing. Fay *v.* Rogers, 2 Gray, 175. See Robbins *v.* Hayward, 16 Mass. 524; Jones, appellant, 8 Pick. 121; Ames J. in Chapin *v.* Waters, 110 Mass. 195, 197; Richardson *v.* Oakman, 15 Gray, 57, 58; Munroe *v.* Holmes, 13 Allen, 109; S. C. 9 Allen, 244; Bennett *v.* Russell, 2 Allen, 537, 539; Newcomb *v.* Goss, 1 Met. 333; Richardson *v.* Hazelton, 101 Mass. 108; Bradley J. in Beall *v.* New Mexico, 16 Wallace, 535, 543. In Judge of Pro-

(*h*) 3 Bing. N. C. 789.

tained any such order from the ecclesiastical court. An action was commenced in the common pleas, on an administration bond,

bate *v.* Adams, 49 N. H. 150, it was held that no action founded upon the probate bond of an executor or administrator, prosecuted for the benefit of a legatee, or the heirs-at-law, lies until after a decree of distribution by the probate court, unless the executor or administrator has expressly admitted the claim to be due. See Coffin *v.* Jones, 5 Pick. 61; Judge of Probate *v.* Briggs, 5 N. H. 68; Probate Court *v.* Van Duzen, 13 Vt. 135; Adams *v.* Adams, 16 Vt. 228; French *v.* Winsor, 24 Vt. 402; Judge of Probate *v.* Lane, 51 N. H. 342; Judge of Probate *v.* Locke, 6 N. H. 396; Williams *v.* Cushing, 34 Maine, 372; Jones *v.* Anderson, 4 McCord, 113; Gordon *v.* Justices of Frederick, 1 Munf. 1; Perkins *v.* Perkins, 46 N. H. 110; Beall *v.* New Mexico, 16 Wallace, 535; Judge of Probate *v.* Emery, 6 N. H. 141; *post*, 540, note (*g*). The non-payment of a debt by an administrator is not such a breach of the condition of his administration bond as will enable the creditor to sue and recover his debt without a previous suit and judgment, fixing the administrator with a *devastavit*. Commonwealth *v.* Evans, 1 Watts, 37; Commonwealth *v.* Wenrick, 8 Watts, 60; Myers *v.* Fritz, 4 Penn. St. 347; Commonwealth *v.* Moltz, 10 Penn. St. 533. See Ordinary *v.* Hunt, 1 McMullan, 380. All that is necessary to entitle a creditor, legatee, or distributee to maintain an action on an administration bond is, that the amount due to the claimant should have been fixed by a judgment at law, or a decree of the probate court. It is not a prerequisite that the administrator should have been driven to insolvency. Commonwealth *v.* Stub, 1 Jones, 150. See Hazen *v.* Durling, 2 N. J. (Eq.) 133. There must be a judgment or decree fixing the amount of the particular claim and the liability of the executor or administrator. Commonwealth *v.* State, *supra;* Myers *v.* Fritz, 4 Penn. St. 346; Judge of Madison County Court *v.* Looney, 2 Stew. & Port. 70; Groton *v.* Tallman, 27 Maine, 68; People *v.* Guild, 4 Denio, 551; Matter of Webster, 1 Halst. Ch. 89; Porter *v.* State, 4 Eng. 226; State *v.* Ritter, 4 Eng. 244; Perkins *v.* Moore, 16 Ala. 9; Gordon *v.* State, 6 Eng. 12; Justices &c. *v.* Sloan, 7 Geo. 31; Glenn *v.* Conner, Harp. Ch. 367; Thompson *v.* Searcy, 6 Porter, 393; Potter *v.* Cummings, 18 Maine, 55; Territory of Florida *v.* Redding, 1 Florida, 242; County Court *v.* Price, 6 Ala. 36; Eaton *v.* Benefield, 2 Blackf. 52; Dinkins *v.* Bailey, 23 Miss. 284; Thornton *v.* Glover, 25 Miss. 132; Ohio *v.* Cutting, 2 Ohio St. 1; Commonwealth *v.* Moltz, 10 Penn. St. 527; Jones *v.* Anderson, 4 McCord, 113; Beasley *v.* Mott, 12 Rich. (Law.) 354; Taylor *v.* Stewart, 5 Call, 520; Davant *v.* Pope, 6 Rich. (S. Car.) 247. But a residuary legatee may maintain a suit on the probate bond without having fixed the amount due him by judgment. Williams *v.* Cushing, 34 Maine, 370. It was, however, held otherwise in Jones *v.* Irving, 1 Cushm. 361. See Fogg *v.* Perkins, 19 N. H. 101. In North Carolina it has been held, that an action can be maintained on an administration bond against the sureties, before judgment against the administrator. Court *v.* Moore, 2 Murph. 22; Smith *v.* Fagan, 2 Dev. 292. So in Kentucky, Hobbs *v.* Middleton, 1 J. J. Marsh. 176. So in South Carolina, Ordinary *v.* Hunt, 1 McMullan, 380; but in the case of a creditor the debt must be ascertained. Ordinary *v.* Jones, 4 McCord, 113; Ordinary *v.* Hunt, *supra*. In Pennsylvania the sureties in an administration bond are liable only for the administration of the goods, &c. of the intestate, which were such at the time of his death. Reed *v.* Commonwealth, 11 Serg. & R. 441. They are not liable for the proceeds of real estate sold by the administrator, or upon a judgment confessed by him; although such proceeds are brought into the administration account; Reed *v.* Commonwealth, 11 Serg. & R.

by a creditor of an intestate, in the name of the archbishop ; and the declaration having made profert of the bond in the usual way,

441 ; Commonwealth *v.* Gilson, 8 Watts, 214 ; Commonwealth *v.* Hilgert, 55 Penn. St. 236 ; nor for the proceeds of the real estate, sold by order of the orphans' court, for the payment of the debts of the intestate. Beale *v.* Commonwealth, 17 Serg. & R. 392 ; Commonwealth *v.* Hilgert, 55 Penn. St. 236. But the administrator *de bonis non cum testamento annexo* and his sureties are liable, and may be sued on their bond for the proceeds of sale of testator's land ordered by the will. Zeigler *v.* Sprenkle, 7 Watts & S. 178 ; Commonwealth *v.* Forney, 3 Watts & S. 356 ; *post*, 654, note (*w*[1]). See Governor &c. *v.* Chouteau, 1 Missou. 731. In Virginia the sureties of an executor are not responsible for the proceeds of land sold by him under the will. Jones *v.* Hobson, 2 Rand. 483 ; Burnett *v.* Harwell, 2 Leigh, 89. See Reno *v.* Tyson, 24 Ind. 56. In Massachusetts the administrator's bond covers the administration "of the proceeds of all the real estate of the intestate that may be sold for the payment of his debts." *Ante*, 533, note (*e*[8]) ; Genl. Sts. c. 94, § 2. And in the same state, the executor's bond covers "the proceeds of all the real estate of the testator that may be sold for the payment of his debts or legacies." Genl. Sts. c. 93, § 2 ; *ante*, 529, note (*a*[1]) ; Wells J. in Hannum *v.* Day, 105 Mass. 38 ; Chapman J. in Bennett *v.* Overing, 16 Gray, 268, 269. So in Maryland, Cornish *v.* Wilson, 6 Gill, 299. In New Hampsbire the sureties in an administration bond are liable for the proceeds of lands in another state with which their principal has been charged, on the settlement of his accounts in New Hampshire. Judge of Probate *v.* Heydock, 8 N. H. 491. The sureties in an administration bond are liable for moneys received by their principal in the discharge of his official duties ; but not otherwise ; as, if tbe administrator of a solvent estate receives the rents and profits of real estate, the sureties are not liable for it ; Gregg *v.* Currier, 36 N. H. 200 ; Perkins *v.* Perkins, 46 N. H. 110, 112 ; Hutcherson *v.* Pigg, 8 Grattan, 220 ; Wills *v.* Dunn, 5 Grattan, 384 ; Thornton *v.* Fitzhugh, 4 Leigh, 209 ; Morrow *v.* Peyton, 8 Leigh, 54 ; Powell *v.* White, 11 Leigh, 309 ; Brown *v.* Glasscock, 1 Rob. (Va.) 461 ; Kimball *v.* Sumner, 52 Maine, 307, and cases ; Oldham *v.* Collins, 4 J. J. Marsh. 49 ; Slaughter *v.* Froman, 2 Monr. 95 ; Brown *v.* Brown, 2 Harr. (Del.) 5 ; Allen *v.* Burton, 1 McMullan (S. Car.), 249 ; Hartz's Appeal, 2 Grant Cas. 83 ; or if the assets do not legally come to the hands of the administrator ; Ennis *v.* Smith, 14 How. (U. S.) 400–416 ; even though the administrator charges himself with the receipt of them. Harker *v.* Irick, 2 Stockt. (N. J.) 269 ; McCampbell *v.* Gilbert, 6 J. J. Marsh. 592 ; Fletcher *v.* Weir, 1 Dana, 345. But in Missouri the sureties of an administrator are liable for the misapplication of rents and profits of land received by him. Strong *v.* Wilkinson, 14 Missou. 116. The decree of the orphans' court in Alabama, against an executor or administrator in final settlement, in the absence of fraud, is conclusive, both as to him and his sureties. Perkins *v.* Moore, 16 Ala. 9 ; Lamkin *v.* Heyer, 19 Ala. 228 ; Watts *v.* Gale, 20 Ala. 817 ; Williamson *v.* Howell, 4 Ala. 693 ; Raglan *v.* Calhoun, 36 Ala. 606 ; Heard *v.* Lodge, 20 Pick. 53 ; Stevens *v.* Matthews, 6 Vt. 269 ; Jones *v.* Jones, 8 Humph. 705 ; Irvine *v.* Backus, 25 Cal. 214 ; Lucas *v.* Guy, 2 Bailey (S. Car.), 403. See, also, to same effect, Garber *v.* Commonwealth, 7 Penn. St. 465 ; Stewart *v.* Treasurer &c. 4 Ohio, 98 ; Matter of Webster's bond, 3 Green Ch. 558. But see Todd *v.* Lewis, 2 Handy (Ohio), 280. The question whether an account settled in the probate court by an administrator was fraudulent cannot be tried in an action on the administration bond for not settling a true account. Paine *v.* Stone, 20 Pick. 75. Who may sue upon the bond, see Judge of Probate

the defendant prayed oyer of it. Whereupon the attorney of the creditor applied to the record keeper of the prerogative court, who had the custody of the bond, and requested that a clerk might be allowed to attend at the office of the defendant's attorney with the bond, on payment of the usual fee. The record keeper declining to do this, as not allowed by the practice of the prerogative court, an office copy of the bond was furnished to the defendant's attorney, who paid for the same and made no objection, but afterwards obtained a judge's order to stay proceedings until the * original bond was produced. Application was then made, on behalf of the creditor, to the judge of the prerogative court for one of the officers of the registry to attend with and produce the bond at the office of the defendant's attorney; but the judge rejected the application. Whereupon the creditor obtained a rule in the common pleas, calling on the defendant to show cause why the judge's order should not be discharged, and why the defendant should not be deemed to have had sufficient oyer of the bond; or why the production of the bond to the defendant's attorney at the registrar's office in doctor's commons should not be deemed sufficient oyer. But the court of common pleas, on cause shown,

v. Tillotson, 6 N. H. 292; Burch *v.* Clarke, 10 Ired. 172; State *v.* Mann, 11 Ired. 160; Ellis *v.* M'Bride, 5 Cushm. 155; Holmes *v.* Cock, 2 Barb. Ch. 426; Crawford *v.* Commonwealth, 1 Watts, 480; Burke *v.* Adkins, 2 Porter, 236; Justices &c. *v.* Wooton, 7 Geo. 465; Perkins *v.* Moore, 16 Ala. 9; Rawson *v.* Piper, 34 Maine, 98; Stevens *v.* Cole, 7 Cush. 467; Anthony *v.* Negley, 2 Carter (Ind.), 211; Dunnell *v.* The Municipal Court of the City of Providence, 9 R. I. 189. How judgment is to be entered and execution awarded, see State *v.* Ruggles, 25 Missou. 99; Judge of Probate *v.* Lane, 51 N. H. 342; Conant *v.* Stratton, 107 Mass. 474. Leave may be granted by the probate court to bring an action upon a probate bond in favor of legatees, without notice to the obligors of the application for such leave, or previously summoning the principal obligor to render an account and ordering distribution thereon. Richardson *v.* Oakman, 15 Gray, 57; Chapman J. in Bennett *v.* Overing, 16 Gray, 267, 270; Gray J. in Richardson *v.* Hazelton, 101 Mass. 108. By statute in Massachusetts, any surety in a bond given to the judge of probate court may, upon his petition to the supreme judicial court or the probate court, be discharged from all further responsibility, if the court, after due notice to all persons interested, deems it reasonable and proper; and the principal shall thereupon give a new bond, with such surety or sureties as the court shall order. Genl. Sts. c. 101, § 16. Court may discharge sureties in Tennessee. Harrison *v.* Turbeville, 2 Humph. 242. As to what will constitute a discharge to sureties, see Pyke *v.* Lenny, 4 Porter, 52. Effect of discharge of sureties, see Alexander *v.* Mercer, 7 Geo. 549. In New Jersey the plaintiff in a suit on the probate bond takes judgment for the penalty; the damages are not assessed at law, but the amount recovered is to be distributed by the ordinary. Ordinary *v.* Barcalow, 7 Vroom, 15.]

discharged the rule; and Tindal C. J. said, that if the court were to accede to the application, they should be deciding, in a point of common law practice, on a most important right of the ecclesiastical court, and should, in effect, destroy the control of that court over suits on administration bonds. His lordship added, that the proper way to proceed would be by *mandamus*, and it would then be seen whether or not the ecclesiastical court had any just objection to the production of the bond. It must be observed that since the common law procedure act (1852), the right of the defendant to demand oyer of the bond has ceased. In lieu of it, in such a case as that just above stated, the proper course, perhaps, would be to make a special application to the court to stay proceedings. (*i*)

In the case of The Archbishop of Canterbury *v.* House, (*j*) Lord Mansfield appears to intimate, that if a party properly entitled is desirous of suing on the bond, the court of queen's bench would have directed the ordinary to permit his name to be used. But in the above mentioned case of The Archbishop of Canterbury *v.* Tubb, Tindal C. J. observed, that that must mean subject to some control in the ecclesiastical court. And in Crowley *v.* Chipp, (*k*) Sir Herbert Jenner * Fust denied that the result of the case of The Archbishop of Canterbury *v.* House was to show that the ecclesiastical court ought *ex debito justitiæ* to permit the bond "to be attended with" for the purpose of its being put in suit; and that learned judge appeared to be of opinion that the court might, in its discretion, decline to make any order in the matter, notwithstanding it was clear that there had been a breach of the bond. On that occasion an administratrix had not exhibited an inventory and account within the time assigned by her administration bond; but no proceedings had been instituted against her for the purpose of calling for an inventory. An application was made to the ecclesiastical court by a creditor of the deceased, for an order that the bond might be attended with, for the purpose of being sued upon at law; and it was contended that, since the non-delivery of the inventory at or before the day specified in the bond clearly constituted a breach of the condition, (*l*) the court ought

(*i*) See Webb *v.* Adkins, 14 C. B. 401.
(*j*) Cowp. 141.
(*k*) 1 Curt. 458.
(*l*) See acc. *infra*, 539. [The remedy, in case of the neglect or refusal on the part of an executor to render an account, is suit upon his bond, which must be brought at the instance of some party in-

to order the bond to be delivered out without at all entering into the merits of the case. But Sir H. Jenner Fust said that he should be extremely unwilling in any case upon the mere non-delivery of an inventory to allow the bond to be attended with; and he refused to make any order until the parties should have cited the administratrix to bring in an inventory. (*m*) She afterwards brought one in; whereupon the court dismissed the parties, but without costs. In a subsequent case, (*n*) A. and B. having appointed C. their attorney for the purpose of taking administration with the will annexed of D., * for their use and benefit, and C. having taken out such administration, and entered into the usual bond, with two sureties, the same learned judge refused to permit the bond "to be attended with" for the purpose of being put in suit against the sureties by A. and B., they never having called for an inventory and account from C., and having given him three years to pay the balance which was due to them under the administration, and he having in the mean time died insolvent. (*o*) In accordance with these decisions, it was held by Lord Langdale (*p*) that, in a case where the claimant had not obtained the sanction of the ecclesiastical court for putting the bond in suit, a sum due from the administrator at his death to the estate of the intestate was not a specialty debt due to the administrator *de bonis non*. And it would not be so, it should seem, even in a case where that sanction had been obtained. (*q*)

terested, which means some party having an interest in the estate. Dunnell *v.* The Municipal Court of the City of Providence, 9 R. I. 189. Where a person, nominated as executor in a will, was appointed and filed a bond approved by the judge of probate at the time the will was proved, neither the fact that the bond was not such in all respects as is required by the statute, nor that the executor neglected to return an inventory or settle an account in accordance with his bond, vitiates what he has rightfully done in the discharge of his trust, unless the opposite party has been prejudiced thereby. Pettingill *v.* Pettingill, 60 Maine, 411.]

(*m*) The learned judge, in the course of his judgment referred to the case of Thomas *v.* Archbishop of Canterbury, 1 Cox, 399 (see *infra*, 544), as having somewhat shaken the authority of The Archbishop of Canterbury *v.* House, and observed, that the impression of Lord Thurlow clearly was, that the spiritual court had a discretion in the matter, and that it would not permit the action to be brought, if the administrator could show that he was not culpable. See, also, Baker *v.* Brooks, 3 Sw. & Tr. 32. [See Bennett *v.* Overing, 16 Gray, 267; *ante*, 534, note (*g*[1]).]

(*n*) Murray *v.* M'Inerheny, 1 Curt. 576.

(*o*) See, further, on the subject of the court refusing to make the order, on the ground of *laches*, Godwin *v.* Knight, 6 Notes of Cas. 261; S. C. 1 Robert. 652.

(*p*) Parker *v.* Young, 6 Beav. 261.

(*q*) See the judgment of Romilly M. R. in Bolton *v.* Powell, 14 Beav. 275, 287; and of the Lord Justice Lord Cranworth,

If the object was to enforce the bond against the sureties, the question for the court, as it was considered in a case before Sir John Nicholl, was not properly the ultimate responsibility of the sureties; it was rather generally the mere fact of whether the bond was or was not forfeited; leaving it to the sureties to plead or prove in the court of law, if they were capable of so doing, that the parties putting it in suit were, by their own *laches*, or otherwise, not in a condition to recover on the bond, notwithstanding its forfeiture. (*r*) It appears, moreover, that the more correct practice of the * ecclesiastical court was to decline to pronounce the bond forfeited; for it appertains to the court, in which the bond is sued, to decide ultimately whether any breach of its condition has taken place. It was only necessary for the spiritual judge, in aid of justice, to order the bond to be attended with, for the purpose of being put in suit. (*s*)

whether proceedings on the bond could be had in a court of equity:

The court would, under special circumstances, direct the bond to be attended with, as well if sued upon in a court of equity as if put in suit in a court of law. (*t*) But the proper course of enforcing the bond was for the creditor or next of kin, as the case may be, to bring an action on the bond in the name of the ordinary, or his representatives, after obtaining permission so to do from the spiritual court, against the obligors. (*t*[1]) And no suit for this purpose has ever been instituted against them, in the first instance, in a court of equity. (*u*) Even where the administrator, who is the obligor, is dead, it has been held that the administrator *de bonis non* of the original intestate cannot sue in a court of equity upon or enforce the bond against the estate of the original administrator, or against the sureties to the bond, at all events unless the

S. C. 2 De G., M. & G. 1, 25; and of Sir H. Jenner Fust in Godwin *v.* Knight, 6 Notes of Cas. 261, 266.

(*r*) Devey *v.* Edwards, 3 Add. 68. See, also, Hunt *v.* Burton, 6 Notes of Cas. 268. But where it clearly appears that the party making the application to the court has no right to sue on the bond, the court will not hesitate to reject the application. Drewe *v.* Long, 18 Jur. 1062, by Sir John Dodson. [See Dunnell *v.* The Municipal Court of the City of Providence, 9 R. I. 189.]

(*s*) Younge *v.* Skelton, 3 Hagg. 780, 788, 790; Godwin *v.* Knight, 6 Notes of Cas. 261, 263, 264. The regular course of practice, in the ecclesiastical court, with respect to applications for the putting in suit of administration bonds, is stated at large by Sir John Nicholl, in his judgment in 3 Hagg. 786, 787.

(*t*) In the Goods of Harrison, 2 Robert. 184.

(*t*[1]) [See *ante*, 534, note (*g*[1]).]

(*u*) 14 Beav. 286; 2 De G., M. & G. 22. See *post*, 543, note (*q*).

suit be instituted in the name of the ordinary, or he has declined to allow his name to be used, or there are some very special circumstances to give the court of equity jurisdiction. (*v*) And it is by no means to be assumed that the ordinary himself could have sued, even if the suit had been instituted in his name. (*x*)

who were entitled to sue on the bond in the name of the ordinary (or of his executor, if he were dead).

A distinction was once taken, between a next of kin and a creditor, as to the right of suing on the bond in the name of the ordinary. (*y*) But the better authorities seem to have established that a creditor had a right *ex debito justitiæ*, as well as the next of kin, to sue upon the administration bond in the name of the ordinary. (*z*) If the ordinary was dead, the action must have been brought in the name of his personal representative, and not of his successor. (*a*)

Administrator *de bonis non*:

If the original administrator were dead, and administration *de bonis non* had been obtained, it was held that such administrator might sue the executors of the deceased administrator at law on the administration bond in the name of the ordinary; and the court would order the bond "to be attended with" in the common law court, and produced at the hearing of the cause. (*b*)

(*v*) Bolton *v.* Powell, 14 Beav. 275; 2 De G., M. & G. 1; [*post*, 537, and note (*b*).]

(*x*) 14 Beav. 290, 291.

(*y*) Wallis *v.* Pipon, Ambler, 183; Ashley *v.* Baillie, 2 Ves. sen. 368. See, also, Hughes *v.* Cook, 1 Cas. temp. Lee, 386, and Hackman *v.* Black, 2 Cas. temp Lee, 251, in which cases Sir G. Lee laid down that a creditor has nothing to do with the administration bond, and no interest in it, and that it had been so decided. [As to the interest enabling a party to institute a suit on the bond, see *ante*, 534, note (g^1), 536, note (*l*).]

(*z*) Greenside *v.* Benson, 3 Atk. 248; Archbishop of Canterbury *v.* House, Cowp. 140. It has been decided by these two cases (said Lord Lyndhurst C. B. in the Archbishop of Canterbury *v.* Robertson, 1 Cr. & M. 711; 3 Tyrwh. 417), and it has been the practice, and has been considered as law, that creditors may sue on the bond where the inventory has not been delivered; but all the authorities go to show that creditors cannot put the bond in suit and assign for breach of non-payment of their debts. See *post*, 540.

(*a*) Howley *v.* Knight, 14 Q. B. 240.

(*b*) In the Goods of Hall, 1 Hagg. 139. [It has been held under statutes in some of the American States that where an administrator *de bonis non*, with or without the will annexed, has been appointed to succeed an executor or administrator whose letters have been revoked, he has authority to require the removed executor or administrator to account fully for his administration of the estate, and may maintain all necessary actions for that purpose; and may, moreover, recover damages of him for any maladministration of the estate; Marsh *v.* The People, 15 Ill. 284; Weld *v.* M'Clure, 9 Watts, 495; Wickham *v.* Page, 49 Missou. 526; Commonwealth *v.* Strohecker, 9 Watts, 479; Drenkle *v.* Sharman, 9 Watts, 485; Carter *v.* Trueman, 7 Penn. St. 320; Bland

It remains to be considered what is a breach of the condition of a bond given under the statute of Charles,

what is a breach of the condi-

Ch. in Hagthorp *v.* Hook, 1 Gill & J. 270; Coleman *v.* M'Murdo, 5 Rand. 51; *post*, 915, and note, 918, and note; Graham *v.* State, 7 Ind. 470; State *v.* Porter, 9 Ind. 342; Shackleford *v.* Bunyan, 7 Humph. 141; Stair *v.* York National Bank, 55 Penn. St. 364; Baldwin *v.* Dearborn, 21 Texas, 446; Boulware *v.* Hendricks, 23 Texas, 667; Hardwick *v.* Thomas, 10 Geo. 266; O'Connor *v.* The State, 18 Ohio, 225; King *v.* Devon, 6 Phil. (Pa.) 551; Foster *v.* Brown, 1 Bailey, 221; Miller *v.* Jasper, 10 Texas, 513; Parrish *v.* Brooks, 4 Brews. (Penn.) 154; and may receive an ascertained balance in the hands of the former administrator. Little *v.* Walton, 23 Penn. St. 164; Miller *v.* Alexander, 1 Hill Ch. 25. So he may maintain an action against the sureties of the removed executor or administrator to recover such balance admitted or proved to be due, without first obtaining judgment against the principal. Franklin County *v.* M'Ilvain, 5 Ohio, 200; Wickham *v.* Page, *supra;* Badger *v.* Jones, 66 N. Car. 305. But it is said, that "by the English law as administered in the ecclesiastical courts, the administrator who is displaced, or the representatives of a deceased administrator or executor intestate, are required to account directly to the persons beneficially interested in the estate, distributees, next of kin, or creditors; and the accounting may be made or enforced in the probate court which is the proper court to supervise the conduct of administrators and executors." "For the delinquency of the former administrator in not prosecuting claims which it was his duty to prosecute, he is responsible to the creditors, legatees, and distributees directly, and not to the administrator *de bonis non*." "This," says Bradley J. in Beall *v.* New Mexico, 16 Wallace, 540, 541, "is the result of the authorities referred to. And it follows that, as the administrator *de bonis non* has no claim against the former administrator on this ground, he cannot prosecute for it on the administration bond." The case In the Goods of Hall, 1 Hagg. 139, relied upon to support the doctrine stated in the text, was one, says the same learned judge, "in which the first administrator died without having distributed the assets in his hands, and leaving a considerable balance of the estate in the hands of his bankers. The administrator *de bonis non* having applied to the executors of the deceased administrator for his balance, and payment being refused, he commenced the action on the former administrator's bond, and the prerogative court sanctioned the proceeding. But this case was undoubtedly founded on the theory that the money in bank was a part of the original estate in specie, and, as such, that the administrator *de bonis non* was entitled to it. If specific effects of the estate remain in the hands of a discharged administrator or executor, or in the hands of his representatives, of course the administrator *de bonis non* is entitled to receive them. And, if they are refused, he will be the proper person to institute suit on the bond to recover the amount. But this is perfectly consistent with the doctrine above expressed, that for delinquencies and *devastavits* he cannot sue his predecessor or his predecessor's representatives, either directly or on their administration bond." 16 Wallace, 541, 542. Such is the prevailing rule where the law has not been changed by statute. See *post*, 915, note (*e*); Gregory *v.* Harrison, 4 Florida, 56; Bank of Pennsylvania *v.* Haldaman, 1 Pen. & W. 161; Kendall *v.* Lee, 2 Pen. & W. 482; Carter *v.* Trueman, 7 Penn. St. 315; In re Small's Estate, 5 Penn. St. 258; Thomas *v.* Stanley, 4 Sneed, 411; Adams *v.* Johnson, 7 Blackf. 529; Johnson *v.* Hogan, 37 Texas, 77; Coleman *v.* M'Murdo, 5 Rand. 51; Stose *v.* People, 25 Ill. 600; Rowen *v.* Kirkpatrick, 14 Ill. 1; American Board of Commis. for Foreign Missions Appeal, 27 Conn. 344; Young *v.* Kimball, 8 Blackf. 167; State *v.* Porter,

tion of the bond given under the statute of Charles :

so as to induce a forfeiture. (b^1) It may be well assigned as a breach, that the administrator has not delivered a true and perfect inventory, (c) or that he has not made a just and true * account, (d) and either of these

9 Ind. 342; Graham *v.* State, 7 Ind. 470; Searles *v.* Scott, 14 Sm. & M. 94; Cheatham *v.* Burfoot, 9 Leigh, 580; Waddy *v.* Hawkins, 4 Leigh, 458; Hagthorp *v.* Hook, 1 Gill & J. 270; Smith *v.* Carere, 1 Rich. Ch. 123; Stubblefield *v.* M'Raven, 5 Sm. & M. 130; Hardwick *v.* Thomas, 10 Geo. 266; Potts *v.* Smith, 3 Rawle, 361; Brownlee *v.* Lockwood, 20 N. J. Eq. 239; Demert *v.* Heth, 45 Miss. 388; Reeves *v.* Patty, 43 Miss. 338. It is held in Mississippi that balances found against an original administrator, upon final settlement of his account, should, if for distribution, be decreed to be paid to the distributees, and not to the administrator *de bonis non*. Gray *v.* Harris, 43 Miss. 421.]

(b^1) [As to the rules by which a probate bond is to be construed, see Judge of Probate *v.* Ordway, 23 N. H. 198, 205, 206.]

(c) Greenside *v.* Benson, 3 Atk. 252, 253. [Edmundson *v.* Roberts, 2 How. (Miss.) 822.] Likewise in an action upon the bond, it is not enough for the defendant, in order to show the condition, as to exhibiting the inventory on such a day, performed, to plead that there was no court held, but he must plead also that he was there ready, &c. for he must show that he has done all that could be done on his side towards a performance. 1 Salk. 172. Assuming that it is a sufficient excuse that no court was held on the day specified, this must be pleaded in excuse of performance, and cannot be pleaded to a suggestion of breaches, or given in evidence before a jury on the trial of breaches suggested on the roll, under the stat. 8 & 9 W. 3, c. 11, s. 8; 1 Cr. & M. 690; 3 Tyrwh. 390. [An omission on the part of an administrator to include in his inventory, within the time prescribed by statute, an amount of money deposited in a savings institution, known by him when he accepted his trust to belong to the estate of his intestate, is a breach of his official bond; and a citation to the administrator to inventory such property is not a necessary prerequisite to a right of action upon his bond, for knowingly omitting to inventory it. Bourne *v.* Stevenson, 58 Maine, 499. In delivering the opinion of the court in Potter *v.* Titcomb, 2 Fairf. 167, Weston J. said: "The law of Massachusetts, in force when the bond was given, clearly made it the duty of the administrator, within three months, to cause an inventory to be made of the estate of the deceased. And, by the condition of the bond, it was to be a true and perfect inventory of all and singular the goods, chattels, rights, and credits of the deceased, which have or shall come to the hands, possession, or knowledge of the administrator. The judge of probate has no power to dispense with this duty. His authority was limited by law; and the bond was for the security of all persons interested in the estate. No citation in the probate court was necessary, as the court has holden in this case, to render the administrator liable upon his bond for not returning a true and perfect inventory." Potter *v.* Titcomb, 1 Fairf. 53.]

(d) Archbishop of Canterbury *v.* Willis, 1 Salk. 172, 315; S. C. 11 Mod. 145. [A failure to settle an account is a breach of the probate bond in New Jersey. Ordinary *v.* Barcalow, 7 Vroom, 15; Dickerson *v.* Robinson, 1 Halst. 195; Ordinary *v.* Hart, 5 Halst. 64; *ante*, 536, note (l). A decree of the probate court, that an administrator ought to render his account, is regarded as furnishing sufficient basis for a suit upon the bond given to secure performance of the orders of the court. French *v.* Winsor, 24 Vt. 402. A settlement, out of court, between the heirs and the administrator of an estate, is not a compliance with the condition of the bond,

breaches will be incurred without any previous citation. (*e*) But with respect to the breach of the condition that the administrator "do well and truly administer according to law" the goods, chattels, &c. of the deceased, it is no ground of forfeiture that the administrator has not paid the debts of the intestate; and therefore a creditor could not sue upon the bond in the name of the or-

not delivering a true inventory or account: it is no breach that the administrator has not paid the debts of the intestate:

given to the judge of probate, to render an account when required in the probate court. Clarke *v.* Clay, 31 N. H. 393.]

(*e*) 3 Atk. 252, 253; 1 Salk. 315; 11 Mod. 145. But according to the modern practice, an inventory is not *required* by the court unless at the instance of a party interested. See *post*, pt. III. bk. II. ch. I. § III. See, also, Crowley *v.* Chipp, *ante*, 535. And it may be observed that the new form of bond prescribed by the court qualifies the condition as to the delivery of an inventory by the addition of the words *whenever required by law so to do*. [In Pennsylvania it has been held that an administrator must settle an account within a year, although not cited; otherwise his bond is forfeited. Campbell *v.* Adcock, cited in 8 Serg. & R. 132; Commonwealth *v.* Bryan, 8 Serg. & R. 128. In Massachusetts an executor or administrator is required within one year after giving bond to render his first account of administration upon oath; and further accounts from time to time as may be necessary or convenient, or as may be required by the probate court; and if, after being duly cited by the probate court, he neglects to render an account of his administration, his bond may be put in suit. Genl. Sts. c. 98, §§ 9, 11; Bennett *v.* Russell, 2 Allen, 537; Munroe *v.* Holmes, 13 Allen, 109, 112. See Richardson *v.* Oakman, 15 Gray, 57; Matthews *v.* Page, Brayt. (Vt.) 106. In Loring *v.* Kendall, 1 Gray, 305, the question arose whether the mere fact that an administrator had not rendered an account within one year was a breach of his bond, but as it appeared in the case that the judge of probate, at the request of all parties in interest, allowed an account subsequently rendered by the administrator, it was held that this was a waiver of the prior breach in not rendering an account within a year, and the decision of the former question was rendered unnecessary. See Bennett *v.* Russell, 2 Allen, 537. In Maine an action cannot be maintained against an executor or administrator upon his official bond, for not accounting for money lost by his neglect or misconduct, until after he has been cited by the judge of probate to render his account thereof. Potter *v.* Cummings, 18 Maine, 55, 58. See Potter *v.* Titcomb, 7 Greenl. 321; Ordinary *v.* Williams, 1 N. & M. 213; Madison County Court *v.* Looney, 2 Stew. & Port. 70; Thompson *v.* Searcy, 6 Porter, 393; Lyles *v.* Caldwell, 3 McCord, 225; Shelton *v.* Cureton, 3 McCord, 412; Lining *v.* Giles, 3 Brev. (S. Car.) 53; Ordinary *v.* M'Clure, 1 Bailey (S. Car.), 7 Simpkins *v.* Powers, 2 N. & M. 213; Behrle *v.* Sherman, 10 Bosw. 292; Crawford *v.* Commonwealth, 1 Watts, 480; People *v.* Corteis, 1 Sandf. 228; Francis *v.* Northcote, 6 Texas, 185; Ordinary *v.* Martin, 1 Brev. (S. Car.) 552. A creditor may sue upon the administrator's bond without citing the administrator to account before the probate court; indeed a creditor has no right to call the administrator to account. Ordinary *v.* Hunt, 1 McMullan, 380. But the debt must be ascertained and fixed in some way. Ordinary *v.* Hunt, 1 McMullan, 380; Ordinary *v.* Jones, 4 McCord, 113. In some states a judgment or decree is required, in others an express admission of the claim seems to be sufficient. See Ordinary *v.* Hunt, and Ordinary *v.* Jones, *supra; ante*, 534, note (g^2).]

nor that he has not distributed the residue, unless there has been a previous decree:

dinary, and assign for breach the non-payment of a debt to him. (*f*) Nor was the neglect or refusal of the administrator to distribute the surplus or residue of the effects of the intestate among the next of kin, according to the statute of distributions, a breach of the condition that the administrator shall deliver and pay over the residue, *unless there had been a previous decree or sentence of the ecclesiastical judge*, because, by the terms of the bond, such decree should precede the distribution. (*g*) And since that is provided for by this special clause in the condition, the neglect or refusal to distribute, until such previous decree or sentence, is not * a breach within the second clause of the condition, viz, that he should "well and truly administer according to law." (*h*) But when the administrator

but it is a breach that he has applied the assets to his own purposes whereby they are lost:

applies and converts to his own use the effects of the intestate, so that those effects are entirely lost to the estate of the intestate (as where he applies the balance of the intestate's estate, after payment of the debts, to his own purposes, and becomes a bankrupt), this is such a breach of the condition of the bond, by which the administrator undertakes "well and truly to administer according to law," as

(*f*) Archbishop of Canterbury *v.* Willis, 1 Salk. 316; Browne *v.* Archbishop of Canterbury, 1 Lutw. 882 *b*; not even if a devastavit be suggested; 1 Cr. & M. 711; [*ante*, 534, note (g^2).] But the assignees of a bankrupt next of kin are not to be deemed creditors within this rule. Drewe *v.* Long, Prerog. July, 1854; 18 Jur. 1060.

(*g*) 1 Cr. & M. 690; 3 Tyrh. 390; 8 B. & C. 151; [Beall *v.* New Mexico, 16 Wallace, 535, 542; *ante*, 534, note (g^2); Judge of Probate *v.* Adams, 49 N. H. 150, 152, 153; Coffin *v.* Jones, 5 Pick. 61; Adams *v.* Adams, 16 Vt. 228; Probate Court *v.* Van Duzen, 13 Vt. 135; Judge of Probate *v.* Lane, 51 N. H. 342, 347, 348; Hurlburt *v.* Wheeler, 40 N. H. 75; Judge of Probate *v.* Kimball, 42 Vt. 320; Ordinary *v.* Smith, 3 Green (N. J.), 92; Ordinary *v.* Barcalow, 7 Vroom, 15; *ante*, 534, note (g^2).] But it must be observed that these terms are omitted in the condition of the bond given under the court of probate act. And no such decree can now be had; for no such suit can be entertained by the probate court (see *ante*, 292). It appears to follow that, as to bonds given under the statute of Charles, this part of the condition has become wholly ineffectual.

(*h*) Archbishop of Canterbury *v.* Tappen, 8 B. & C. 151. Sir John Nicholl, on the application to allow the bond to be put in suit, appears to have thought that this neglect might be a breach of the condition; but his attention was not particularly directed to this point, the great contest before him being whether the sureties ought to be charged under the particular circumstances that had taken place; and it is obvious, from some parts of his judgment, that he would have thought it right to allow the next of kin to try this or any other doubtful question in a court of law, by an action on the bond, which could not be brought without the permission of the court. See 3 Add. 68; [and see Barbour *v.* Robertson, 1 Litt. (Ky.) 93.]

will entitle the next of kin to have the bond put in suit at their instance; and the plaintiff in such case is entitled to recover, in an action against the sureties, the full amount of the money that has been so misapplied. (*i*) The whole of the damages so recovered should be paid into the ecclesiastical court, there to be distributed as the effects of the intestate. (*k*)

what is a breach of the condition of a bond given under the new law.

In accordance with and relying on the authorities above cited, the case of Sandrey *v.* Michell (*l*) was decided. There the action was against sureties to a bond conditioned according to the form given by the rule made in pursuance of the 81st section of the court of probate act, (*m*) and which consequently contained, as part of the condition, the terms * (not to be found in the bond given under the statute of Charles), that *the administrator shall pay the debts which the deceased owed at his death.* The action was brought by a creditor, to whom the bond had been assigned under sect. 83, and the declaration alleged that assets came to the hands of the administrator, and that he had wasted the same, and did not pay the debt of the plaintiff. The plea was that the only breach of the condition of the bond was the non-payment of the debt to the plaintiff. The replication was, that the administrator had wasted assets of the deceased sufficient to pay the debt. And the court of queen's bench held that the defendant was entitled to judgment, as the bond could only be enforced for the general benefit

(*i*) Archbishop of Canterbury *v.* Robertson, 1 Cr. & M. 690; S. C. 3 Tyrwh. 390. Whether the circumstance of the administrator dying largely indebted to the intestate's estate, is a breach, has been questioned. Bolton *v.* Powell, 2 De G., M. & G. 1.

(*k*) 1 Cr. & M. 713; 3 Tyrwh. 419; [Bradley J. in Beall *v.* New Mexico, 16 Wallace, 535, 543. In Massachusetts all money received on an execution awarded in a suit upon an administration bond, except where it is awarded for the benefit of a creditor, or a person next of kin, shall be paid to the co-executor or co-administrator, if there is any, or to whomsoever is then the rightful executor or administrator, and shall be assets in his hands to be administered according to law. Genl. Stats. c. 101, § 29. See Wiggin *v.* Swett, 6 Met. 198. It was held in Newcomb *v.* Williams, 9 Met. 525, that when an executor, who is unfit to be such, is sued on his administration bond in a case in which execution is to issue without expressing that it is for the use of any particular person, the judge of probate should remove him, and appoint an administrator *de bonis non* with the will annexed, who will be entitled to the money that may be received on such execution; and in the mean time the entry of judgments for the plaintiff should be suspended until such removal and new appointment can be effected. Bennett *v.* Russell, 2 Allen, 537.]

(*l*) 3 B. & S. 405.

(*m*) See *ante*, 532.

of persons interested in the estate of the intestate, and not for the non-payment of a particular debt. (*n*)

21 & 22 Vict. c. 95, s. 15, bonds given before Jan. 11, 1858, to remain in force.

By stat. 21 & 22 Vict. c. 95, s. 15, "bonds given to any archbishop, bishop, or other person exercising testamentary jurisdiction in respect of grants of letters of administration made prior to January 11, 1858, or in respect of grants made in pursuance of the court of probate act or of this act, whether taken under a commission or requisition executed before or after the said 11th day of January, shall inure to the benefit of the judge of the court of probate, and, if necessary, shall be put in force in the same manner, and subject to the same rules (so far as the same may be applicable to them), as if they had been given to the judge of the said court subsequently to that day." (*o*)

It was held in Young *v.* Hughes, (*p*) that this enactment had not a retrospective effect, so as to enable the assignee of a bond given to the ordinary before the passing of the court of probate act to maintain an action *commenced by him before the stat.* 21 & 22 Vict. c. 95 *passed.* But although it is plain that such a bond is not assignable under the 83d * section of the court of probate act, yet there seems to be no doubt that, under the 15th section of the act above stated, a bond given to the ordinary prior to January 11, 1858 (the day on which the court of probate act came into operation), may, at any time after the 15th section came into operation, be assigned and proceeded upon by the assignee in all respects as if it had been given to the judge of the court of probate subsequently to January 11, 1858. (*q*)

Breach of bond given when the administration is not within 21 Hen. 8:

Where the administration is not within the statute 21 Hen. 8, as in the case of an administrator *durante minore ætate* with the will annexed, (*r*) or other grant of administration when the deceased dies testate, and the ordinary had taken a bond from the administrator, conditioned for

(*n*) The court gave leave to amend the declaration, so that the plaintiff should sue as trustee under the 83d sect. [*Ante*, 534, note (*g*²).]

(*o*) See, also, sect. 14, *ante*, 292, note (*p*); [*ante*, 534, note (*g*²).]

(*p*) 4 H. & N. 76. See, also, Young *v.* Oxley, 1 Sw. & Tr. 25.

(*q*) 4 H. & N. 84, by Pollock C. B. It seems to have been the opinion of Martin B. and Channell B. that the 87th sect. of the court of probate act (see *ante*, 296) shows an intention to transfer to the court of chancery the jurisdiction over such a bond. 4 H. & N. 84, 86. *Sed quære de hoc.* See Bouverie *v.* Maxwell, L. R. 1 P. & D. 272.

(*r*) See *ante*, 479, 480.

the due payment of debts and legacies, a breach might well be assigned that, though he had more than sufficient to pay all the debts, he has not paid a legacy. (*s*)

how many breeches may be assigned:

Where a party had obtained from the prerogative court a general order to put the administration bond in suit against the surety, the court of common law, in which the action was brought, could not restrain the party so empowered from suggesting as many breaches as he chose, notwithstanding it may appear, on affidavit, that the order was obtained from the spiritual judge solely on one particular ground. (*t*)

how far equity will relieve against forfeiture of the bond:

An administratrix entered into the usual bond in the prerogative court to exhibit an inventory within a limited * time, &c. The time having elapsed without an inventory being exhibited, a creditor put the bond in suit in the name of the archbishop, and the administratrix filed her bill for an injunction; which was granted on the terms of her giving judgment in the action, which was to stand as a security for costs at law and in equity (but not for the debt), and amending the bill by submitting to account. (*u*)

dispensing with sureties.

It must be observed that under the 81st section of the court of probate act, (*v*) the court has power to dispense with sureties altogether. (*x*)

Bond by administrator *pendente lite*.

In an administration *pendente lite*, limited to recover certain sums, and granted jointly to the nominees of the two parties in the suit, the court will not dispense with such administrators entering into a joint bond. (*y*)

Administration bond when administrator is out of England.

If the administration be committed to a person out of England, it is requisite that the sureties to the bond shall be resident within the kingdom. (*z*)

When this rule was established, the assignee of the

(*s*) Folkes *v.* Docminique, 2 Stra. 1137.

(*t*) Archbishop of Canterbury *v.* Robertson, 1 Cr. & M. 181. See the observations of Sir H. Jenner Fust in Crowley *v.* Chipp, 1 Curt. 460. The defendant cannot plead payment of money into court as to some of the breaches and performances as to the rest. Bishop of London *v.* McNeil, 9 Exch. 490.

(*u*) Thomas *v.* Archbishop of Canterbury, 1 Cox, 399. See, also, 2 De G., M. & G. 17.

(*v*) *Ante*, 531.

(*x*) For instances where the court has exercised this power, see Cleverly *v.* Gladdish, 2 Sw. & Tr. 335; In the Goods of De la Farque, Ib. 631. It should be observed that the court has no power to dispense with the *bond*. In the Goods of Powis, 34 L. J., P. M. & A. 55. [See *ante*, 529, note (*a*[1]).]

(*y*) Stanley *v.* Bernes, 1 Hagg. 221. But see sect. 83 of the court of probate act, *ante*, 532.

(*z*) In the Goods of O'Byrne, 1 Hagg.

Whether in such case the sureties must be resident within the kingdom.

bond could not have served the sureties out of England with process. But since the common law procedure act, 15 & 16 Vict. c. 76, s. 18, service of a person abroad may be effected. And the rule has consequently been relaxed. (*a*)

Administration bond when minor comes of age.

Where there has been an administration *pendente minore ætate*, and the minor coming of age takes upon himself the * administration, he is obliged to give security to the same amount that the administrator did in the first instance. (*b*)

Justifying securities to the administration bond are called for at the court's discretion according to the circumstances of each case; except that there is one general rule, that where there is not a personal service of the decree on the party or parties having a prior claim to the grant, justifying securities are required. (*c*) Where the securities are required to justify in the ordinary course of practice, the court will not dispense with this, even partially, but under very special circumstances. (*d*)

Justification of sureties to the bond:

Where the application that the sureties may be directed to jus-

316. See, also, Cambiaso *v.* Negrotto, 2 Add. 439, as to bonds on grants of administration to foreigners. [The sureties in every bond given to the judge of the probate court in Massachusetts must be inhabitants of that state and such as the judge approves. Genl. Sts. c. 101, § 12. See Picquet, appellant, 5 Pick. 65, 76. But under this section an executor's bond, which is signed by two sureties who are inhabitants of Massachusetts, and by a third person who is described as an inhabitant of another state, if approved and accepted by the probate court, is sufficient to qualify him to act. Clarke *v.* Chapin, 7 Allen, 425, 426. Hoar J. in this case said that it was the duty of the judge of probate "to determine the sufficiency of those who were legally qualified to be sureties, and to regard no others; and this, we think, it must be presumed he did." It is not necessary that the sureties should reside in the same county in which the application for probate or administration is made. Barksdale *v.* Cobb, 16 Geo. 13. Non-residents may be taken as sureties on an administration bond in South Carolina. Jones *v.* Jones 12 Rich. (Law) 623. So in Kentucky, Rutherford *v.* Clark, 4 Bush, 27.]

(*a*) In the Goods of Reed, 3 Sw. & Tr. 439. But it is still maintained as to sureties resident in Scotland; for the common law procedure act, s. 18, excepts places in Scotland or Ireland. Herbert *v.* Sheill, 3 Sw. & Tr. 479, overruling In the Goods of Ballingall, Ib. 444, in note.

(*b*) Abbott *v.* Abbott, 2 Phillim. 578.

(*c*) 3 Hagg. 194, note (*a*); In the Goods of Milligan, 2 Robert. 108. The court will not dispense with this rule in favor of the official assignee of a deceased bankrupt. Belcher *v.* Maberly, 2 Curt. 629.

(*d*) Howell *v.* Metcalfe, 2 Add. 348. The mere fact that a receiver of the personal estate has been appointed by the court of chancery is no ground for the dispensation. Jackson *v.* Jackson, 35 L. J., P. M. & A. 3.

tify, is made on behalf of a next of kin, the court feels bound to grant it; but it may be sufficient for the sureties to justify in respect of the share of the party excluded from the administration. (*e*)

next of kin administrator *cum testamento annexo*:

Where administration *cum testamento annexo* was granted to the next of kin, on the ground of there being no executor or residuary legatee who survived the testator, the party, who had unsuccessfully claimed the administration derivatively from the residuary legatee, prayed that the sureties to the administration bond of the next of kin might be compelled to justify; but the court rejected the application, as contrary to the established practice. (*f*)

residuary legatee:

But a residuary legatee for life, taking administration with the will annexed, may be compelled to procure justifying sureties. (*g*) On a late occasion, the court refused, on renunciation * of a co-executor, to grant administration with the will annexed, without justifying securities, to the daughter, the residuary legatee, during the lunacy of her mother, the other executor and residuary legatee in trust. (*h*)

legatee:

In a modern case administration *de bonis non* with a will annexed, in which was no executor, was granted to one of two legatees, a decree with intimation having issued in their joint names against the residuary legatee; the sureties justifying in the amount of the surplus beyond the interest of the one legatee or (on a proxy of consent from the other) beyond the joint interests, and an affidavit of no outstanding debts being made. (*i*)

husband resident abroad:

On a late occasion (*k*) a husband, resident abroad, was directed, on the application of creditors, to give justifying security resident within the jurisdiction, on taking a grant of administration to his wife.

temporary administrator:

There may also be justifying sureties required to the administration bond in cases of temporary general administration; as *durante minore ætate;* (*l*) or on a grant to a widow, where there is a minor daughter entitled in distribution, limited till a last will is found; (*m*) or on a grant to the use and benefit of a lunatic, pending the lunacy. (*n*)

(*e*) Coppin *v.* Dillon, 4 Hagg. 376.
(*f*) Taylor *v.* Diplock, 2 Phillim. 280.
(*g*) Friswell *v.* Moore, 3 Phillim. 139.
(*h*) In the Goods of Hardstone, 1 Hagg. 487. See, also, In the Goods of Williams, 3 Hagg. 217.
(*i*) Pickering *v.* Pickering, 1 Hagg. 480.
(*k*) In the Goods of Noel, 4 Hagg. 207.
(*l*) Howell *v.* Metcalfe, 2 Add. 350.
(*m*) In the Goods of Campbell, 2 Hagg. 555.
(*n*) *Ante*, 517.

the court will not allow separate bonds.

If the court decrees a general grant, but, under special circumstances, requires the sureties to justify only as to a *part* of the property, it will not allow *separate* bonds, so that other securities than those who justify in the requisite amount shall enter into the common administration bond, in double the amount of the whole property. (*o*)

On a late occasion, in an administration *pendente lite*, * limited to recover certain sums, and granted jointly to the nominees of the two parties in the suit, the court would not dispense with such administrators entering into a joint bond. (*p*)

Administration bond by attorney of next of kin.

Where a person is authorized by a simple power of attorney to take out administration as agent for the use and benefit of a party entitled to administration who is abroad, the court will only grant administration to the agent on the same terms as it would have granted it to the party himself, and, therefore, will not alter the usual conditions of the administration bond or the terms of the ordinary administration oath. (*q*)

Administration bond by a third person for a wife entitled to administration when the husband refuses to execute one.

If the husband of a married woman who is entitled to administration refuses to execute the administration bond or to assist in her obtaining the grant, the court will grant administration to her and allow a third person to execute the bond. (*r*)

Whether claim on adminis-

It may here be remarked, that it was held that an administration bond forfeited before the bankruptcy of the administrator was not provable under the bankruptcy law consolidation act, 1849 (12 & 13 Vict. c. 106); and, con-

(*o*) Howell *v.* Metcalfe, 2 Add. 348. But see now s. 83 of the court of probate act, *ante*, 532. [An executor's bond, approved by the judge of probate, in which the sureties are each bound in half the sum in which the principal is bound, is not for that cause void, but is binding on the obligors, and sufficient to give effect to the executor's appointment, and to render his acts as such valid. Baldwin *v.* Standish, 7 Cush. 207. But Dewey J. in this case said: "If this question had arisen upon an appeal from the judge of probate, allowing and approving an executor's bond in such form, we should be strongly inclined to the opinion, that it was a departure from the usual course of proceeding, which ought not to be introduced." See *ante*, 329, note (*a*[1]).]

(*p*) Stanley *v.* Bernes, 1 Hagg. 221. See, further, as to the practice respecting the sureties to administration bonds, Bond *v.* Bond, 1 Cas. temp. Lee, 429; Allen *v.* Allen, 2 Cas. temp. Lee, 244. See, further, as to the practice with respect to suing on administration bonds, In the Goods of Irving, L. R. 2 P. & D. 658.

(*q*) In the Goods of Goldsborough, 1 Sw. & Tr. 295.

(*r*) In the Goods of Sutherland, 31 L. J., P. M. & A. 126.

sequently, a certificate under that act was no bar to an action on the bond. (*s*)

tration bond is barred by certificate in bankruptcy.

It remains to mention such rules of the court of probate as apply to administration bonds.

By rule 38, P. R. (Non-contentious Business), "Administration bonds are to be attested by an officer of the principal registry, by a district registrar, or by a commissioner or * other person now or hereafter to be authorized to administer oaths under 20 & 21 Vict. c. 77, and 21 & 22 Vict. c. 95; but in no case are they to be attested by the proctor, solicitor, attorney, or agent of the party who executes them. The signature of the administrator or administratrix to such bonds, if not taken in the principal registry, must be attested by the same person who administers the oath to such administrator or administratrix." (*t*)

Rule 38, P. R. (Non-contentious Business.) Who are to attest the bond.

By rule 39, "In all cases of limited or special administration two sureties are to be required to the administration bond (unless the administrator be the husband of the deceased or his representative, in which case but one surety will be required), and the bond is to be given in double the amount of the property to be placed in the possession of or dealt with by the administrator by means of the grant. The alleged value of such property is to be verified by affidavits if required."

Rule 39. Number of sureties and amount of bond.

By rule 40, "The administration bond is, in all cases of limited or special administrations, to be prepared in the registry." (t^1)

Rule 40. Preparation of bond.

By rule 41, "The registrars are to take care (as far as possible) that the sureties to administration bonds are responsible persons." (t^2)

Rule 41. Sureties to be responsible persons.

(*s*) Markham *v.* Brooks, 2 H. & C. 908; Kent *v.* Thomas, 40 L. J. Ex. 186. See, also, the 153d section of the bankruptcy act, 1861, and the 31st section of the act of 1869 (32 & 33 Vict. c. 71).

(*t*) But this rule may be dispensed with. In the Goods of Parker, L. R. 1 P. & D. 301.

(t^1) [See *ante*, 531, note (a^3).]

(t^2) [An ordinary has been held liable to an action if he neglect to take an administration bond. Boggs *v.* Hamilton, 2 Mill (S. Car.) Const. 382; McRae *v.* David, 5 Rich. (S. Car.) 475. This is provided by statute in Pennsylvania, act March 15, 1832, § 27; *ante*, 530, note (e^1).]

*BOOK THE SIXTH.

OF THE EFFECT OF PROBATE AND LETTERS OF ADMINISTRATION, AS LONG AS THEY ARE UNREVOKED. — OF THE REVOCATION OF THEM, AND OF THE CONSEQUENCES THEREOF.

CHAPTER THE FIRST.

OF THE EFFECT OF PROBATE AND LETTERS OF ADMINISTRATION AS LONG AS THEY REMAIN UNREPEALED.

As to what facts probate, &c. is conclusive.

It is a legal consequence of the exclusive jurisdiction of the court of probate in deciding on the validity of wills of personalty, and granting administration, that its sentences pronounced in the exercise of such exclusive jurisdiction, should be conclusive evidence of the right directly determined. (*a*) Hence a probate, even in common form, unrevoked, is conclusive both in the courts of law (*b*) and of equity, (*c*) as to

(*a*) 1 Phill. Ev. 343, 7th ed.; [Merrill *v.* Harris, 23 N. H. 142; Mutual Benefit Life Ins. Co. *v.* Tisdale, Sup. Ct. (U. S.) Oct. T. 1875. The limitation is to be observed. To be conclusive the decrees of probate courts must be made in the exercise of their jurisdiction. Emery *v.* Hildreth, 2 Gray, 228, 231; Jochumsen *v.* Suffolk Savings Bank, 3 Allen, 87; Gray J. in Waters *v.* Stickney, 12 Allen, 3; Tebbetts *v.* Tilton, 31 N. H. 273; Wales *v.* Willard, 2 Mass. 120; Holyoke *v.* Haskins, 5 Pick. 20; Smith *v.* Rice, 11 Mass. 507; Sigourney *v.* Sibley, 21 Pick. 101; *post*, 586, note (*a*). Mr. Redfield, in his able work on surrogates' courts in New York, p. 13, says that "the force and effect of a surrogate's decree are determined by the rules which govern all courts of limited jurisdiction. It may be attacked either directly or collaterally as being void for want of jurisdiction over the subject-matter. If the surrogate did not have jurisdiction over the subject-matter, his decree is not merely voidable, subject only to be reversed on appeal or to be vacated in a direct proceeding for that purpose, but it is absolutely void, and affords no protection for acts done under it." See note (*d*) below.]

(*b*) Noel *v.* Wells, 1 Sid. 359; S. C. 1 Lev. 235; 2 Keb. 337; Allan *v.* Dundas, 3 T. R. 125; [Gray J. in Waters *v.* Stickney, 12 Allen, 3; Dublin *v.* Chadbourn, 16 Mass. 441; Peters *v.* Peters, 8 Cush. 529; Taylor *v.* Tibbatts, 13 B. Mon. 177.]

(*c*) Attorney General *v.* Ryder, 2 Chan. Cas. 178; Archer *v.* Mosse, 2 Vern. 8; Nelson *v.* Oldfield, 2 Vern. 76; Griffiths *v.* Hamilton, 12 Ves. 298; Jones *v.* Jones,

the appointment of executor, and the validity and contents of a will, so far as it extends to personal property; and it cannot be impeached by evidence even of fraud. (*d*)

3 Meriv. 171. All the cases on this subject will be found collected and commented on with great ability in Hargrave's Law Tracts, p. 459 *et seq.* A probate obtained as a matter of course, on a Scotch confirmation, under stat. 21 & 22 Vict. c. 56 (see *ante*, 363), stands on the same footing; and it makes no difference that proceedings are pending in Scotland for a reduction of the confirmation. Cumming *v.* Fraser, 28 Beav. 614.

(*d*) Archer *v.* Mosse, 2 Vern. 8; Plume *v.* Beale, 1 P. Wms. 388; Kerrich *v.* Bransby, 7 Bro. P. C. 437, 2d ed.; S. C. 1 Eq. Cas. Abr. 133; Griffiths *v.* Hamilton, 1 Ves. 307; [Gray J. in Waters *v.* Stickney, 12 Allen, 3; Allen *v.* Macpherson, 1 Phill. 145, 146; S. C. 1 H. L. Cas. 211, 221; In re Broderick's Will, 21 Wallace, 503; James *v.* Chew, 2 How. (U. S.) 619, 645; Townsend *v.* Townsend, 4 Coldw. (Tenn.) 70; Sever *v.* Russell, 4 Cush. 513; Strong *v.* Perkins, 3 N. H. 518; Tompkins *v.* Tompkins, 1 Story, 547; Patten *v.* Tallman, 27 Maine, 17; Merrill *v.* Harris, 27 N. H. 142; Tebbetts *v.* Tilton, 31 N. H. 273, 287; Tibbatts *v.* Berry, 10 B. Mon. 473; Moore *v.* Tanner, 5 Mon. 42; Fortune *v.* Buck, 23 Conn. 1; King *v.* Bullock, 9 Dana, 41; Campbell *v.* Logan, 2 Bradf. Sur. 90; Thompson *v.* Thompson, 9 Penn. St. 234; Barney *v.* Chittenden, 2 Green (Ia.), 165; Dublin *v.* Chadbourn, 16 Mass. 433; Shumway *v.* Holbrook, 1 Pick. 114; Rogers *v.* Stevens, 8 Ind. 464; Thomas J. in Emery *v.* Hildreth, 2 Gray, 231; Judge of Probate *v.* Lane, 51 N. H. 342, 348; Wade *v.* Lobdell, 4 Cush. 510; Hegarty's Appeal, 75 Penn. St. 503; *ante*, 293, note (*s*). The executors are considered as representing the legatees, in regard to the litigation respecting the validity of the will; and unless a case of fraud and collusion can be made out against them, the legatees are bound by the adjudication in the suit to which the executors are parties; Colvin *v.* Fraser, 2 Hagg. 292; Medley *v.* Wood, 1 Hagg. 645; Newell *v.* Weeks, 2 Phill. 224; and that, too, though the same persons are executors under two conflicting testamentary instruments. Hayle *v.* Hasted, 1 Curt. 236. The court, however, sometimes directs the parties interested to be brought before it. Reynolds *v.* Thrupp, 1 Curt. 570. In Stearns *v.* Wright, 51 N. H. 609, Sargent J. said: "In our view, our courts of probate are of limited and special jurisdiction, viz, in that they have no jury, and their proceedings are not according to the course of the common law. Wood *v.* Stone, 39 N. H. 572. Yet they are to be regarded as courts of general jurisdiction on the subjects to which they relate, and are entitled to all the presumptions in favor of their proceedings which are allowed in the case of other tribunals of general jurisdiction, — more especially as they are now made by statute courts of record. Rev. Sts. c. 152, § 19; Genl. Sts. c. 170, § 1; Tebbetts *v.* Tilton, 24 N. H. 120; Kimball *v.* Fisk, 39 N. H. 110. And their judgments where they have jurisdiction are conclusive. They may be reexamined on appeal, but cannot be impeached collaterally, except for fraud and want of jurisdiction in the court. Wilson *v.* Edmonds, 24 N. H. 517; Merrill *v.* Harris, 26 N. H. 142; Hurlburt *v.* Wheeler, 40 N. H. 73; Hall *v.* Woodman, 49 N. H. 295; Mooers *v.* White, 6 John. Ch. 387." See Roderigas *v.* East River Savings Institution, 15 Am. Law Reg. (N. S.) 205, and note at the end. The adjudication of the register in the probate of a will is conclusive on all matters within his jurisdiction, if not appealed from within the time limited by law, just as if made by the probate judge. Hegarty's Appeal, 75 Penn. St. 503; Holliday *v.* Ward, 19 Penn. St. 485; Loy *v.* Kennedy, 1 Watts & S. 396; Hilliard *v.* Binford, 10 Ala. 977. In many of the American States courts of probate have the same power and complete jurisdic-

* Therefore, it is not allowable to prove that another person was appointed executor, or that the testator was insane, or that the will of which the probate has been granted was forged: for that would be directly contrary to the seal of the court in a matter within its exclusive jurisdiction. (*e*) So the probate of a will con-

tion over the probate of wills of real as of personal estate, and hence their decrees are held to be equally conclusive upon the question of the validity and due execution of such wills, whether of personal or real estate; and such decrees are not open to contestation in any other court. See Parker *v.* Parker, 11 Cush. 519; Brown *v.* Wood, 17 Mass. 68, 72; Dublin *v.* Chadbourn, *supra;* Osgood *v.* Breed, 12 Mass. 533, 534; Tompkins *v.* Tompkins, *supra;* Poplin *v.* Hawke, 8 N. H. 124; Strong *v.* Perkins, *supra;* Potter *v.* Webb, 2 Greenl. 257; Patten *v.* Tallman, *supra;* Fuller, ex parte, 2 Story, 327, 329; Judson *v.* Lake, 3 Day, 318; Fortune *v.* Buck, 23 Conn. 1; Lewis *v.* Lewis, 5 Louis. 388, 393, 394; Robertson *v.* Barbour, 6 Mour. 523; Sneed *v.* Ewing, 5 J. J. Marsh. 460; *post,* 564; 1 Dan. Ch. Pr. (4th Am. ed.) 874, note (5), and cases cited; Boyse *v.* Rossborough, 3 De G., M. & G. (Am. ed.) 817, note (1). In some states this conclusive effect of wills as to real estate is enforced by statute. In several of the states provision is made by statute that probate of wills of real estate shall be conclusive after the lapse of a certain number of years, and in the mean time be open to reconsideration. See Durrington *v.* Borland, 3 Porter, 37; Hardy *v.* Hardy, 26 Ala. 524; Tarver *v.* Tarver, 9 Peters, 180; Scott *v.* Calvit, 3 How. (Miss.) 157; Parker *v.* Brown, 6 Grattan, 554; Bailey *v.* Bailey, 8 Ohio, 246; Hegarty's Appeal, 75 Penn. St. 512, 513; Kenyon *v.* Stewart, 8 Wright, 189. In some states probate of a will of real estate is *primâ facie,* but not conclusive, evidence of the due execution of the will. See Smith *v.* Bonsall, 5 Rawle, 80; Logan *v.* Watt, 5 Serg. & R. 22; Coates *v.* Hughes, 3 Binney, 498; Barker *v.* McFerran, 26 Penn. St. 211; Harven *v.* Springs, 10 Ired. 180; Randall *v.* Hodges, 3 Bland, 47; Townshend *v.* Duncan, 2 Bland, 45; Darbey *v.* Mayer, 10 Wheat. 470; Singleton *v.* Singleton, 8 B. Mon. 340; Welles's Will, 5 Litt. 273; Hegarty's Appeal, 75 Penn. St. 512. As to the effect of probate of a will in New York, it is said that a will may be proved at the same time, both as a will of real and of personal property. The effect of the probate differs, however, as to each class of property. As to the real estate, the probate is not conclusive either as to the validity or the due execution of the will. These questions may be litigated whenever rights to real estate claimed under the will are litigated. But in respect to dispositions of personal property contained in the will, the rule is different. Redf. L. & P. of Surrogates' Courts, 118, 119; Matter of Kellum, 50 N. Y. 298; Bogardus *v.* Clark, 4 Paige, 623, 626, 627; Jackson *v.* Le Grange, 19 John. 386; Morrell *v.* Dickey, 1 John. Ch. 153; Jackson *v.* Thompson, 6 Cowen, 178; Muir *v.* Trustees &c. 3 Barb. Ch. 477; Rogers *v.* Rogers, 3 Wend. 514. As to New Jersey, see Sloan *v.* Maxwell, 2 Green Ch. 566; Harrison *v.* Rowun, 3 Wash. C. C. 580. South Carolina, see Taylor *v.* Taylor, 1 Rich. 533; Crosland *v.* Murdock, 4 McCord, 217;] *ante,* 45, note (*i*); *post,* 557, 558.

(*e*) Noel *v.* Wells, *ubi supra;* [Dublin *v.* Chadbourn, 16 Mass. 433; Parker *v.* Parker, 11 Cush. 525, 526. So the decree of the court of probate duly approving and allowing the will of a married woman, unappealed from and unreversed, is final and conclusive upon the heirs-at-law of the testator, and they cannot, in a court of common law, deny the legal capacity of the testatrix to make such will. Parker *v.* Parker, 11 Cush. 519; Ward *v.* Glenn, 9 Rich. (Law) 127; *ante,* 54, note (*y*); Judson *v.* Lake, 3 Day, 318; Poplin *v.* Hawke, 8 N. H. 124; Cassels *v.* Vernon,

clusively establishes in all courts that the will was executed according to the law of the country where the testator was domiciled. (*f*)

In short, without the *constat* of the court of probate no other court can take notice of the rights of representation to personal property; and when that court has, by the grant of probate or letters of administration, established the right, no other court can permit it to be gainsaid. (*g*)

By the court of probate act (20 & 21 Vict. c. 77, s. 75), "After any grant of administration, no person shall have power to sue or prosecute any suit, or otherwise act as executor of the deceased, as to the personal estate comprised in or affected by such grant of administration, until such administration shall have been recalled or revoked." (*g*[1])

So, in Bouchier *v.* Taylor, (*h*) it was decided by the house of lords, that after a sentence in the ecclesiastical court determining the question who are the next of kin of the intestate, and granting letters of administration to the person found to be such next of kin, the court of chancery is precluded from directing any issue to

5 Mason, 332; Robinson *v.* Allen, 11 Grattan, 785. This is true even in regard to a will made and admitted to probate in another state or country which has also been allowed and recorded in Massachusetts according to the mode prescribed by statute in that state. Parker *v.* Parker, 11 Cush. 519; Dublin *v.* Chadbourn, 16 Mass. 433.]

(*f*) Whicker *v.* Hume, 7 H. L. Cas. 124. But see the observations of Lord Cranworth, Ib. 156.

(*g*) Attorney General *v.* Partington, 3 H. & C. 204; [L. R. 4 H. L. 100. A decree of the probate court appointing an administrator is conclusive, unless appealed from. Clark *v.* Pishon, 31 Maine, 504; Record *v.* Howard, 58 Maine, 225. Letters testamentary and of administration are conclusive evidence of the authority of the persons to whom granted, and are sufficient to establish the representative character of the plaintiff who assumes to sue by virtue thereof. Carroll *v.* Carroll, 60 N. Y. 123; Belden *v.* Meeker, 47 N. Y. 307; Farley *v.* McConnell, 52 N. Y. 630. An order of the court of probate directing the estate of an intestate to be distributed to the persons whom such court finds to be the heirs-at-law and entitled to the estate, is conclusive, and furnishes full protection to the administrator, until set aside on appeal. Kellogg *v.* Johnson, 38 Conn. 269. See Roderigas *v.* East River Savings Institution, 15 Am. Law Reg. (N. S.) 205.]

(*g*[1]) [See Moore *v.* Ridgeway, 1 B. Mon. 234; Carter *v.* Carter, 10 B. Mon. 327. The jurisdiction of the probate court to grant administration cannot be attacked collaterally. Abbott *v.* Coburn, 28 Vt. 663; Irwin *v.* Scriber, 18 Cal. 499; Andrews *v.* Avory, 14 Grattan, 229; Quidort *v.* Pergeaux, 15 N. J. (Law) 473; *post*, 563, note (*c*). But it may be shown, notwithstanding the grant of administration, that the deceased left a will, lost or destroyed; and upon such proof being made, the will will be sustained and the administration revoked. Bulkley *v.* Redmond, 2 Bradf. Sur. 281.]

(*h*) 4 Bro. C. C. 708, Toml. ed.

try that question. (h[1]) And this decision was held by Lord Lyndhurst, in Barr *v.* Jackson (*i*) (reversing the decree of Knight Bruce V. C.), (*j*) to be a binding authority for the proposition, that if the sentence of the ecclesiastical court, in a suit for administration, turns upon the question of which of the parties is next of kin to the intestate, such sentence is conclusive upon that question *in a subsequent suit in the court of chancery, between the same parties, for distribution. (*k*)

Upon this principle it was decided, in a modern case, that payment of money to an executor, who has obtained probate of a forged will, is a discharge to the debtor of the deceased, notwithstanding the probate be afterwards declared null in the ecclesiastical court, and administration be granted to the intestate's next of kin; (*l*) for if the executor had brought an action against the debtor, the latter could not have controverted the title of the executor as long as the probate was unrepealed; and the debtor was not obliged to wait for a suit, when he knew that no defence could be made to it. (*m*)

(h[1]) [The regularity and sufficiency of the appointment of an administrator by a probate court having jurisdiction to appoint one on an estate, cannot be drawn in question, in an action brought by the administrator against a stranger, to recover a debt due to the intestate. Emery *v.* Hildreth, 2 Gray, 228; Flinn *v.* Chase, 4 Denio, 85; Burnley *v.* Duke, 2 Rob. (Va.) 102. Nor can the regularity of the appointment be questioned in any collateral proceeding. Wright *v.* Wallbaum, 39 Ill. 554; Eslava *v.* Elliot, 5 Ala. 264; Carroll *v.* Carroll, 60 N. Y. 123; Bryan *v.* Walton, 14 Geo. 185; Naylor *v.* Moffatt, 20 Misson. 126; Boody *v.* Emerson, 17 N. H. 577; Sadler *v.* Sadler, 16 Ark. 628; James *v.* Adams, 22 How. Pr. 409; *ante*, 448; Clark *v.* Pishon, 31 Maine, 503; Riley *v.* McCord, 24 Misson. 265; Quidort *v.* Pergeaux, 15 N. J. (Law) 473; Belden *v.* Meeker, 47 N. Y. 307.]

(*i*) 1 Phil. C. C. 582.

(*j*) 1 Y. & Coll. C. C. 585.

(*k*) In Long *v.* Wakeling, 1 Beav. 400, where A. B., being entitled to a fund in court, died, and administration was granted to a person, as "the natural and lawful sister" of A. B., and it appeared from the proceedings in the cause that A. B. was illegitimate, the court refused to pay the fund to the administratrix, but directed it to be carried over to a separate account, with directions that it should not be paid out of court without notice to the crown. [See Wescott *v.* Cady, 5 John. Ch. 334, 343; Morrell *v.* Dickey, 1 John. Ch. 153; Burger *v.* Hill, 1 Bradf. Sur. 360; Colton *v.* Ross, 2 Paige, 396; Bogardus *v.* Clark, 4 Paige, 623; Pritchard *v.* Hicks, 1 Paige, 270.]

(*l*) Allan *v.* Dundas, 3 T. R. 125; [Thomas J. in Emery *v.* Hildreth, 2 Gray, 231; *post*, 590, note (x[1]); Roderigas *v.* East River Savings Institution, 15 Am. Law Reg. (N. S.) 205, and note at the end.] See, also, Prosser *v.* Wagner, 1 C. B. N. S. 289, and stat. 20 & 21 Vict. c. 77, s. 77; *post*, 591.

(*m*) Allan *v.* Dundas, 3 T. R. 129. [In a case where probate of a will was revoked, on the ground that the witnesses were incompetent, it was held that the acts of the executor before the revocation

When there is a question, whether particular legacies given by a will are cumulative or substituted, it is often determined by the circumstance of the bequest having been given by distinct instruments. (*n*) In such a case, if a probate has been granted, *as of a will and codicil*, this is conclusive of the fact of their being distinct instruments, though written on the same paper. (*o*)

* The probate is also conclusive as to every part of the will in respect of which it has been granted: for example, in Plume *v.* Beale, (*p*) where an executor proved a will of personal property, and then brought a bill in equity to be relieved against a particular legacy, on the ground of its having been interlined in the will by forgery, Lord Cowper dismissed the bill with costs, observing, that the executor might have proved the will in the ecclesiastical court, with a particular reservation as to that legacy. (*q*)

In what cases a court of equity will interfere.

But though courts of equity are bound to receive, as testamentary, a will, in all its parts, which has been proved in the proper spiritual court, yet they may, in certain cases, affect with a trust a particular legacy or a residuary bequest, which has been obtained by fraud. (*r*) For instance, if the drawer of a will should fraudulently insert his own name, instead of that of a legatee, he would be considered in equity as a trustee for the real legatee. (*s*) And it has never been

were valid, and that he might be cited to render his account. Peebles's Appeal, 15 Serg. & R. 39, 42.] Where, however, a sum of stock was standing in the name of a testatrix, which her executors overlooked, and, the dividends remaining unclaimed, the stock was transferred to the national commissioners, and afterwards one Sanders procured a probate, in the name of T. Hunt, of a forged will of the testatrix, and obtained a transfer, it was held by Lord Langdale M. R. that the probate did not authorize a payment to Sanders, and that a party giving faith to the probate was bound to see that the person claiming under it was a real T. Hunt. Ex parte Jolliffe, 8 Beav. 168.

(*n*) See *infra*, pt. III. bk. III. ch. II. § VIII.

(*o*) Baillie *v.* Butterfield, 1 Cox, 392.

(*p*) 1 P. Wms. 388.

(*q*) See *ante*, 377; [Hegarty's Appeal, 75 Penn. St. 514 *et seq.*; Meluish *v.* Milton, L. R. 3 Ch. D. 27.]

(*r*) Mitf. Plead. 257, 4th ed.; [Dowd *v.* Tucker, 14 Am. Law Reg. (N. S.) 477; Vickery *v.* Hobbs, 21 Texas, 570.]

(*s*) Marriot *v.* Marriot, 1 Stra. 666; S. C. Gilb. Eq. Rep. 203; Mitf. Pl. 258, 4th ed. See *post*, 558, note (*e*); [In re Broderick's Will, 21 Wallace, 510; *ante*, 45, note (*m*).] So in Segrave *v.* Kirwan, 1 Beat. 157, the executor, who was a barrister, had himself prepared the will, the rule of law at that time being that the executor was entitled to the residue unless otherwise disposed of or unless a legacy was bequeathed to him. See *post*, pt. III. bk. III. ch. V. § II. And Sir A. Hart held that it was the duty of the executor to have informed the testator that such was the rule, and that he could not be allowed to profit from this omission, but must be decreed to be a trustee for the next of

*thought that courts of equity, by declaring a trust, in such cases, infringed upon the jurisdiction of the ecclesiastical courts. (*t*)

Again, although it is now settled that a will cannot, either before or after probate, be set aside in equity, on the ground that *the will* was obtained by *fraud on the testator*, yet where *probate* has been obtained by *fraud on the next of kin*, a court of equity will interfere, and either convert the wrong-doer into a trustee, in respect of such probate, or oblige him to consent to a repeal or revocation of it in the court in which it was granted. (*u*) Thus in Barnesley *v.* Powell, (*v*) the bill sought to be relieved against a

kin. See, also, Bulkeley *v.* Wilford, 2 Cl. & Fin. 102, 177, 178; S. C. 8 Bligh, 111. It was held by Sir J. Stuart V. C. (notwithstanding the case of Allen *v.* McPherson, *post*, 556 *et seq.*) that the court, under its equitable jurisdiction, has authority to declare an attorney a trustee for the heir-at-law and next of kin of real and personal estate given him by a will prepared by himself, where he has improperly taken advantage of the testator's ignorance, or allowed him to remain under a mistaken impression which influenced the gift. Hindson *v.* Weatherill, 1 Sm. & G. 609. But this decision was reversed on appeal, on the facts, the lords justices declining to give any opinion on the law of the case. Lord Justice Turner, however, distinguished it from Segrave *v.* Kirwan, observing that in that case the testator had no intention to benefit Kirwan the counsel. 5 De G., M. & G. 301. See, also, Walker *v.* Smith, 29 Beav. 394; [Williams *v.* Fitch, 18 N. Y. 547; Chamberlain *v.* Chamberlain, 2 Freeman, 34; Nutt *v.* Nutt, 1 Freeman Ch. (Miss.) 128; Yates *v.* Cole, 1 Jones Eq. (N. Car.) 110; Barron *v.* Greenough, 3 Ves. 151; Corley *v.* Lord Stafford, 1 De G. & J. 238; Perry Trusts, § 181; Kerr F. & M. 171; Greenfield *v.* Bates, 5 Ir. Ch. 219; McCormic *v.* Grogan, L. R. 4 H. L. 82; Norris *v.* Frazer, L. R. 15 Eq. 318; Robinson *v.* Denson, 3 Head (Tenn.), 395. A very suitable and exemplary application of the principle suggested in the text was recently made in Connecticut (Dowd *v.* Tucker, 14 Am. Law Reg. N. S. 477), where it appeared that the testatrix was an aunt of the defendant, that she lived with him, and had given him all her property by will, but upon her death-bed she desired to change her will and give a certain parcel of real estate to a niece, and had a codicil prepared for that purpose. Before signing the codicil, wishing to secure the consent of the defendant to the change, she had him called in for the purpose. After hearing her, he replied that she was weak and that she need not trouble herself to sign the codicil, but that he would deed the property to the niece and carry out the wishes of the aunt. Trusting to his promise, she made no change in her will, but after her decease the defendant refused to make the conveyance to the niece. On a bill in equity brought by the niece to compel the defendant to convey, it was held that he took the property under a trust for her, which a court of equity would enforce. The same principle was acted on in Jones *v.* McKee, 3 Penn. St. 496.]

(*t*) 1 Stra. 673; Gilb. Eq. Rep. 209; Fonbl. Eq. bk. 4, pt. 2, c. 1, s. 1, note (*a*).

(*u*) Mitf. Pl. 257, 4th ed. [But a court of equity will not give relief by charging the executor of a will, or a legatee, with a trust in favor of a third person, alleged to be defrauded by a forged or fraudulent will, where the court of probate could afford relief by refusing probate of the will in whole or in part. In re Broderick's Will, 21 Wallace, 503.]

(*v*) 1 Ves. sen. 119, 284, 287; 2 Roper,

paper writing, purporting to be the will of the plaintiff's father, under which the defendant, Mansel Powell, claimed, and which was not without evidence to support it, although there was strong suspicion of forgery. It was also sought to be relieved against several acts of the plaintiff since his father's death; such as the decree of the court of exchequer against him and a sentence in the prerogative court, wherein the plaintiff's consent to establish that will by a probate was obtained, and a conveyance and assurances made by him. Lord Hardwicke C. directed an issue, with a special direction on the decretal order, to know on what foundation the jury went, if they found against the will, whether upon forgery, or any particular defect in the execution; and his lordship, after making some observations, with respect to the relief against the decree of the court of exchequer, proceeded to remark, "As to the sentence of the prerogative court, as at present advised, that will create no difficulty if the will is found forged; for then the plaintiff's consent appearing to have been obtained by the misrepresentation of that forged will, * that fraud infects the sentence; against which the relief must be here. This is not absolute, but only to show the tendency of my opinion upon the equity reserved after the trial; for I should not scruple decreeing the defendant, who obtained that probate, to stand as a trustee in respect of the probate; which would not overturn the jurisdiction of that court." After a very long trial by a special jury, a verdict was brought in against the will, with an indorsement that it was grounded on forgery, and not on any defect in the execution. Upon the equity reserved, Lord Hardwicke admitted that undoubtedly the jurisdiction of the wills of personal estate belonged to the ecclesiastical court, according to which law it must be tried, notwithstanding the will is found forged by a jury at law, upon the examination of witnesses; but there was a material difference between the court of chancery taking upon itself to set aside a will of personal estate on account of fraud or forgery in obtaining or making that will, and taking from the party the benefit of a will established in the ecclesiastical court by his fraud, not upon the testator, but the person disinherited thereby. That fraud in obtaining a will infected the whole; but the case of a will, of which the probate was obtained by fraud on the next of kin, was of another considera-

Leg. 688, 3d ed.; recognized by Lord Cottenham, in Price *v.* Dewhurst, 4 M. & Cr. 85.

tion. (*x*) That, in the case before him, the plaintiff had given a covenant to the defendant to do all acts which Powell should require of him; in consequence of which, a special proxy under hand and seal was obtained from him, confessing the allegations; upon which sentence was pronounced of probate to the defendants, the executors. The probate depended on that deed: and it was, therefore, proper for the court to inquire, and set it aside for fraud, if proved; and that was the ground of jurisdiction in the court of chancery, distinct from the will itself, and abstracted from the general * jurisdiction of the ecclesiastical court to determine of a will of personal estate. On the whole circumstances of the case, his lordship decreed, that the defendants should consent, in the ecclesiastical court, the next term, to a revocation of the probate, and that, after such revocation, the defendants should have a fortnight's time to propound the paper writing in the ecclesiastical court; (*x*[1]) on failure of which, his lordship said he would compel the defendants to consent to the granting administration to the plaintiff: and his lordship added, "I think I ought to go farther; and although I shall not yet decree a trust, yet even now I shall be warranted to decree an account of the personal estate, to be paid into the bank, for the benefit of the parties entitled, which for security was done in Powis *v.* Andrews; and the present case, from all the ill practice that has been, is stronger than that. This is the better method, to avoid any jealousy of infringing on the ecclesiastical court." It being insisted for the plaintiff, that the court ought to direct no examination of the said paper writing, but grant a perpetual injunction, from the circumstances of its being produced and found with the forged will, and its reciting a forged deed; his lordship thought this would be a very good defence in the ecclesiastical court, as they were circumstances of suspicion; but that it would be going too far to say, that, because of ill practice in one will, he should have no right as to another.

The effect of this decision was considered in the modern case of Gingell *v.* Horne. (*y*) There, after a will of personalty had been proved *per testes* in the ecclesiastical court, a bill was filed by the next of kin, alleging that the testator's signature to the

(*x*) The distinction here taken by Lord Hardwicke was recognized by Lord Apsley in Meadows *v.* Duchess of Kingston, Ambl. 764.

(*x*[1]) [Gray J. in Waters *v.* Stickney, 12 Allen, 4, 5.]

(*y*) 9 Sim. 539.

will was obtained when he was not of sound and disposing mind; that his medical attendants were not called as witnesses when the probate was obtained; and that the evidence of the testator's incompetency did not come to the knowledge of the plaintiffs until after the time allowed *for appealing from the sentence of the ecclesiastical court had expired; and praying that the will might be declared to have been fraudulently obtained, and that the residuary legatee might be declared a trustee for the plaintiffs. A demurrer to the bill was allowed by Sir L. Shadwell V. C. And his honor said he had long considered the law as settled, that there is no method of escaping from the effect of probate, unless in a case like Barnesley *v.* Powell. That in the present case no fraud was practised on the plaintiffs in obtaining probate; and this bill, therefore, did not afford any such materials for the interference of the court as there were in Barnesley *v.* Powell, in which Lord Hardwicke made a decree which afforded an opportunity of having the matter reconsidered in the ecclesiastical court.

The subject has been since fully investigated, and all the authorities relating to it have been discussed, in the case of Allen *v.* Macpherson. (*z*) There the testator had by his will and subsequent codicils bequeathed considerable property to the plaintiff, and made also other bequests to other relatives. He afterwards by a further codicil revoked these bequests, and in lieu of them made a small pecuniary provision for the plaintiff. The bill alleged that this codicil was obtained by false and fraudulent representations made by an illegitimate son of the testator, acting in confederacy with the defendant, his daughter and residuary legatee, as to the character and conduct of the plaintiff. In the ecclesiastical court the plaintiff had unsuccessfully resisted the admission to probate of the revoking codicil, on the ground that it had been obtained by undue influence. And the bill further stated that the appellant was confined in that court to grounds of objection which affected the codicil as an entire instrument, and was not permitted to go into the case stated in the bill or into any other case solely relating to the parts of the codicil which affected only the appellant. To this bill the defendant demurred. Lord *Langdale M. R. overruled the demurrer, being of opinion that, by analogy to former decisions, as the will alleged that the revocation had been procured by the fraud of the defendant, the court of

(*z*) 5 Beav. 469; 1 Phill. C. C. 133; 1 H. L. Cas. 191.

chancery had jurisdiction to deprive her of the benefit of it, and to declare her to be a trustee of that to which the law entitled her for the benefit of the person to whose prejudice the fraud was practised. (*a*) But this decision was reversed by Lord Lyndhurst C. on appeal; and his lordship relied on the distinction taken by Lord Hardwicke (as above stated), in Barnesley *v.* Powell, and recognized by Lord Apsley in Meadows *v.* The Duchess of Kingston, (*b*) between fraud on the testator and fraud upon the person disinherited thereby. His lordship further relied on Kerrich *v.* Bransby, (*c*) as a decision of the house of lords establishing not merely that a will cannot be set aside in equity for fraud, (*d*) but further, that the court of chancery has no jurisdiction to declare the fraudulent legatee a trustee for the party defrauded. And this decision was afterwards affirmed on appeal to the house of lords; their lordships holding that the ecclesiastical court had jurisdiction to refuse and ought to have refused probate of that part of the codicil which affected the appellant, because, giving credit to the facts stated by the bill and admitted by * the demurrer, that part of the codicil was not the will of the testator, having been obtained by a fraud practised on him; but that the proper course would have been to appeal to the privy council in order to set the matter right, and not to file a bill in equity, which was, in effect, an attempt to review the decision of a court of probate by the court of chancery. (*e*)

(*a*) 5 Beav. 469.

(*b*) Ambl. 762; *ante*, 554, note (*x*).

(*c*) 7 Bro. P. C. 437; *ante*, 45, note (*m*), 549, note (*d*).

(*d*) But Lord Abinger C. B. in his judgment in Middleton *v.* Sherburne, 4 Y. & Coll. Exch. C. 358, argued with much pains that in Kerrich *v.* Bransby the bill was dismissed on the merits, and that the case is, therefore, no authority for the proposition that a will cannot be set aside in equity for fraud. That, however (observed Lord Lyndhurst, in Allen *v.* MacPherson, 1 Phill. C. C. 146), has not been the understanding of the profession, and Lord Hardwicke, who probably was acquainted with the history of the case, expressly states in Barnesley *v.* Powell, that it was decided on the question of jurisdiction. And Lord Eldon, in Ex parte Fearon, 5 Ves. 633, 647, observed that it was determined in Kerrich *v.* Bransby, that the court of chancery could not take any cognizance of wills of personal estate as to matter of fraud.

(*e*) 1 H. L. Cas. 191. Lords Lyndhurst, Brougham, and Campbell were of opinion that the decree should be affirmed, *dissentientibus* Lords Cottenham C. and Langdale M. R. Lord Lyndhurst, in the course of delivering his opinion, observed as to the case mentioned by Gilbert C. B. in Marriot *v.* Marriot (*ante*, 552, note (*s*)), of the drawer of the will fraudulently inserting his own name instead of that of the legatee, that if probate were refused in such a case, on account of the fraud, the real legatee would lose his legacy. And his lordship added, that he thought it would be found, on examining the cases

It may properly be remarked, in this place, that where a person had acted under a probate, and admitted facts material to its validity, a court of equity may interfere by injunction, and prevent such person from proceeding further to contravert the will in the ecclesiastical court. (*f*)

Further, a court of equity, by reason of its jurisdiction as a court of construction, may, under particular circumstances, so construe an instrument, of which probate has been obtained, as to render it ineffectual. Thus in Gawler *v.* Standerwick, (*g*) a paper was proved in the spiritual court as a codicil of the testator, which was signed by the executors and others, and purported to be an acknowledgment of what *they understood* to be the will of the testator, when he was unable to speak, in favor of certain legatees; and a bill having been filed in equity, a question was raised * whether they were entitled to their legacies under this paper proved as a codicil. Sir Lloyd Kenyon, master of the rolls, said that, as it had been proved in the spiritual court, he was bound to receive it as a testamentary paper; but having so done, *the court of equity was to construe it.* Now the effect of this codicil was only that the parties *understood* it to be the will of the testator that the asserted legatees should have legacies, and the heir promised to perform this; but the court could not convert the promise of the heir into the will of the testator; and his honor therefore thought that this paper, though testamentary, yet operated nothing.

Again, in Walsh *v.* Gladstone, (*h*) the testator had drawn two

in which the house of lords had declared a legatee or executor to be a trustee for other persons, that they have been either questions of construction, or cases in which the party had been named as trustee, or had engaged to take as such, or in which the court of probate could afford no adequate or proper remedy. [The case of Allen *v.* Macpherson was followed in Meluish *v.* Milton, L. R. 3 Ch. D. 27, where it appeared that a testator made a will giving all his property to his wife, and appointing her sole executrix. She proved the will. The heir-at-law and sole next of kin filed a bill to have her declared a trustee of the property for him, on the ground that she had fraudulently concealed from the testator the fact that she was not his lawful wife, as she had a former husband living; and it was held, that the court of chancery had no jurisdiction to entertain the case, which was within the exclusive jurisdiction of the court of probate; and that the case was not distinguished from Allen *v.* Macpherson by the fact that the lady had not asked the testator to make a will in her favor.]

(*f*) Sheffield *v.* Buckinghamshire, 1 Atk. 628; S. C. 3 Bro. P. C. 148; 2 Rop. Leg. 689, 3d ed.; Gascoyne *v.* Chandler, 3 Swanst. 418, note.

(*g*) 2 Cox, 16.

(*h*) 13 Sim. 261.

checks on his banker in favor of two of his servants, with a direction that the checks should be presented after his death. About a year afterwards he made a formal will, in which, among other bequests, he gave an annuity to each of the two servants, and the residue of his personal estate to certain other persons, and revoked all former wills. After his death, all the three instruments were admitted to probate as constituting, together, his last will. And it was held by Shadwell V. C. that, although he was bound, by the decision of the ecclesiastical court, to consider the two checks as part of the will, yet that nothing which that court had done, in the way of construction, would bind the court of chancery; and his honor proceeded to state that his opinion, sitting in the court of construction, was that the bequests made by the checks were revoked by the will; and he decreed accordingly. This decision was afterwards affirmed by Lord Lyndhurst C., (*i*) who considered the question as one of construction, which it was within the competence of the court of chancery to determine, notwithstanding the probate granted by the ecclesiastical court; and his lordship relied on the case above stated, of Gawler *v.* Standerwick, and also that of Campbell *v.* Lord Radnor, (*k*) * in which it was declared that the first codicil, which had been admitted to probate, was to be considered as virtually revoked by the second. (*l*)

Accordingly in Thornton *v.* Curling, (*m*) Lord Eldon C. expressed his opinion that if a British subject domiciled in a foreign country, by his will appoints an executor, but makes a disposition of his personal property, which, though valid by the laws of England, is invalid by the laws of that foreign country, the court of chancery is at liberty, notwithstanding probate may have been granted in this country, to hold that the will has no operation beyond appointing the executor. And his lordship observed, that although, as the ecclesiastical court had granted probate of the will, he must take it to be a will, yet what part of the contents of that will was effectual, and in what way the court should determine on the property, was quite a different thing. (*n*)

So in Campbell *v.* Beaufoy, (*o*) a plea by an executor who has proved a will, that "the testator was at the date of his will, and

(*i*) 1 Phill. C. C. 294.
(*k*) 1 Bro. C. C. 171.
(*l*) See *post*, pt. III. bk. III. ch. II. § VII.
(*m*) 8 Sim. 310.
(*n*) See *ante*, 367; [Hegarty's Appeal, 75 Penn. St. 514 *et seq.*]
(*o*) Johns. 320.

also at the time of his death, domiciled in France, and that all the bequests of the personal estate affected to be made by it are by the law of France null and void," was held by Wood V. C. to be a good plea in bar to a suit by a legatee under the will for payment of his legacy and for administration of the personal estate of the testator.

So in Loftus *v.* Maw, (*p*) which there has already been occasion to state, a revoking codicil, though it had been admitted to probate, was not allowed under the circumstances to have any revoking effect. (*q*)

An executorship, &c. may be denied in pleading.

It must, moreover, be observed that an executorship or administratorship may be denied in pleading, by a plea of *ne unques executor* or *administrator*, notwithstanding *profert* of the probate or letters of administration; and it was held *that this traverse, upon issue joined, must be tried by the country (on which issue the probate or letters will be conclusive evidence), and not by the certificate of the ordinary, as in cases of excommunication. (*r*) And from its having been thus established that a probate is not conclusive in *pleading*, probably, grew the doubt which once existed, whether it was conclusive in *evidence*. (*s*)

Cases where probate, &c. is not conclusive.

Under the law before the passing of the court of probate act (1857), the jurisdiction of the ecclesiastical court was confined to goods and chattels; it had no power of administration over other property; and therefore its judgments would bind those only who claim an interest in personal property. Hence the probate was not conclusive evidence, or even, it should seem, admissible evidence, that the instrument was a will, so as to pass copyhold or customary estate, (*t*) or so as to operate as a sufficient execution of a power to charge land. (*u*)

(*p*) 3 Giff. 592.

(*q*) *Ante*, 126. See, also, the observations of Lord Cranworth and Lord Wensleydale in Whicker *v.* Hume, 7 H. L. Cas. 156, 165.

(*r*) Graysbrook *v.* Fox, Plowd. 282; Abbot of Strata Mercella's case, 9 Co. 31 *a*; Hensloe's case, 9 Co. 40 *b*; Anon. 1 Show. 408. But a traverse that a testator made a will, by which A. B. was appointed executor, is bad. See Allen *v.* Dundas, 3 T. R. 130, 131, overruling an Anonymous case in Com. 150.

(*s*) Hargrave's Law Tracts, 459. [See Griffith *v.* Wright, 18 Geo. 173.]

(*t*) Hume *v.* Rundell, Madd. & Geld. 339; Jervoise *v.* Duke of Northumberland, 1 Jac. & W. 570; Archer *v.* Slater, 11 Sim. 507; but see Cary *v.* Askew, 1 Cox, 244; Doe *v.* Danvers, 7 East, 299.

(*u*) Hume *v.* Rundell, Madd. & Geld. 331; [6 Madd. 331.]

Again, it has already appeared, (*v*) that to establish in evidence the will of a married woman made in execution of a power, probate of it in the court of probate is first necessary, in order to confirm judicially its testamentary nature. But formerly the production of such a probate would not alone have been sufficient to induce a court of equity to act upon it; for there were other special circumstances which might have been required to give the instrument effect as a valid appointment, viz, attestation, sealing, &c. with which circumstances the temporal courts did not trust the judgment * of the spiritual court. The witnesses, therefore, to these facts, must have been examined in chief to prove that the will was the wife's act, &c.; and if an attestation were not required by the power, still her signature must have been proved. (*w*) But by the 10th section of the new wills act (see preface, xii.) all such additional varieties in the execution of testamentary appointments have, in effect, been abolished.

Further, as the court of probate had no jurisdiction to authenticate a will, as far as it relates to real estate, it was held that the probate was no evidence at all of the validity or contents of a will, as to such property, (*x*) not even when the original will was lost, (*y*) except indeed as a mere copy. So on an indictment for forging a will, probate of that will unrepealed is not conclusive evidence of its validity so as to be a bar to the prosecution. (*z*)

It must also be observed, that although the sentences of the court of probate are conclusive evidence of the right directly determined, yet they are not so of any collateral matter, which may possibly be collected or inferred from the sentence by argument. (*a*) Therefore letters of administration which have been granted to a

(*v*) *Ante*, 56, 391.

(*w*) Rich *v.* Cockell, 9 Ves. 376; 2 Rop. Husb. & Wife, 189, 2d ed. See, also, Morgan *v.* Annis, 3 De G. & Sm. 461, where Knight Bruce V. C. said he had no doubt the court of chancery had jurisdiction to decide on the validity of the execution of a testamentary power over personalty, with reference to the donee's state of mind at the time of the alleged execution.

(*x*) Bull. N. P. 245. See Doe *v.* Ormerod, 1 Moo. & Rob. 466. [See *ante*, 549, note (*d*).]

(*y*) Doe *v.* Calvert, 2 Campb. 389; [Carroll *v.* Carroll, 60 N. Y. 125.]

(*z*) Rex *v.* Buttery, Russ. & Ry. C. C. R. 342; Rex *v.* Gibson, Ib. 343, note (*a*); [Gray J. in Waters *v.* Stickney, 12 Allen, 4.] It is said in Rex *v.* Vincent, 1 Stra. 481, that the probate was admitted as conclusive evidence on a similar prosecution; but that case must now be considered as overruled.

(*a*) Blackham's case, 1 Salk. 290; [Tebbetts *v.* Tilton, 31 N. H. 273, 284 *et seq.*]

person as administrator of the effects of A. B. deceased, are not *primâ facie* evidence of A. B.'s death. (*b*)

* Likewise, though no evidence was receivable to impeach the probate or the letters of administration, being the judicial acts of a court having competent authority, yet it might be proved that the court which granted them had no jurisdiction, and that therefore their proceedings were a nullity. (*c*) Thus it might, under the

(*b*) Thompson *v.* Donaldson, 3 Esp. N. P. C. 63; Moons *v.* De Bernales, 1 Russ. C. C. 301; [Mutual Benefit Life Ins. Co. *v.* Tisdale, Sup. Ct. U. S. Oct. T. 1875; 15 Am. Law Reg. N. S. 412. The probate court, in granting letters of administration, does not adjudicate that the person is dead, but that the letters shall be granted to the applicant. Mutual Benefit Life Ins. Co. *v.* Tisdale, *supra;* Carroll *v.* Carroll, 60 N. Y. 121. See Newman *v.* Jenkins, 10 Pick. 515; Helm *v.* Smith, 2 Sm. & M. 403. So that in a suit by an executor or administrator, the letters testamentary are admissible in evidence and are conclusive of his right to sue; but such letters, in an action between strangers, are not admissible to prove the death of the testator or intestate. Thus, in an action upon a policy of insurance on the husband's life in favor of his wife, letters of administration issued to her upon his estate are not evidence of the husband's death. Mutual Benefit Life Ins. Co. *v.* Tisdale, *supra.* See, further, Vanderpool *v.* Van Valkenberg, 6 N. Y. 190; Collins *v.* Ross, 2 Paige, 396]; (but see French *v.* French, Dick. 268, where Lord Hardwicke, under particular circumstances, admitted the probate as proof of the testator's death. [See, also, Tisdale *v.* Conn. Life Ins. Co. 26 Iowa, 177; S. C. 28 Iowa, 12; Jeffers *v.* Radcliff, 10 N. H. 242, 245.]) However, if the plaintiff sues as executor or administrator, and there is no plea of *ne unques executor* or *administrator*, the plaintiff's right to sue is admitted, and therefore no evidence can be required of the death of the testator or intestate. Lloyd *v.* Finlayson, 2 Esp. 564. [So held in Newman *v.* Jenkins, 10 Pick. 515.]

(*c*) 3 T. R. 130, [and cases in note (*f*) below. Cutts *v.* Haskins, 9 Mass. 543; Wales *v.* Willard, 2 Mass. 120; Holyoke *v.* Haskins, 9 Pick. 259; Holyoke *v.* Haskins, 5 Pick. 20; Sumner *v.* Parker, 7 Mass. 83; Sigourney *v.* Sibley, 21 Pick. 101; Smith *v.* Rice, 11 Mass. 507; Emery *v.* Hildreth, 2 Gray, 231. But by statute in Massachusetts the jurisdiction assumed in any case by the court, so far as it depends on the place of residence of a person, shall not be contested in any suit or proceeding, except on appeal in the original case, or when the want of jurisdiction appears on the same record. Genl. Sts. c. 117, § 4. Such is the law of Maine. Thus, where administration was granted upon a representation that the deceased at the time of her death was a citizen of Maine, and the record stated that this fact was made fully to appear, and there was no suggestion of fraud, and no appeal from the decree of the probate court granting the administration, and the settlement of the estate was proceeded with till the administrator had settled his fourth and final account, and had applied for an order of final distribution, it was held that the domicil of the deceased, at the time of her death, must be regarded as conclusively settled, not only for the purpose of giving jurisdiction to the probate court, but also for the purpose of distributing the estate; and that it was not competent to show that the domicil of the deceased, at the time of her death, was in Ohio, and not in Maine, either to show want of jurisdiction in the probate court, or to affect the distribution of the estate. Record *v.* Howard, 58 Maine, 225. The reasoning of Walton J. in this case is conclusive upon the wisdom of the rule. See *ante*, 550, note (*q*[1]).]

old law, be shown upon a plea of *ne unques executor* that the deceased had *bona notabilia* in divers dioceses; and that consequently the bishop or other inferior judge had no jurisdiction to grant probate or administration; (*d*) for this confessed and avoided, and did not falsify the seal of the ordinary. (*e*) So it may be proved that the supposed testator or intestate is alive; for in such case the court of probate can have no jurisdiction, nor their sentence any effect. (*f*) And it may be shown that the seal attached to the supposed probate has been forged; for that does not impeach the judgment of the court of probate; (*g*) or that the letters testamentary have been revoked; for this is in affirmance of its proceedings. (*h*)

Alterations in the law as to the effect of probate as to real estate.

Stat. 20 & 21 Vict. c. 71, s. 61. Where a will affecting real estate is proved in solemn form, or is the subject of a contentious proceeding, the heir and persons interested in the real estate to be cited.

Very material alterations of some of the doctrines above stated have been introduced by the court of probate act, 1857 (20 & 21 Vict. c. 77).

By sect. 61 of that statute, "Where proceedings are taken under this act for proving a will in solemn form, or for revoking a probate of a will, on the ground of the invalidity thereof, or where in any other contentious cause or matter under this act the validity of a will is disputed, unless in the several cases aforesaid the will affects only personal estate, the heir-at-law, devisees, and other persons * having or pretending interest in the real estate affected by the will shall, subject to the provisions of this act, and to the rules and orders under this act, be cited to see proceedings, or otherwise summoned in like manner as the next of kin, or others having or pretending interest in the personal estate affected by a will, should be cited or summoned and may be permitted to become parties, or intervene for their respective interests

(*d*) Marriot *v.* Marriot, 1 Stra. 671; Bull. N. P. 247. [So a decree of the judge of probate appointing an administrator in Massachusetts, in a case where the deceased had no domicil and left no estate subject to administration within the state, was held to be void for want of jurisdiction. Crosby *v.* Leavitt, 4 Allen, 410, 411.]

(*e*) 1 Stra. 671; 1 Saund. 275 *a*, note to Rex *v.* Sutton.

(*f*) 3 T. R. 130; [Tilghman C. J. in Peebles's Appeal, 15 Serg. & R. 42; King *v.* Bullock, 9 Dana, 41; Payne's Will, 4 Monr. 422; Moore *v.* Tanner, 5 Monr. 42; Marshall C. J. in Griffith *v.* Frazier, 8 Cranch, 9, 24; *ante*, 409, note (*a*); *post*, 575, note (o[1]), 586, note (*a*); Jochumsen *v.* Suffolk Savings Bank, 3 Allen, 87; Hooper *v.* Stewart, 25 Ala. 408. But see Roderigas *v.* East River Savings Bank, 13 Albany Law Jonrn. 42, Jan. 15, 1876.]

(*g*) Marriot *v.* Marriot, 1 Stra. 671.

(*h*) Bull. N. P. 247.

in such real estate, subject to such rules and orders, and to the discretion of the court." (*i*)

And by sect. 62, "Where probate of such will is granted, after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall inure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of her majesty's court of probate, shall in all courts, and in all suits and proceedings affecting real estate of whatever tenure (save proceedings by way of appeal under this act, or for the revocation of such probate or administration), be received as conclusive evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate; (*i*[1]) and where probate is refused or revoked on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this act, such decree or order shall inure for the benefit of the heir-at-law or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in * any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders." (*k*)

Sect. 62. Where the will is proved in solemn form, or its validity otherwise decided on, the decree of the court to be binding on the persons interested in the real estate.

(*i*) The affidavit on which an application to cite the persons interested in the real estate affected by a will in dispute is based, must state not only that it disposes of real estate, but that it was executed according to the law of England, and at a date since the wills act came into operation. Campbell *v.* Lucy, L. R. 2 P. & D. 209. See, also, Peacock *v.* Lowe, L. R. 1 P. & D. 311. ["In proceedings of this nature, as the probate of wills, granting titles of administration, &c., the judge of probate having given that public notice which the law requires, the mere fact that some of the heirs are infants, idiots, or insane, will not defeat the probate of the will, or the granting of titles of administration." Dewey J. in Parker *v.* Parker, 11 Cush. 524.]

(*i*[1]) [In Massachusetts and many other of the American States, the jurisdiction of the courts of probate extends to wills of real as well as of personal estate, and their decrees are equally conclusive of the validity of wills affecting either alone or both combined. Parker *v.* Parker, 11 Cush. 525, 526; 1 Dan. Ch. Pr. (4th Am. ed.) 874; *ante*, 549, note (*d*); Boyse *v.* Rossborough, 3 De G., M. & G. 817, note (1); *ante*, 549, note (*d*).]

(*k*) This clause, as likewise the 61st section, *ante* 563, and sections 63 and 64, *infra*, are not applicable to wills executed before the wills act, or which in whole or in part have been executed not in accordance with the requirements of the wills act. Campbell *v.* Lucy, L. R. 2 P. & D. 209. See, also, as to the construction of this and the

Sect. 63. Heir in certain cases not to be cited, and where not cited not to be affected by probate.

And by sect. 63, "Nothing herein contained shall make it necessary to cite the heir-at-law or other persons having or pretending interest in the real estate of a deceased person, unless it is shown to the court and the court is satisfied, that the deceased was, at the time of his decease, seised of or entitled to or had power to appoint by will some real estate beneficially, or in any case where the will propounded, or of which the validity is in question, would not in the opinion of the court, though established as to personalty, affect real estate; but in every such case, and in any other case in which the court may, with reference to the circumstances of the property of the deceased or otherwise think fit, the court may proceed without citing the heir or other persons interested in the real estate; provided, that the probate, decree, or order of the court shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party." (*l*)

Sect. 64. Probate or office copy to be evidence of the will in suits concerning real estate, save where the validity of the will is put in issue.

And by sect. 64, "In any action at law or suit in equity, where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to * establish in proof such devise or other testamentary disposition, to give to the opposite party, ten days, at least, before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence, as proof of the devise or other testamentary disposition, the probate of the said will or the letters of administration with the will annexed, or a copy thereof stamped with any seal of the court of probate; and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will and of its validity and contents, notwithstanding the same may not have been proved in solemn

two following sections, Barraclough *v.* Greenhow, L. R. 2 Q. B. 612, reversing the decision of the queen's bench, 7 B. & S. 178.

(*l*) See *ante*, 342, and the rule 78 there stated, as to obtaining the requisite order authorizing the citation of the heir, &c. See, also, the cases cited, Ib. note (*t*), as to the construction of the rule.

form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition."

It will be observed, that unless the will has been proved in solemn form and its validity declared by decree or order, so as to fall within the 62d section, it will still be necessary to produce the original will, if notice of disputing the validity be given under the 64th section. But such notice will be given at the peril of having to pay the costs of the production and proof of the will. (*m*)

Sect. 15. As to costs of proof of will.

For by sect. 65 it is enacted, that "In every case in which, in any such action or suit, the original will shall be produced and proved, it shall be lawful for the court or judge before whom such evidence shall be given to direct by which of the parties the costs thereof shall be paid."

How far the original will may be referred to, in order to correct inaccuracies in the probate.

In L'Fit *v.* L'Batt, (*n*) there was a French will, the original whereof was proved in French, and, under it in the same probate, the will was translated into English, but it * appeared to be falsely translated; upon which it was objected, that the translation being part of the probate, and allowed in the spiritual court, it must bind; and the application must be to the spiritual court to correct the mistakes in the translation, which until then must be conclusive. But, by the master of the rolls, (*o*) nothing but the original is part of the probate, neither hath the spiritual court power to make any translation; and supposing the original will was in Latin (as was formerly very usual) and there should happen to be a plain mistake in the translation of the Latin into English, surely the court might determine according to what the translation ought to be. And so it was done in that case.

In Havergal *v.* Harrison, (*p*) where the words in the probate were "brother and sister," and it was suggested that in the original will the words were "brothers and sister," Lord Langdale M. R. said he was bound by the probate, but if, on the production of the original will, a doubt existed as to the accuracy of the probate copy, the court would give an opportunity to the parties

(*m*) But see Barraclough *v.* Greenhough, L. R. 2 Q. B. 612.

(*n*) 1 P. Wms. 526.

(*o*) Sir Joseph Jekyll.

(*p*) 7 Beav. 49.

to apply to the ecclesiastical court to set it right. Accordingly, in Oppenheim *v.* Henry, (*q*) *coram* Wood V. C., where the probate copy of a will was in these words: "I release my sons from all claims due to me by bonds *on* moneys advanced to them by me," and his honor was desired to look at the original will, in order to ascertain whether the word written "*on*" in the probate was not "*or*" in the will, the learned judge declined to do so, and said that looking at the will to ascertain the alleged inaccuracy of the probate was quite different from the case of a question arising on the punctuation of the will, or on the introduction of a capital letter, or other mark indicating where a sentence was intended to begin, and which might affect its sense. The law seems not to be settled on the point last suggested by his * honor, viz, whether, and in what cases, the court will look at the will itself in order to derive aid in its construction from the punctuation, or manner of writing, or from other appearances on the face of it. In Compton *v.* Bloxham, (*r*) *coram* Knight Bruce V. C., his honor relied, in construing a will, on the circumstance that certain words began an entirely new sentence; and he begged to have it observed, that although it was a will of personalty, he had sent for and examined the original will, and had been influenced by it in his construction. Again, in Shea *v.* Boschetti, (*s*) where a *fac-simile* probate of a will, with certain passages of it struck through, had been granted, Sir J. Romilly M. R. expressed his opinion, that, whether the court of probate grants a *fac-simile* probate or not, the court of chancery is bound to look at anything in the original will itself which may aid and assist it in coming to a correct conclusion as to the construction to be put upon the contents of the will. So in Manning *v.* Purcell, (*t*) it appears that the lord justices, in construing a will of personalty, ordered the original will to be produced, and had regard to certain erasures appearing therein, but which had been omitted in the probate, notwithstanding that counsel objected that the probate copy could alone be looked at. But in Gann *v.* Gregory, (*u*) *coram* Lord Cranworth C. where the ecclesiastical court had granted a *fac-simile* probate of a will, made after the wills act came into operation, with cross lines drawn in ink over the bequests of certain legacies (the de-

(*q*) 9 Hare, 802, note (*b*) to Walker *v.* Tippin.
(*r*) 2 Coll. 201.
(*s*) 18 Beav. 321.
(*t*) 7 De G., M. & G. 55.
(*u*) 3 De G., M. & G. 777.

cree in the prerogative court having been pronounced for the will as contained in the document, "with the several alterations, interlineations, and erasures, appearing therein"); and it was suggested to his lordship, that if the original will were looked at, it would be seen that the pencil alterations made in the legacies contained under the cross lines must have been made after those lines were drawn, and it might * thence be inferred that the testator meant the legacies to remain part of the will; his lordship said that he was not one of those who thought it was competent for the court of chancery on every occasion to look at the original will, though he was aware Lord Eldon did it in some instances, but in each there were particular circumstances. (*u*[1]) And his lordship proceeded to express his opinion, that as probate had been granted of the will, with the alterations in it, it must be taken as conclusively settled by the ecclesiastical court that the

(*u*[1]) [To *determine the construction*, the original will, both of real and personal estate, may be looked at. It was said, indeed, by an eminent judge (Sir William Grant in Sandford *v.* Raikes, 1 Mer. 651), that his decision on the construction of the will before him could not depend on the grammatical skill of the writer, in the position of characters expressive of a parenthesis; that it was from the words and from the context, not from the punctuation, that the sense must be collected, and there are probably few imaginable cases in which punctuation could exercise a very important influence upon the construction. See per Sir E. Sugden, in Heron *v.* Stokes, 2 Dr. & War. 98. But it seems a little unreasonable to refuse all effect to "grammatical skill," when employed in fixing a position for parenthetical characters, when that same skill is the foundation of all testamentary construction. Certainly, in recent times, no hesitation has been felt by the courts in following what is stated to have been Lord Eldon's practice, viz, in examining original wills "with a view to see whether anything there appearing — as, for instance, the mode in which it was written, how dashed and stopped — could guide them in the true construction to be put upon it." Per Lord Justice Knight Bruce in Manning *v.* Purcell, 24 L. J. Ch. 523, note; 7 De G., M. & G. 55. See, also, Child *v.* Elsworth, 2 De G., M. & G. 683; Gauntlett *v.* Carter, 17 Beav. 590; Milsome *v.* Long, 3 Jur. N. S. 1073; Oppenheim *v.* Henry, 9 Hare, 802, note; Arcularius *v.* Sweet, 25 Barb. 406; Yates *v.* Thompson, 3 Cl. & Fin. 569. It is true that Lord Cranworth expressed an opinion as stated in the text, that it was not competent for the court of chancery (*i. e.* the court of construction) on every occasion to look at the original will. But that was in a case where the object proposed was by looking at an original will of personal property, virtually to procure a reversal of the decision come to by the ecclesiastical courts with respect to the form of the probate copy in question. In Langston *v.* Langston, 2 Cl. & Fin. 194, 221, 240, Lord Brougham, in the house of lords, on a question of construction appears to have called for and examined the original draft of the will, to see if there had not been an error in copying; although his lordship said he was aware, as a lawyer, that he had no right to look at it. See the remarks upon this proceeding, in 1 Jarman Wills (3d Eng. ed.), 382, note (*h*); and in Grant *v.* Grant, L. R. 5 C. P. 736, per Mr. Justice Blackburn.]

will was at its execution in its present state; that is, that the testator executed the instrument with the lines drawn over it, meaning thereby, that the legacies were not to stand part of the will. Again, in Taylor *v.* Richardson, (*v*) *coram* Kindersley V.C., where the probate had been delivered out with blanks in the course of the will, and it was suggested that it might be construed as if the words ran continuously, his honor observed, that the ecclesiastical court said that the will was an instrument in such and such words, and in certain places such and such blanks, and that the court of chancery was bound to look at them as part of the will.

On the whole, it may, perhaps, be doubted whether, in strictness, the court of chancery has not gone beyond its legitimate means for construing wills of personalty even in the instances above mentioned, where it has sought aid from appearances in the will itself not to be found in the probate, and whether the more proper cause is not to apply to the ecclesiastical court for a corrected *fac-simile* probate, if it be desired to rely on stops or capital letters, or any marks which, in truth, are apparent in the will, though not in the probate. For until the court of probate has sanctioned them as legal parts of the will, *non constat*, that they have not been introduced by a stranger, (*v*[1]) or by the testator himself after the will was executed, or otherwise, so as not properly to form a part of it. And this can only be decided * in the ecclesiastical court, which is bound to exclude from its probate, whether a *fac-simile* probate or not, all such appearances on the face of the will as do not legitimately belong to it as a testamentary instrument. (*w*)

(*v*) 2 Drew. 16.

(*v*[1]) [As to alterations made in wills by parties interested and by strangers, Malin *v.* Malin, 1 Wend. 625; Jackson *v.* Malin, 15 John. 297; 2 Pothier, Evans, 179–181.]

(*w*) See *ante*, 331, *fac-simile* probates.

* CHAPTER THE SECOND.

OF THE REVOCATION OF PROBATE AND LETTERS OF ADMINISTRATION.

Court of probate act, s. 75. After grant of administration no one to have power to sue, &c. as executor until the grant is recalled or revoked.

By the court of probate act, 21 & 22 Vict. c. 77, s. 75, "After any grant of administration, no person shall have power to sue or prosecute any suit or otherwise act (*a*) as executor of the deceased, as to the personal estate comprised in or affected by such grant of administration, until such administration shall have been recalled or revoked." (*a*[1])

A probate or a grant of letters of administration may be revoked in two ways: 1. On a suit by citation. 2. On an appeal to a higher tribunal to reverse the sentence by which they are granted. (*a*[2])

Revocation upon citation.

A revocation by citation usually is, when the executor or administrator is cited before the judge by whom the probate or letters of administration were originally granted, to bring in the same, and to show cause why they should not be revoked. (*a*[3])

(*a*) When administration has been granted, and another person intermeddles with the goods, this shall not make him executor *de son tort*, by construction of law. *Ante*, 261.

(*a*[1]) [White *v.* Brown, 7 T. B. Mon. 446. As to the right and freedom of appeal from a judge of probate, in New Hampshire, see Moulton's Petition, 50 N. H. 532, 537.]

(*a*[2]) [Morgan *v.* Dodge, 44 N. H. 258.]

(*a*[3]) [In the Matter of Paige, 62 Barb. 476. This subject was elaborately considered in Waters *v.* Stickney, 12 Allen, 1, in which it was held that the probate court, after admitting a will to probate, and after the time for appealing from the decree has passed, may admit to probate a codicil to the same will, written upon the back of the same leaf upon which the will was written, if such codicil escaped attention, and was not passed upon at the time of the probate of the original will. After a thorough review of the cases, Gray J. said: "In the face of these authorities it is impossible to deny the power of a court of probate to approve a subsequent will or codicil, after admitting to probate an earlier will by a decree the time of appealing from which is past; or to correct errors arising out of fraud or mistake in its own decrees. This power does not make the decree of a court of probate less conclusive in any other court, or in any way im

An appeal under the old law was to be effected by demanding letters missive, called *Apostoli*, from the judge *a quo*, to the judge *ad quem*. (*b*)

Revocation on appeal:

The manner and form of appeals was regulated by several statutes. By stat. 24 Hen. 8, c. 12, s. 5 (repealed by 1 & 2 Ph. & M. c. 8, and revived by stat. 1 Eliz. c. 1), the appeal, where the cause was commenced before the archdeacon, lay to the bishop; and by sect. 6, where the cause was commenced before the bishop, to the archbishop of the *province; and by sect. 7, where the cause was commenced before the archdeacon of the archbishop to the court of arches, (*c*) and from the court of arches to the archbishop. By statute 25 Hen. 8, c. 19, an appeal was given from the archbishop to certain commissioners.

Manner and form of appeals, stat. 24 Hen. 8.

Stat. 25 Hen. 8, c. 19. Appeal to the delegates.

These commissioners were commonly called delegates (accord-

pair the probate jurisdiction, but renders that jurisdiction more complete and effectual, and by enabling a court of probate to correct mistakes and supply defects in its own decrees, better entitles them to be deemed conclusive upon other courts. There is no reason to apprehend that such a power may be unjustly exercised. It is vested in the same court which is intrusted with the original jurisdiction over all probates and administrations. No decree admitting a later instrument to probate, or modifying or revoking a probate already granted can be made without notice to all parties interested. Every party aggrieved by the action of the probate court has the right of appeal to this court; and an application of this nature, where one will has already been proved, would never be granted except upon the clearest evidence. The new decree would not necessarily avoid payments made or acts done under the old decree while it remained unrevoked. Allen *v.* Dundas, 3 T. R. 125; Peebles's Appeal, 15 Serg. & R. 39; Kittredge *v.* Folson, 8 N. H. 98; Stone *v.* Peasley's Estate, 28 Vt. 720." Waters *v.* Stickney, 12 Allen, 15.]

(*b*) Gibs. Cod. 1035.

(*c*) Com. Dig. tit. Prerogative, D. 13, citing Heath *v.* Atworth, 2 Dyer, 240 *b*.

The person who administers justice in the court of arches, is the official principal of the archbishop: who was called *officialis de arcubus*, and the court itself *curia de arcubus*, from its being anciently held in the *Ecclesia B. Mariæ de Arcubus*, or Bow-church, by reason of the archbishop's having ordinary jurisdiction in that place, as the chief of his peculiars in London, and being the church where the dean of those peculiars (commonly called the dean of the arches) held his court. And because these two courts were held in the same place, and the dean of the arches was usually substituted in the absence of the official while the offices remained in two persons, and the offices themselves have in many instances been united in one and the same person, as they now remain; by these means a wrong notion hath obtained, that it is the dean of the arches, as such, who hath jurisdiction throughout the province of Canterbury: whereas the jurisdiction of that office is limited to the thirteen peculiars of the archbishop in the city of London; and the jurisdiction throughout the province, for receiving of appeals, from the sentences of inferior ecclesiastical courts and the like, belonged to him only as official principal. Gibs. Cod. 1004.

ing to the language of the civil and canon law), on account of the special commission or delegation they received from the king. (*d*)

* No appeal lay from a sentence in a court of delegates; not even to the lords in parliament. (*e*) But on a petition to the king in council, a commission of review might be granted under the great seal, appointing new judges, or adding more to the former judges, to revise, review, and rehear the cause; (*f*) for the king was not restrained by the statutes 24 & 25 Hen. 8, and the pope, as supreme head, whose authority is now annexed to the crown by stat. 26 Hen. 8, c. 1, and 1 Eliz. c. 1, had power to do it. (*g*)

Commission of review.

But by stat. 3 & 4 W. 4, c. 92, the statute of 25 Hen. 8 was repealed, and the power of the court of delegates transferred to the judicial committee of the privy council.

Stat. 3 & 4 W. 4, c. 92. Appeal to judicial committee.

(*d*) The king might appoint whom he pleased as delegates. Com. Dig. Prerogative, D. 14. And in the exercise of its discretion the court of chancery would either grant a full commission of delegates, *i. e.* to lords spiritual and temporal, judges of the common law and civilians, or one to judges and civilians only. When the jurisdiction of bishops was in controversy, or a question depending that concerned the canon and ecclesiastical law, a full commission was granted. Where it was altogether a matter of law, as a question on a will, a commission issued to judges and civilians only. Ex parte Hellier, 3 Atk. 798. If any of the judges were in the commission, the place of assembly was usually appointed by one of them at Sergeants' Inn. Com. Dig. Prerogative, D. 14. If the delegates were equally divided in opinion, a commission of adjuncts might issue to add others to the judges delegate. Emerton *v.* Emerton, T. Raym. 475; 4 Burr. 2254. The proceedings of the delegates were according to the rules of the civil and ecclesiastical law. Vanbrough *v.* Cock, 1 Chan. Cas. 201, by the lord keeper. And on that account it had been particularly adjudged, that a suit there did not abate by the death of the parties; this being the course of the ecclesiastical courts. 1 Burn E. L. 61, 62; Com. Dig. Prerogative, D. 14. The delegates could not fine or imprison; 4 Inst. 334; and whether they had power to excommunicate has been doubted; Stevenson *v.* Wood, 2 Bulst. 4; though it seems to have been exercised in practice. 2 Roll. Abr. 223, Prerogative, G. pl. 3; Wood's Inst. 505. The court of delegates, it should seem, had no original jurisdiction, but was only to review and to reverse, or affirm, the sentence appealed from. Therefore, the better opinion appears to be, that they could not grant letters of administration or probate. Stevenson *v.* Wood, 2 Bulst. 4; Reeve *v.* Denny, Latch, 85; *contra*, 2 Roll. Abr. 223, Prerogative, G. pl. 4; and see Com. Dig. Administrator, B. 2. It is said in Toller, p. 75, that where probate granted by the special court is affirmed on an appeal to the arches or delegates, the usage is to send the cause back. But when the first sentence is reversed, the court below shall be ousted of its jurisdiction, and the court which reverses it shall grant probate *de novo*.

(*e*) Saul *v.* Wilson, 2 Vern. 118; Cottington's case, 2 Swanst. 326, note to Kennedy *v.* Lord Cassilis.

(*f*) 1 Oughton, tit. 302, sect. 2, note (*e*), pl. 5.

(*g*) 4 Inst. 341; Gervis *v.* Hallewell, Cro. Eliz. 571.

And now by the court of probate act, 1857 (20 & 21 Vict. c. 77), the appellate jurisdiction in matters and causes * testamentary is transferred from the privy council to the house of lords.

Court of probate act, s. 39. Appeal from the court of probate to the house of lords.

For by the 39th section it is enacted, that "Any person considering himself aggrieved by any final or interlocutory decree or order of the court of probate may appeal therefrom to the house of lords, (g^1) provided always, that no appeal from any interlocutory order of the court of probate shall be made without leave of the court of probate first obtained, but on the hearing of an appeal from any final decree all interlocutory orders complained of shall be considered as under appeal as well as the final decree."

Rule 87.

By rule (made in 1862), "Contentious Business," No. 87, "Application for leave to appeal against any interlocutory decree or order of the court of probate must be made within a month of the delivery of the decree or order appealed from, or within such extended time as the judge shall direct, and notice of such application must be given to the party in whose favor such order or decree has been made, and filed in the registry." A form of notice is given, No. 29. (h)

Rule 88.

By rule 88, "Parties may proceed to carry into effect the decision of the court of probate, notwithstanding any notice of appeal, or of application for leave to appeal, unless the judge shall otherwise order; and the judge may order the execution of his decree or order to be suspended upon such terms as he sees fit." (h^1)

(g^1) ["In the hearing of a probate appeal, the first duty of the appellant is to establish his right to appeal. Ordinarily, unless this is made affirmatively to appear, the appeal will be dismissed without further examination." Barrows J. in Pettingill *v.* Pettingill, 60 Maine, 419. As to notice of appeal, see Sheldon *v.* Court of Probate of Johnston, 5 R. I. 436; Shaw *v.* Newell, 9 R. I. 111.]

(h) On referring to this form it will be found that it is not a notice of application for leave to appeal against an interlocutory order, but a notice that the party has already appealed against a final order.

(h^1) [The judgment of the appellate court is only upon the order, &c. from which the appeal is taken, and is certified to the probate court, where further proceedings are had, or are stopped, as if the decision had been made by that court. The appeal gives no jurisdiction to the appellate court to proceed in the settlement of an estate, but only to reconsider the order, &c. appealed from; and its judgment is to be carried into effect by the probate court, whose jurisdiction over the cause and the parties is not taken away by the appeal. Metcalf J. in Dunham *v.* Dunham, 16 Gray, 577, 578; Curtiss *v.* Beardsley, 15 Conn. 523; Small *v.* Haskins, 26 Vt. 218; Fletcher *v.* Fletcher, 29 Vt. 103.]

Second grant of administration or probate without revoking the first:

Some authorities maintain that if the ordinary committed administration to the wrong party, and then committed it to the right, the second grant was a repeal of the first, without any sentence of revocation; (*i*) but in other cases it has been held that the first is not avoided except by judicial sentence. (*j*) And the practice was, to call in and revoke * the first administration before the second was granted. (*k*) So, before revocation of a probate, the court will not grant a new one. (*l*)

If the bishop of a diocese, as he ought, had granted administration of the goods of an intestate, not having *bona notabilia*, to one, and the archbishop had granted administration of the same goods to another; in this case the effect of the first administration was suspended till the other was repealed by sentence. (*m*)

But after an administration by an archbishop, if the bishop to whom it belonged granted administration, and then the first administration was repealed, the administration granted by the bishop before the repeal was held to stand good. (*n*) And in all cases where the first administration is repealed, the second stands good, though granted after the grant of the first, and before the repeal of it. (*o*)

what are sufficient grounds for the revocation or reversal:

It remains to consider what are sufficient grounds for the revocation of a probate or letters of administration. (*o*[1])

It has already appeared, that where an executor ob-

(*i*) Newman *v.* Beaumond, Owen, 50; 4 Burn E. L. 293; Godolph. pt. 2, c. 31, s. 4; [Ex parte Barker, 2 Leigh, 719; Burnley *v.* Duke, 1 Rand. 108; Ragland *v.* King, 37 Ala. 8; Haynes *v.* Meeks, 20 Cal. 288; Grande *v.* Chaves, 15 Texas, 550; Petigru *v.* Ferguson, 6 Rich. Eq. 378; People *v.* White, 11 Ill. 341; M'Laurin *v.* Thompson, Dudley (S. Car.), 335.]

(*j*) Pratt *v.* Stocke, Cro. Eliz. 315; Toller, 126; [White *v.* Brown, 7 T. B. Mon. 446; Coltart *v.* Allen, 40 Ala. 155.]

(*k*) Toller, 126; [Petigru *v.* Ferguson, 6 Rich. Eq. 378.] But see In the Goods of Langley, 2 Robert. 407, where an administration granted to a woman, falsely swearing herself to be the wife of the deceased, was, after the necessary decrees had been taken out, and attempts made to serve her, but without success, declared to be null and void, and administration decreed to the lawful widow, notwithstanding the prior administration was outstanding. See, also, In the Goods of Sparke, 17 Jur. 812.

(*l*) Toller, 75; Rains *v.* Commissary of Canterbury, 7 Mod. 146, 147.

(*m*) Godolph. pt. 2, c. 31, s. 5.

(*n*) Sir J. Nedham's case, 8 Co. 135 *b*.

(*o*) Com. Dig. Administrator, B. 3, citing Charnock *v.* Currey, 2 Brownl. 119.

(*o*[1]) [See Emerson *v.* Bowers, 14 Barb. 658. Some of the grounds of revocation are: that the probate court has no jurisdiction, and consequently its proceedings

of probates:

tains probate of a will in common form, he may be afterwards cited by a next of kin, to prove it *per testes*, or in

are absolutely void, Tebbetts *v.* Tilton, 31 N. H. 273; Sigourney *v.* Sibley, 21 Pick. 101; S. C. 22 Pick. 507; Cutts *v.* Haskins, 9 Mass. 543; Holyoke *v.* Haskins, 5 Pick. 20; Wilson *v.* Frazier, 2 Humph. 30; Johnson *v.* Corpenning, 4 Ired. Eq. 216; *ante*, 292, note (*p*); Cottle, appellant, 5 Pick. 480; Morgan *v.* Dodge, 44 N. H. 255; Ex parte Barker, 2 Leigh, 719; Dole *v.* Irish, 2 Barb. 639; People *v.* White, 11 Ill. 341; Fisk *v.* Norvel, 9 Texas, 13; Langworthy *v.* Baker, 23 Ill. 484; that the judge of probate was interested in the case, *ante*, 292, note (*p*); *post*, 587, note (*e*); Coffin *v.* Cottle, 5 Pick. 480; Echols *v.* Barrett, 6 Geo. 443; Stearns *v.* Wright, 51 N. H. 600; but see Whitworth *v.* Oliver, 39 Ala. 286; that the person whose will has been proved or upon whose estate administration has been granted, is still living; *ante*, 409, note (*a*); *post*, 584, note (*q*), 586, note (*a*); Hooper *v.* Stewart, 25 Ala. 408; that the letters testamentary or of administration have irregularly or illegally issued; *post*, 587, 588, and notes; Kittredge *v.* Folsom, 8 N. H. 109; Mills *v.* Carter, 8 Blackf. 203; McCord *v.* Fisher, 13 B. Mon. 193; Moore *v.* Smith, 11 Rich. (Law) 569; Patton's Appeal, 31 Penn. St. 465; Creath *v.* Brent, 3 Dana, 129; Griffith *v.* Frazier, 8 Cranch, 9; Mathews *v.* Daubthill, 7 Ala. 273; Carow *v.* Mowatt, 2 Edw. Ch. 57; Springs *v.* Erwin, 6 Ired. 27; Morgan *v.* Dodge, 44 N. H. 255; Lees *v.* Browning, 15 Ala. 495; that the cause of a limited or qualified administration has ceased to exist, Morgan *v.* Dodge, 44 N. H. 260, 261, and instances stated and cases cited; State *v.* Williams, 9 Gill, 173; Patton's Appeal, 31 Penn. St. 465. See, also, Barber *v.* Converse, 1 Redf. Sur. 330; Gasque *v.* Moody, 12 Sm. & M. 153. Where a will is admitted to probate without notice or citation, as required by statute, the probate is erroneous, and will be vacated on application to the court by those entitled to notice. Lawrence's Will, 3 Halst. Ch. 215; Lees *v.* Browning, 15 Ala. 495; Roy *v.* Segrist, 19 Ala. 810; Gray J. in Waters *v.* Stickney, 12 Allen, 15. As to revoking letters of administration, obtained upon a false suggestion of a matter of fact, and without due notice to the party rightfully entitled to administration, see Proctor *v.* Wanmaker, 1 Barb. Ch. 302; Kerr *v.* Kerr, 41 N. Y. 272; Wallace *v.* Walker, 37 Geo. 265. A failure by an executor to comply with the condition of his appointment, that he should give bonds for the faithful performance of his duties, "would furnish good cause to revoke the appointment. But such revocation would not be justified, unless the circumstances indicated intentional wrong or gross negligence. It would be quite unjust and irregular, that an executor, who had been duly appointed, and had filed a bond supposed to be proper and suitable, should be removed without notice and opportunity to file a new bond. Wingate *v.* Wooten, 5 Sm. & M. 245. Letters testamentary can be properly issued only where the condition of the appointment of executor has been complied with. If issued when the bond required by law has not been given, they may be properly revoked as having issued improvidently, and new letters would be issued when the proper bond was given." "The power to act as executor, and to administer the estate, is dependent on giving the bond, and is suspended until that is done." Bell C. J. in Morgan *v.* Dodge, 44 N. H. 261, 262. Where letters of administration are revoked for informality or illegality, new letters may be granted to the same person without a new application or notice in New Jersey. Delany *v.* Noble, 3 N. J. Eq. 559. It is provided by statute, in Massachusetts, that when an executor or administrator residing out of the state, having been duly cited by the probate court, neglects to render his accounts and settle the estate; or when an executor or administrator becomes insane

solemn form. (*p*) And upon this citation, if the executor does not sufficiently prove the will, the probate will be revoked.

If the will has been proved in solemn form, either by the executor himself, in the first instance, or upon citation as above stated, and the next of kin have been cited to see * proceedings, they cannot afterwards, by a fresh citation, again put the executor on proof of the will. (*q*) But if fraud can be shown, or if a later distinct will be set up, then the parties having an interest under such later will may again cite the executor, who has succeeded

or otherwise incapable of discharging the trust, or evidently unsuitable therefor, the probate court may remove him; and thereupon the other executor or administrator, if there is any, may proceed in discharging the trust as if the one removed were dead. If there is no other executor or administrator, the court may commit administration of the estate not already administered to such person as shall be deemed fit, in like manner as if the executor or administrator removed were dead. Genl. Sts. c. 101, § 2. As to when an executor or administrator becomes "evidently unsuitable," see Hussey *v.* Coffin, 1 Allen, 354; Drake *v.* Green, 10 Allen, 124; Thayer *v.* Homer, 11 Met. 104; Winship *v.* Bass, 12 Mass. 198. As to the power of the court in Pennsylvania to vacate letters of administration, in various cases, see Hossetter's Appeal, 6 Watts, 244; Ex parte Taggart, 1 Ash. 321; Cohen's Appeal, 2 Watts, 175; Webb *v.* Dietrich, 7 Watts & S. 401; McCaffrey's Estate, 38 Penn. St. 331. An administrator, who fails to give the required bonds, may be removed; Succession of De Flechier, 1 La. Ann. 20; Heydock *v.* Duncan, 43 N. H. 95; Webb *v.* Dietrich, 7 Watts & S. 401; Devanport *v.* Irvine, 4 J. J. Marsh. 60; so one who refuses to inventory property when reasonably requested with suitable guaranties. Andrews *v.* Tucker, 7 Pick. 250. See Booth *v.* Patrick, 8 Conn. 106; Minor *v.* Mead, 3 Conn. 289; Oglesby *v.* Howard, 43 Ala. 144. If one of several executors persists in preventing others from inspecting or using the papers, and thereby retards the settlement of the estate, it is such mismanagement as affords ground for removal; Chew's Estate, 2 Parsons, 153; so where an executor or administrator has refused to perform and has knowingly violated the duties of his trust; Marsh *v.* The People, 15 Ill. 284; Chew *v.* Chew, 3 Grant, 289; Rogers *v.* Morrison, 21 La. Ann. 455; or is squandering the estate; Newcomb *v.* Williams, 9 Met. 525; Emerson *v.* Bowers, 14 Barb. 658; so where his report shows upon its face that he had given an unauthorized preference to creditors, in distributing the assets. Foltz *v.* Prouse, 17 Ill. 487. On the question, whether removal from the state by the executor or administrator, is sufficient ground for vacating his appointment, see Branch Bank *v.* Donelson, 12 Ala. 741; Hardaway *v.* Parham, 27 Miss. 103; Hostetter's Appeal, 6 Watts, 244; Harris *v.* Dillard, 31 Ala. 191; Succession of McDonogh, 7 La. Ann. 472; Yerkes *v.* Broom, 10 La. Ann. 94; Hall *v.* Monroe, 27 Texas, 700. As to a case where an executor at the time of his appointment was known to reside out of the state, see Wiley *v.* Brainerd, 11 Vt. 107, and the remarks of Williams C. J.; Walker *v.* Torrance, 12 Geo. 604; Brown *v.* Strickland, 28 Geo. 387. The court may, of its own motion, institute and carry on proceedings to revoke letters testamentary, which they believe have been irregularly issued. County Court of Mecklenburgh *v.* Bissell, 2 Jones (Law) 387.]

(*p*) *Ante*, 334.

(*q*) *Ante*, 334 *et seq.*

in proving in solemn form, and obtain a revocation of the probate. (*r*)

If probate or letters of administration had been granted by the wrong jurisdiction, as by a bishop, when there were *nota notabilia*, or by an archbishop, when there were not, it was a cause of nullity in the former case and of reversal in the latter. (*s*)

It was held in Nicol *v.* Askew, (*t*) that probate of a testamentary paper, in the nature of a codicil, having been granted by consent in common form, could not afterwards be revoked on the allegation that the conditions on which such consent was given had not been complied with, there being no proof of fraud or circumvention practised either upon the court or the parties.

of letters of administration:

With respect to the question as to what shall be a just ground for the revocation of letters of administration, (t^1) it has been said that, at common law, the ordinary might repeal an administration at his pleasure; (*u*) but now since the statute 21 Hen. 8, c. 5, when it is granted it cannot be repealed, unless for a just cause. (*v*) So where administration is granted

(*r*) Wentw. Off. Ex. 111, 112, 14th ed.; [Gray J. in Waters *v.* Stickney, 12 Allen, 4, 6. In cases of fraud, error, or mistake, the probate court may vacate the probate of a will and proceed *de novo*. Hamberlin *v.* Terry, 1 Sm. & M. Ch. 589.]

(*s*) 1 Saund. 275, note to Rex *v.* Sutton. [The judge of probate is to grant letters of administration on a representation that the deceased left property within his jurisdiction. If the representation should prove incorrect, the letters will be vacated; but if, on the other hand, it shall appear that there was property, they will have effect. *Per curiam*, in Harrington *v.* Brown, 5 Pick. 519, 522.] In a modern case in the prerogative court, a diocesan administration, obtained by one next of kin, was directed to be brought in, and pronounced null and void, on the prayer of another next of kin, who had taken out a prerogative administration; the diocesan administrator being personally cited, and showing no cause to the contrary. Loton *v.* Loton, 1 Hagg. 683.

(*t*) 2 Moore P. C. C. 88.

(t^1) [See Hubbard *v.* Smith, 45 Ala. 516; Dowdy *v.* Graham, 42 Miss. 451.]

(*u*) Brown *v.* Wood, Alcyn, 36; Godolph. pt. 2, c. 31, s. 4.

(*v*) Treat. on Eq. bk. 4, pt. 2, c. 1, s. 5; [Taylor *v.* Biddle, 71 N. Car. 1, 4, 5. The power of removal of an administrator, for failing to perform the duties of his office as prescribed by law, is inherent in the office of ordinary or judge of probate at common law, and must of necessity be so, to prevent a failure of justice. Bynum J. in Taylor *v.* Biddle, 71 N. Car. 5; Stoever *v.* Ludwig, 4 Serg. & R. 201. But no administrator can be removed except for legal cause, nor without a citation, or notice to be heard. Morgan *v.* Dodge, 44 N. H. 261; Wingate *v.* Wooten, 5 Sm. & M. 245; Bieber's Appeal, 11 Penn St. 157; Gasque *v.* Moody, 12 Sm. & M. 153; Wilson *v.* Hoes, 3 Humph. 142; Muirhead *v.* Muirhead, 6 Sm. & M. 451; Flora *v.* Mennice, 12 Ala. 836; Branch Bank *v.* Doncl-son, 12 Ala. 741; Mills *v.* Carter, 8 Blackf. 203; Carter *v.* Anderson, 4 Geo. 516; Stoker *v.* Kendall, Bushee (Law), 242; Flinn *v.* Chase, 4 Denio, 84; Murray *v.* Oliver, 3 B. Mon. 1.]

without the obligation of the statute, as administration *durante minore ætate*, it was held that when the ordinary had once exercised his power by granting * the administration, he should not repeal it without due cause. (*w*) Again, though the court has power to revoke a limited administration it is very unwilling to do so, unless there was some misrepresentation in the first instance in obtaining the grant. (*x*)

It seems indeed to have been formerly holden in some cases that if the ordinary, since the statute, had once granted administration, he could not afterwards revoke or repeal it on any ground; for it was said that, having once executed his power, he had nothing further to do in the affair. (*y*)

Hence, in Sir George Sand's case, (*z*) where a prohibition was prayed, because Sir George had the administration of his son's goods granted to him, and since that, a woman, pretending she was his wife, sued to have the administration repealed, a prohibition was granted; for though the statute says that the ordinary may grant administration to the wife or next of kin, yet when he has granted it to the next of kin, as the father is, he has executed his power, and his hands are closed, and he cannot repeal it.

But notwithstanding these opinions, it is now agreed that the administration, though granted to a next of kin, may be repealed by the court, not arbitrarily, yet where there shall be just cause for so doing; of which the temporal courts are to judge. (*a*)

when granted to next of kin:

Therefore the administration may be revoked where it was granted in an irregular manner, as where a next of kin comes too hastily to take out the administration within the * fourteen days; (*b*) or where it has been granted *non vocatis jure vocandis*, without citing the necessary parties; (*c*) in which cases, the ad-

(*w*) Grandison *v.* Dover, Skinn. 155; S. C. 3 Mod. 23, 25; Taylor *v.* Shore, T. Jones, 161. And in Grandison *v.* Dover the court denied that the ordinary without cause could repeal an administration before the statute of Hen. 8.

(*x*) Lopes *v.* Hartley, 7 Notes of Cas. Supplement, xxxi.

(*y*) Fotherby's case, Cro. Car. 62, 63; 3 Bac. Abr. 49, tit. Exors. F. 3, 12.

(*z*) 1 Sid. 179, 403; S. C. 3 Keb. 667, 683; T. Raym. 93.

(*a*) Burn E. L. 293; 3 Bac. Abr. 50; tit. Executors, E. 3, 12. See Koster *v.* Sapte, 1 Curt. 691. [See *ante*, 575, note (*o*[1]), 576, note (*v*). A grant of administration, as in cases of intestacy, when the deceased died leaving a nuncupative will, has been held voidable and revocable. Jennings *v.* Moses, 38 Ala. 402.]

(*b*) 3 Bac. Abr. *ubi supra*.

(*c*) Com. Dig. Administrator, B. 8; Ravenscroft *v.* Ravenscroft, 1 Lev. 305; [Morgan *v.* Dodge, 44 N. H. 260; *ante*, 575, note (*o*[1]).]

ministration, though not void, is voidable. (c^1) In Harrison *v.* Weldon, (d) Walker Weldon died intestate, leaving Anne his wife and Amphillis his sister. The sister, upon the common oath that she believed he died intestate, without wife or children, obtained administration; and in a suit to repeal it as obtained by surprise, it appeared to be the course of the court never to grant it to the next of kin, until the wife is cited. The sister moved for a prohibition, and insisted that the ordinary had executed his authority. But the court held that the ordinary could not be said to have executed his authority; having never had an opportunity to make the election which the statute of the 21st Hen. 8, c. 5, gives him; that it was incident to every court to rectify mistakes they were led into by the misrepresentation of the parties; that if there were no surprise (of which the court below was judge), there ought to be a prohibition, because then the administration would have been duly and regularly granted; but here was a plain surprise, and therefore they denied a prohibition. In the report of this case in Fitzgibbon, (e) Chief Justice Raymond, Mr. J. Probyn, and Mr. J. Page said it was different from Sir George Sand's case (above stated), because it did not appear what the circumstances of that case were; but Mr. Justice Lee said "that it was the common course of the ecclesiastical court to require an affidavit that the party is the person entitled, before they grant administration to him; and therefore the same surprise must be supposed to have been in Sand's case as here, though the book is silent; and the reason there given is, that the power being once executed, the ordinary cannot go back." Hence it should seem * that Sand's case must be considered as overruled by Harrison *v.* Weldon.

Again, the administration may be revoked, if a next of kin, to whom it has been committed, becomes *non compos*, or otherwise incapable, (f) or, it has been said, if he goes beyond sea. (g)

(c^1) [*Ante*, 575, note (o^1). So where administration is granted to creditors or remote kindred, before those previously entitled by law have voluntarily renounced their trust or have neglected beyond the specified time to take or apply for administration. Munsey *v.* Webster, 24 N. H. 126; Stebbins *v.* Lathrop, 4 Pick. 33; Mills *v.* Carter, 8 Blackf. 203; Thompson *v.* Hackett, 2 Hill (S. Car.), 347; Williams's Appeal, 7 Penn. St. 259.]

(d) Stra. 911.

(e) Harrison *v.* Mitchell, Fitzgib. 303; [Gray J. in Waters *v.* Stickney, 12 Allen, 5.]

(f) Agreed by all the justices in Offley *v.* Best, 1 Sid. 373; Bac. Abr. *ubi supra*; 4 Burn E. L. 292; Com. Dig. Administrator, B. 8; [Stearns *v.* Fiske, 18 Pick. 24, 28; *ante*, 575, note (o^1).] See *ante*, 517, 518, 519.

(g) Bac. Abr. *ubi supra*. [See Sarkie's Appeal, 2 Penn. St. 159.]

A fortiori the court may repeal its grant of administration, when made to other than the next of kin, as if it be granted to a next of kin, together with one not of kin, as to a sister and her husband; (*h*) or to one of kin, but not next of kin; (*i*) or to a creditor before the renunciation of the next of kin. (*k*) In these cases, the administration is not void, but voidable only. (*l*) So if the next of kin, at the time of the death of the intestate, happen to be incapable of administering by reason of attaint or excommunication, and the court commits it to another; if he afterwards becomes capable, the court may repeal the first administration, and commit it to the next of kin. (*m*)

when granted to one not next of kin:

In a modern case, the tenant for life of certain property having assigned over his interest to the remainderman, an administration with the will annexed, which had been granted to the tenant for life, limited to that interest, was revoked, and a new administration, limited to that property, decreed to the remainderman, then possessed of the sole interest therein. (*n*)

when granted *cum testamento annexo:*

In another modern case a creditor having obtained an administration *cum testamento annexo*, and completely settled his own debt, went away. Sir John Nicholl said he saw no other remedy, than that the administration should * be revoked, and the executor should retract his renunciation, and be allowed to take probate of the will; otherwise great loss might accrue, and injustice be done; and the learned judge observed, that the court has greater authority over an administrator with the will annexed, granted to a creditor, than over an administration under the statute. (*o*)

Administration *cum testamento annexo*, whether granted to a next of kin or one not next of kin, is voidable, and may be repealed, if there be a residuary legatee. (*p*) So although upon an executor's refusal to prove the will, and take upon him the office of executor, whereupon administration is committed to another, the executor cannot go back again and prove the will, and assume

(*h*) Brown *v.* Wood, Aleyn, 36; Com. Dig. Administrator, B. 8; *ante*, 450.

(*i*) Blackborough *v.* Davis, 1 Salk. 38; Anon. Hetley, 48.

(*k*) Ib.; Com Dig. Administrator, B. 6; [*ante*, 578, note (c[1]).]

(*l*) Ib.

(*m*) Gibs. Cod. 479; 4 Burn E. L. 293.

(*n*) In the Goods of Ferrier, 1 Hagg. 241.

(*o*) In the Goods of Jenkins, 3 Phillim. 33.

(*p*) Godolph. pt. 2, c. 31, s. 3; *ante*, 462.

the executorship; yet if the administration were committed only upon the executor's making default to come in upon process, in that case the executor might at any time after have appeared and proved the will, and so caused the administration to be revoked. (*q*) So the administration may be revoked, if it be granted on the refusal of an executor, who has before administered. (*r*)

In a modern case (*s*) an administration with a will annexed, obtained after a *caveat* entered had expired, but without notice to the adverse party, and while the will was in suit in Ireland — the *forum domicilii* — was revoked, as surreptitiously obtained, and the party condemned in costs of a petition in support of it.

re-grant *ad eundem* after a revocation *quia improvide*, &c.

If administration be repealed *quia improvide*, that is, where on a false suggestion in respect to the time of the intestate's death it issued before the expiration of a fortnight from that event, or where the court in committing it took * security inadequate to the value of the property, it shall be granted to the same person. (*t*)

What is not a ground for revocation.

It is usual, where there is a question about a will, or when the right of administration comes in dispute, to enter what is called a *caveat* (which is a caution entered in the court of probate to stop probates, administrations, faculties, and such like from being granted without the knowledge of the party that enters.) (*u*) By the canon law it is said to stand in force for three months, (*x*) and is of such force and validity, that if an administration or the like be granted pending such *caveat*, the same is void. (*y*) But the better opinion seems to be, that it is otherwise by the common law; which will take no notice of a *caveat*, but considers it as a mere cautionary act done by a stranger, to prevent the court from doing any wrong; (*z*)

Caveat.

(*q*) Godolph. *ubi supra*; Baxter & Bale's case, 1 Leon. 20. But see now stat. 21 & 22 Vict. c. 95, s. 16; *ante*, 275.

(*r*) Godolph. *ubi supra*; Com. Dig. Administrator, B. 6. See *ante*, 277, that such administration is not void, but voidable only.

(*s*) Trimlestown *v.* Trimlestown, 3 Hagg. 243.

(*t*) Toller, 125; Com. Dig. Administrator, B. 8; Offley *v.* Best, 1 Sid. 293.

(*u*) 3 Burn E. L. 244, Phillimore's ed.

(*x*) 3 Bac. Abr. 41; Executors, E. 3, 8. But by the practice of the prerogative office it was allowed to stand valid even beyond six months. 3 Burn E. L. 192, Phillimore's ed. The practice as to *caveats* is now regulated by the stat. 20 & 21 Vict. c. 77, s. 53, and the rules of 1862, P. R. Nos. 59, 60, 61, 62, 63, 64, 65, 66, 67. It is not thought requisite to do more than refer to this enactment and these rules, as the subject is not, it is considered, properly within the scope of this treatise.

(*y*) 3 Burn E. L. 244, Phillimore's ed.

(*z*) Hutchins *v.* Glover, Cro. Jac. 463;

and, therefore, in the common law courts, administration or probate granted contrary to a *caveat* entered shall stand good. (*a*)

If administration be granted to a younger brother, the elder cannot have it repealed, unless it has been granted by surprise. (*b*) So if administration be granted to a creditor, * and afterwards a creditor to a larger amount appear, it shall not be revoked for him. (*c*) So also administration *de bonis non*, with the will annexed, granted to one where two had equal right, is good and shall not be revoked. (*d*) Nor can the court revoke the grant on account of abuse; for it ought to take sufficient caution in the first instance to prevent maladministration. (*e*) Nor can the court revoke it on account of the administrator's omission to bring an inventory and account. (*f*)

And if an administration has been properly granted, it cannot be revoked, even on the application of the administrator himself, and although he has not intermeddled with the effects; at all events unless some strong ground for the revocation be shown. (*f*[1]) Therefore, where a party entitled in distribution to an intestate's effects, took out administration under a belief that she and her brother were the only next of kin, but, finding there were other parties equally entitled, and that the estate must be administered by the court of chancery, and not having intermeddled with the effects, she applied for a revocation of her grant and a new one

S. C. 1 Roll. Rep. 191; Gibs. Cod. 778. [The practice of entering a *caveat* exists in some of the American States, as to which, and its use and effect, and the mode of proceeding, see Gibson C. J. in Wikoff's Appeal, 15 Penn. St. 281–288; Ottinger *v.* Ottinger, 17 Serg. & R. 143; Bradford's Will, 1 Parsons, 150, 160; Hanna *v.* Munn, 3 Md. 230; Cain *v.* Warford, 3 Md. 454.

(*a*) Godolph. pt. 2, c. 33, s. 5; Offley *v.* Best, 1 Lev. 186; S. C. 1 Sid. 293; 2 Keb. 63, 72, 83, 208, 340, 392, 420, by Kelynge C. J. and Twysden J.; but Moreton and Wydham, justices, thought that the granting of administration pending the *caveat* was a good ground for revoking it. See Trimlestown *v.* Trimlestown, 3 Hagg. 243; *ante*, 580.

(*b*) Ayliff *v.* Ayliff, 2 Keb. 812. So where a niece obtained administration, a nephew could not get it repealed. Hill *v.* Bird, Sty. 102; *ante*, 428.

(*c*) Dubois *v.* Trant, 12 Mod. 438. [Wilson *v.* Frazier, 2 Humph. 30. If the next of kin do not apply for administration, or fail to give security, and another person is appointed, they have no further right, and the court has no power to revoke such appointment or declare it void. Stoker *v.* Kendall, Busbee (Law), 242; Jinkins *v.* Sapp, 3 Jones (Law), 510; Williams's case, 18 Abb. Pr. 350; Sowell *v.* Sowell, 41 Ala. 359; Cole *v.* Dial, 12 Texas, 100.]

(*d*) Taylor *v.* Shore, T. Jones. 161.

(*e*) Thomas *v.* Butler, 1 Vent. 219, by Hale.

(*f*) Hill *v.* Bird, Sty. 102.

(*f*[1]) [M'Gowan *v.* Wade, 3 Yerger, 375.]

to one of the other parties who was willing to take it, the rest consenting; the court refused the application, on the ground that an administration properly granted could not be revoked on a mere suggestion that it would be for the benefit of the estate. (*g*)

How far a party who has once propounded a will and withdrawn is barred.

In a modern case, the attorneys of an executrix had withdrawn from the suit, after propounding an alleged will, and suffered a next of kin to take administration; and it was held, *under the particular circumstances* of the transaction, that the executrix was not barred from calling upon the * next of kin to bring in the administration, and re-propounding the alleged will. (*h*) But in ordinary cases, where the parties, being present, declare they proceed no farther, or duly authorize a practitioner to take that step for them, the court, as far as it legally can, will hold them bound. (*i*)

An executor who has proved a will in common form cannot, as such executor, take proceedings to call in question the validity of that will. He has no right, therefore, to cite the persons interested under it, to propound it in solemn form, or show cause why the probate in common form should not be revoked. The executor of an executor is in the same position in this respect as the original executor. (*j*)

Citation by next of kin, contesting a will, of all persons interested "to see proceedings."

Where a next of kin is cited by an executor to see a will propounded, and contends for an intestacy, he may take out a decree, citing all persons interested under the will "to see proceedings;" for although it is true that the act of the executor, being the appointee of the deceased, would, to a certain extent, bind all persons interested under the will, (*k*) yet some party might, perhaps, at a future time, allege collusion. (*l*) The decree in such a case should be framed in the largest terms "against all persons in gen-

(*g*) In the Goods of Heslop, 5 Notes of Cas. 2; S. C. 1 Robert. 457. [See Cole *v.* Dial, 12 Texas, 100; M'Beth *v.* Hunt, 2 Strobh. 335. But where the resignation of an administrator is accepted by the probate court, such acceptance amounts to a revocation of his letters; and if there be other administrators the burden of administration is cast upon them. Marsh *v.* The People, 15 Ill. 284.]

(*h*) Trower *v.* Cox, 1 Add. 19; [Gray J. in Waters *v.* Stickney, 12 Allen, 5.]

(*i*) 1 Add. 225; [Cole *v.* Dial, 12 Texas, 100.]

(*j*) In the Goods of Chamberlain, L. R. 1 P. & D. 316.

(*k*) See Wood *v.* Medley, 1 Hagg. 657, 658, 667, 668; *ante*, 335.

(*l*) Colvin *v.* Fraser, 1 Hagg. 107; *ante*, 339.

eral," and if any of the legatees happen to be dead, care should be taken to cite their representatives. (*m*)

The parties thus cited need not appear at all; and in ordinary cases, if they intervene, when an executor, the person intrusted by the executor to see his will executed, is before the court, they will not be allowed their costs out of the estate. (*n*)

Party in possession of administration not bound to propound his interest till the party calling it in question has established his own.

Where two parties appear *before* any administration has been granted, both are to propound their interests, and * proceed *pari passu*. (*o*) But where an administration has been regularly obtained, the person in possession of it is not bound to propound his interest, till the party calling it in question has established his own. (*p*)

Revocation of probate of will of one falsely supposed to be dead.

When probate had been granted of the will of an officer in the army, on the affidavit of his brother and executor, that he had received intelligence that the testator had been killed in battle, which he believed to be true, but which was in fact unfounded; the proctor for the executor brought and left in the registry the probate, and the court, on motion of counsel, by an interlocutory decree, revoked the same, and declared it to be null and void to all intents and purposes. At the same time the purposed deceased appeared personally, and the judge, at his petition, decreed the original will, together with the probate first cancelled, to be delivered out of the registry to him. (*q*)

When a new allegation will

In the court of appeal, even from a definitive sentence, it is competent to either party, under certain circumstances, to bring in a new allegation and support it by proof. (*r*)

(*m*) 1 Hagg. 109.

(*n*) Colvin *v.* Fraser, 2 Hagg. 368.

(*o*) *Ante*, 425, 410.

(*p*) Dabbs *v.* Chisman, 1 Phillim. 155; Hibben *v.* Calemberg, 1 Phillim. 166; S. C. 1 Cas. temp. Lee, 655.

(*q*) In the Goods of Napier, 1 Phillim. 83; [*ante*, 409, note (*a*); 563, 575, note (o[1]); *post*, 586, note (*a*); Gray J. in Waters *v.* Stickney, 12 Allen, 4.]

(*r*) The rule is thus stated in 1 Oughton, tit. 318, pl. 1: "In causâ appellationis a sententiâ definitivâ licet tam appellanti, quam parti appellatæ, non allegata (coram judice a quo) allegare, et non probata probare, *dummodo non obstet publicatio testium productorum in primâ instantiâ*." See Jones *v.* Goodrich, 5 Moore P. C. 47. [In Harper *v.* Harper, 1 N. Y. Sup. Ct. 351, 364, which was heard on appeal from the surrogate, upon an issue involving the question of the mental capacity of the testator, Potter J. said: "If it is found that opinions of testamentary capacity are given

be allowed in the court of appeal.

But it seems an established rule, that matter which could have been pleaded below, and which directly contradicts the plea on which witnesses have been examined below, is not admissible: although matter more generally responsive may with caution be received, especially where the cause has not been properly conducted in the court below. (*s*) In a * modern case (*t*) the court of delegates, on appeal from the prerogative court of Canterbury, rejected an allegation pleading facts not shown to be *noviter ad notitiam perventa.* (*u*)

Prohibition.

If the ecclesiastical courts, in the repealing of administration or probates, transgressed the bounds which the law prescribes to them, a prohibition from the temporal courts would be awarded; as in the case above mentioned, where the ordinary had granted a regular administration, and was proceeding to repeal it on insufficient grounds, such as maladministration, (*x*) or that the letters issued after a *caveat* entered. (*y*) But no prohibition to the ecclesiastical courts would issue on suggestion that they were about to repeal an administration granted by surprise; or that they refused to commit the administration to the intestate's next of kin, but were proceeding to grant it to another: for the point, who is in fact next of kin, was of spiritual cognizance, and must have been contested before the spiritual jurisdiction. (*z*)

both ways, or stand in conflict, unless the preponderance is strongly against the finding of the surrogate, the great advantage possessed by him of a personal inspection of the witnesses, and the opportunity of witnessing their manner of testifying, give to that officer such peculiar advantages and opportunities of weighing testimony over that of the reviewing court, that a reversal of his judgment will be rarely ordered."]

(*s*) Price *v.* Clark, 3 Hagg. 265, note (*a*); Jones *v.* Goodrich, 5 Moore P. C. 47.

(*t*) Fletcher *v.* Le Breton, 3 Hagg. 365.

(*u*) See, also, Craig *v.* Farnell, 6 Moore P. C. 446.

(*x*) See *ante*, 582.

(*y*) See *ante*, 581.

(*z*) Toller, 127; *ante*, 550. [The office of a writ of prohibition is to prevent the exercise, by a tribunal possessing judicial powers, of jurisdiction over matters not within its cognizance, or to prevent it from exceeding its jurisdiction in matters within its cognizance. It does not lie to restrain a ministerial act, nor can it take the place of a writ of error or other proceeding to review judicial action, or of a suit in equity to prevent or redress fraud. Thomson *v.* Tracy, 60 N. Y. 31. The action and effect of this writ is fully considered in the above case.]

*CHAPTER THE THIRD.

OF THE EFFECT OF REVOCATION OF PROBATE, OR LETTERS OF ADMINISTRATION, ON THE MESNE ACTS OF THE EXECUTOR OR ADMINISTRATOR.

It remains to consider what effect the revocation of probate or letters of administration has on the intermediate acts of the former executor or administrator.

The first important distinction on this subject is, between grants which are void, and such as are merely voidable. If the grant be of the former description, the mesne acts of the executor or administrator, done between the grant and its revocation, shall be of no validity. As if administration be granted on the concealment of a will, and afterwards a will appear, inasmuch as the grant was void from its commencement, all acts performed by the administrator in that character shall be equally void; nor can they, although the executor should refuse to act, be made good by relation. (*a*) So in Graysbrook *v.* Fox, (*b*) an action of *detinue* was brought by an executor against the defendant who had purchased goods belonging to the testator, from one to whom the ordinary had, immediately after the testator's death, and before the executor had proved the will, granted administration; and it

Where the grant is void:

(*a*) Abram *v.* Cunningham, 2 Lev. 182; S. C. 1 Freem. 445; 1 Vent. 363; 2 Mod. 146; T. Jones, 72; 3 Keb. 725. [See *post*, 588, note (*g*); Langworthy *v.* Baker, 23 Ill. 484. Administration granted upon the estate of a living person under the erroneous belief that he was dead, is void, although he had been absent for more than seven years without being heard from. Jochumsen *v.* Suffolk Savings Bank, 3 Allen, 87; Hooper *v.* Stewart, 25 Ala. 408; Morgan *v.* Dodge, 44 N. H. 259; Moore *v.* Smith, 11 Rich. (S. Car.) 569. "When the presumption arising from the absence of seven years is overthrown by the actual personal presence of the supposed dead man, it leaves no ground for sustaining the jurisdiction." Dewey J. in Jochumsen *v.* Suffolk Savings Bank, 3 Allen, 87, 96; Moore *v.* Tanner, 5 Monr. 42. But see Roderigas *v.* East River Savings Institute, 13 Albany Law Journ. No. 3, p. 42, Jan. 15, 1876; 15 Am. Law Reg. N. S. 205; *ante*, 409, note (*a*). A grant of administration, originally void and not merely voidable, can acquire no validity from an acquiescence of twenty years or any longer period. Holyoke *v.* Haskins, 5 Pick. 20.]

(*b*) Plowd. 276.

was holden that the executor who sued after probate might recover. So if administration be granted before the refusal of the executor, a sale by the administrator of the testator's effects shall be void, although the executor aforesaid appear and renounce. (*c*) Or if the executor omit * proving the will, whereby administration is granted to a debtor, the executor may afterwards prove it, and then sue the administrator for the debt, which is not extinguished by the administration. (*d*) So in a late case, a will was proved by the executor named in it, who after probate sold the goods of the testator; at the time of the sale he had notice of a subsequent will, which was afterwards proved, and the probate of the former will revoked on citation; whereupon the executor under the latter will brought trover against the executor under the former for the goods sold; and it was holden, that the action was sustainable to recover the full value, and that the defendant was not entitled, in mitigation of damages, to show that he had administered assets to the amount. (*e*)

In these cases, when the wrongful executor or administrator has sold the property of the deceased, the rightful representative may either, as in the case just mentioned, maintain trover or detinue; or he may bring assumpsit for the money produced by the sale, as

(*c*) Abram *v.* Cunningham, *ubi supra.*

(*d*) Baxter & Bales' case, 1 Leon. 90; Oke *v.* Needham, 1 Brownl. 79. See, also, Throckmorton *v.* Hobby, 1 Brownl. 51, as to the invalidity of a release by an administrator under a void grant.

(*e*) Woolley *v.* Clark, 5 B. & Ald. 744; [Gibson C. J. in Hinkle *v.* Eichelberger, 2 Penn. St. 483; Kittredge *v.* Folsom, 8 N. H. 111.] But see *ante*, 271, note (*a*), and stat. 20 & 21 Vict. c. 77, s. 77; *post*, 591, [and note (*e*[1]).] So where an administratrix sued a debtor of the intestate, and, pending the suit, another by fraud procured a second administration to himself jointly with her, and after judgment released the debtor, on which he brought an *audita querela*, and in the mean time the second administration was revoked, the release was held of no avail. Anon. Dyer, 339 *a*; Packman's case, 6 Co. 19 *a*. [In Gay *v.* Minot, 3 Cush. 352, a will was proved before a judge of probate who was interested in the case, being indebted to the testator on a promissory note secured by mortgage. The executor afterwards made a *bonâ fide* assignment of such note and mortgage and received the full amount due thereon, and thereupon presented the will a second time to the same judge of probate, who approved and allowed it. It was held that the first probate was void on account of the interest of the judge, and that it was incapable of being made good by confirmation, waiver, or ratification of those interested; that the executor derived no authority under such probate, and was not authorized thereby to assign the note and mortgage; that such assignment was irregular and effected no change of ownership, but left the judge interested in the case as before; and, consequently, that the second probate was equally void with the first. See *ante*, 292, note (*p*); *post*, 591, note (*e*[1]).]

so much money received to his use, as executor or administrator; for the plaintiff may waive the tort, and suppose the sale made with his consent. (*f*)

* It should seem, however, that, as between the rightful representative and a person to whom the executor or administrator under a void probate, or grant of letters, has aliened the effects of the deceased, the act of alienation, *if done in the due course of administration*, shall not be void. Thus, in the case of Graysbrook *v.* Fox, above mentioned, it was laid down by the court, that if the sale had been made to discharge funeral expenses or debts, which the executor or administrator was compellable to pay, the sale would have been indefeasible forever. (*g*)

If the grant were only voidable, then another distinction arises between the case of a suit by citation, which is to countermand or revoke a former probate or former letters of administration, and an appeal, which is always to reverse a former sentence. (*h*) In case of an appeal all intermediate acts of the executor or administrator are ineffectual; because the appeal sus-

Where the grant is voidable.

(*f*) Lamine *v.* Dorrell, 2 Lord Raym. 1216. Where an auctioneer, employed by a supposed executrix, sold goods of the testator, but before payment the real executrix claimed the money from the buyer, it was held that the auctioneer could not afterwards maintain an action against the buyer, though the latter expressly promised to pay on being allowed to take away the goods. Dickenson *v.* Naul, 4 B. & Ad. 638. See, also, Crosskey *v.* Mills, 1 Cr., M. & R. 298; Allen *v.* Hopkins, 13 M. & W. 94. [A depositor in a savings bank may maintain an action to recover the amount of his deposit, although it appears that the bank has paid the amount due, to one who has been appointed as his administrator upon a presumption of his death after seven years' absence without being heard from. Jochumsen *v.* Suffolk Savings Bank, 3 Allen, 87. But see Roderigas *v.* East River Savings Bank, 13 Albany Law Journ. No. 3, p. 42, Jan. 15, 1876; 15 Am. Law Reg. (N. S.) 205; *ante*, 409, note (*a*).]

(*g*) Plowd. 282, 283. See *ante*, 272; Coulter's case, 5 Co. 30 *b*; Parker *v.* Kett, 1 Lord Raym. 661; S. C. 12 Mod. 471; [Kittredge *v.* Folsom, 8 N. H. 108; Ragland *v.* Green, 14 Sm. & M. 194; *post*, 589, note (*t*[1]). By statute in Massachusetts, if, after granting letters of administration as of an intestate estate, a will of the person deceased is duly proved and allowed, the first administration shall be revoked, and the executor, or administrator with the will annexed, may demand, collect, and sue for all the goods, chattels, rights, and credits of the deceased remaining unadministered. Genl. Sts. c. 94, s. 5. See Patton's Appeal, 31 Penn. St. 465. Where the estate has been fully settled, and all the moneys in the hands of the administrator have been paid over in pursuance of an order of court, and a will is subsequently discovered and proved, the executor cannot compel such administrator to account for the money received and paid over. Barkaloo *v.* Emerick, 18 Ohio, 268; Bigelow *v.* Bigelow, 4 Ohio, 138; Kittredge *v.* Folsom, 8 N. H. 98; Price *v.* Nesbitt, 1 Hill Ch. 445; Poag *v.* Carroll, Dudley (S. Car.), 1.]

(*h*) Tackman's case, 6 Co. 18 *b*; *ante*, 571.

pends the former sentence ; (*i*) and on its reversal it is as if it had never existed. (*k*)

But if the suit be by citation, and the grant of administration be voidable only (as where it has been granted to a party not next of kin), (*l*) or on the refusal of an executor who has before administered, (*m*) *or non vocatis jure vocandis*, without citing the necessary parties, (*n*) all lawful acts done by the first administrator shall be valid ; (n^1) as a *bonâ fide* sale or a gift by him of the goods of the intestate, (*o*) and such gift shall be available, even if it were with intent to defeat the second administrator, or were made *pendente lite*, on the * citation ; (*p*) although by stat. 13 Eliz. c. 5, it be void as to a creditor. (*q*) Again, if the administration be granted on condition, all the acts which the administrator does before the breach of the condition are good ; so that

(*i*) Price *v.* Parker, 1 Lev. 158 ; [Fletcher *v.* Fletcher, 29 Vt. 98 ; Pierpoint J. in Williams *v.* Robinson, 42 Vt. 662, 663 ; Shephard *v.* Rhodes, 60 Ill. 301. Where an order of the probate court, revoking letters of administration, has been appealed from, the appeal suspends the order of revocation, and leaves the letters in full force and effect pending the appeal ; and where an appeal is taken from an order granting letters, the letters cannot be granted pending the appeal. State *v.* Williams, 9 Gill, 173 ; Shauffler *v.* Stoever, 4 Serg. & R. 202. A bond given by the executor upon the probate of a will in the probate court is not vacated, but only suspended in its operation, by a subsequent appeal from the probate of the will ; and upon an affirmance of the probate, no new bond need be given by the executor. Dunham *v.* Dunham, 16 Gray, 577.]

(*k*) 6 Co. 18 *b* ; Semine *v.* Semine, 2 Lev. 90 ; Godolph. pt. 2, c. 31, s. 5 ; Digby *v.* Wray, 3 Bac. Abr. 51, Executors, E. 13 ; Allen *v.* Dundas, 3 T. R. 129, in the judgment of Ashurst J. See, also, Thomas *v.* Butler, 1 Ventr. 219.

(*l*) *Ante*, 579.

(*m*) *Ante*, 577, 578.

(*n*) *Ante*, 277.

(n^1) [*Post*, 589, note (t^1), 590, and cases in note (x^1) ; Foster *v.* Brown, 1 Bailey, 221 ; Price *v.* Nesbit, 1 Hill (S. Car.), 445 ; Wood *v.* Nelson, 9 B. Mon. 600 ; Morgan *v.* Dodge, 44 N. H. 261, and cases cited ; *ante*, note (*g*) ; Fisher *v.* Bassett, 9 Leigh, 119 ; Jones *v.* Jones, 14 B. Mon. 464 ; Peebles's Appeal, 15 Serg. & R. 39 ; Kittredge *v.* Folsom, 8 N. H. 98 ; Bigelow *v.* Bigelow, 4 Ohio, 138.]

(*o*) Wadesworth *v.* Andrews, cited Dyer, 166 *b*, in margin.

(*p*) Bro. Abr. Administrator, pl. 33 ; Packman's case, 6 Co. 18 *b* ; S. C. Cro. Eliz. 459 ; S. C. *nom.* Wilson *v.* Pateman, Moore, 396 ; Godolph. pt. 2, c. 31, s. 5. A distinction was taken by Trevor C. J. in an anonymous case in Comyns's Reports, p. 150 (which was overruled in Allen *v.* Dundas, 3 T. R. 125), between an executor and an administrator, from which it would result that the acts of an executor under a *voidable* probate are altogether invalid. There seems no principle on which such a doctrine can rest ; but the question is not perhaps of any importance ; inasmuch as the case of a merely voidable probate can but rarely occur ; and when it does, *e. g.* where the probate was prerogative instead of diocesan, the doctrine that the acts of an executor before probate are valid, would, it should seem, in almost every case, prevent the point from arising.

(*q*) 6 Co. 18 *b* ; Treat. on Eq. pt. 2, c. 1, s. 5.

the subsequent administrator cannot avoid any gifts or sales before such breach made by such conditional adminstrator. (*r*) So if administration be committed to a creditor, and after repealed at the suit of the next of kin, the creditor shall retain against the rightful administrator, and his disposal of goods, even pending his citation, till sentence of repeal, is good. (*s*) And where there was a citation to repeal administration, but the grant was affirmed and administration granted to another, upon which an appeal was sued, and both sentences repealed, an assignment of a lease made by the first administrator in the mean time was held good; (*t*) for the repeal was merely of the sentence in the citation, and so it is all one as if the administration had been avoided in the suit upon the citation. (*t*[1])

But where an administrator sold a term charged with a trust, in trust for himself, although the administration was *revoked on a suit by citation, and not on an appeal, the assignment was decreed to be set aside. (*u*)

Test whether administration void or voidable.

It may perhaps be laid down as a general test, whether an administration is void or voidable, that, where the grant is in derogation of the right of an executor, it is void; but where the administration is granted by the proper jurisdiction, and is only in derogation of the right of the next of kin, or residuary legatee, it is merely voidable. (*x*)

Payment to an executor or administrator under a void probate or ad-

It must be observed, that whether the probate or letters of administration be void or voidable, if the grant be by a court of competent jurisdiction, a *bonâ fide* payment to the executor or administrator, of a debt due to the estate, will be a legal discharge to a debtor. (*x*[1]) With respect

(*r*) 6 Co. 19 *a*; Godolph. pt. 2, c. 31, s. 5.

(*s*) Blackborough *v.* Davis, 1 Salk. 38; S. C. 1 Ld. Raym. 684; Com. 96; 1 P. Wms. 43; 12 Mod. 615.

(*t*) Semine *v.* Semine, 2 Lev. 90; S. C. T. Raym. 224, *nom.* Syms *v.* Syms.

(*t*[1]) [It is provided by statute in Massachusetts, that where an executor or administrator is removed, or letters of administration are revoked, all previous sales, whether of real or personal estate, made lawfully by the executor or administrator, and with good faith on the part of the purchaser, and all other lawful acts done by such executor or administrator, shall remain valid and effectual. Genl. Sts. c. 101, s. 3. See *ante*, 588, and notes (*g*) and (*n*[1]); *post*, 590, and note (*x*[1]); St. Mass. 1873, c. 253.]

(*u*) Jones *v.* Waller, 2 Chanc. Cas. 129; 11 Vin. Abr. 118. See, also, Johnson *v.* Chester, Finch, 430.

(*x*) However it has been shown that an administration is not void, but voidable only, where improperly committed after acts of administration by an executor. *Ante*, 277.

(*x*[1]) [Thomas J. in Emery *v.* Hildreth, 2 Gray, 231; Gray J. in Waters *v.* Stick-

ministration is a discharge.

to payments to an administrator, in a case as early as the time of Charles 2, the administrator of the lessee paid rent to the administrator of the lessor; the latter administration was repealed, and granted to D., who sued at law as well for the rent paid to the former administrator of the lessor, as for rent since due, and got a verdict and judgment against the administrator of the lessee for the same; but the defendant was relieved in equity as to the rent paid, because he had paid it to the visible administrator. (*y*) And in a modern case, it was held that payment to an executor, who had obtained probate of a forged will, was a discharge to the debtor, notwithstanding the probate was afterwards declared null in the ecclesiastical court; (*z*) on the principle that if the executor had brought an action against the debtor, the latter could not have controverted the title of the executor, as long as the probate was unrepealed; and the debtor was *not obliged to wait for a suit, when he knew that no defence could be made to it. (*a*)

This, however, was to be understood only where the grant was revoked on citation; if it were reversed on appeal, the administrator's or executor's authority was suspended by the appeal, and of course such payments would have been void. (*b*)

In a case at N. P. before Trevor C. J. an administrator made an attorney to receive debts due to the intestate; he received them, and paid them over to the administrator. Afterwards a will appeared, and the letters of administration were repealed by citation; and then the executor brought assumpsit against the attorney for money had and received; and it was held that the action lay, because the administration was merely void, and so the attorney had no authority. (*c*) But in a subsequent case, Lord

ney, 12 Allen, 15; Peebles's Appeal, 15 Serg. & R. 39; Kittredge *v.* Folsom, 8 N. H. 98, 108, 109; Stone *v.* Peasley, 28 Vt. 720; Lord Romilly M. R. in Hood *v.* Lord Barrington, L. R. 6 Eq. 222; Moore *v.* Tanner, 5 T. B. Mon. 42; Morgan *v.* Dodge, 44 N. H. 261, and cases cited; Spencer *v.* Cahoon, 4 Dev. (Law) 225; *ante*, 549, note (*a*), 551, 588, notes (*g*) and (n^1), 589, note (t^1); Roderigas *v.* East River Savings Institution, 15 Am. Law Reg. N. S. 205; Belden *v.* Meeker, 47 N. Y. 307; Parham *v.* Moran, 4 How. 717.]

(*y*) Stevens *v.* Langley, Finch, 40.

(*z*) Allen *v.* Dundas, 3 T. R. 125, 129.

(*a*) See, also, the judgment of Best J. in the case of Woolley *v.* Clarke, 5 B. & Ald. 746; and Phillips *v.* Biron, 1 Stra. 509; Digby *v.* Wray, Bac. Abr. Exors. F. 3, 13. But see, also, Ex parte Jolliffe, 8 Beav. 168; *ante*, 551, note (*m*). And see stat. 20 & 21 Vict. c. 77, s. 77, *infra*.

(*b*) Toller, 131. But see stat. 20 & 21 Vict. c. 77, s. 77, *infra*.

(c) Jacob *v.* Allen, 1 Salk. 27.

Holt, under similar circumstances, nonsuited the executor. (*d*) And Lord Mansfield, in Sadler *v.* Evans, (*e*) expressed his dissent from the decision of C. J. Trevor, and his approbation of the contrary decision of Lord Holt. But these cases have reference to the doctrine, that if a known agent has paid over the money to his principal, the remedy is against the latter only.

And by the court of probate act (20 & 21 Vict. c. 77, s. 77) it is expressly enacted, "that where any probate or administration is revoked under this act, all payments *bonâ fide* made to any executor or administrator under such probate or administration before the revocation thereof shall be a legal discharge to the person making the same." (*e*[1])

20 & 21 Vict. c. 77, s. 77. *Bonâ fide* payments under revoked grants to be valid.

And by sect. 78, "All persons and corporations making or * permitting to be made any payment or transfer *bonâ fide* upon any probate or letters of administration granted in respect of the estate of any deceased person under the authority of this act shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration." (*e*[2])

Sect. 78. Payments under invalid probates, &c. to be protected.

Whether the administration be void or voidable, or be revoked on citation or appeal, if an action was brought by the administrator, and while it was pending administration was committed to another, the writ would have abated. (*f*) But now by sect. 76 of the court of probate act (20 & 21 Vict. c. 77), "where before the revocation of any temporary administration any proceedings at law or in equity have been commenced by or against any administrator so appointed, the court in which such proceedings are pending may order that a suggestion be made upon the record of the revocation of such administration, and of the grant of probate or administration which shall have been made consequent

Abatement of suit by administrator by revocation of administration.

20 & 21 Vict. c. 77, s. 76. Suggestion to be made on the record.

(*d*) Pond *v.* Underwood, 2 Ld. Raym. 1210.

(*e*) 4 Burr. 1986.

(*e*[1] [By a late statute in Massachusetts, provision is made for the relief of the parties affected, in cases where an appointment of an executor or administrator by any probate court shall be vacated or declared void by reason of any irregularity, or want of jurisdiction or authority of the court making the same. St. Mass. 1873, c. 253, §§ 1, 2, 3.]

(*e*[2]) [Lord Romilly M. R. in Hood *v.* Lord Barrington, L. R. 6 Eq. 222.]

(*f*) Bro. Administrator, pl. 3; Toller, 131.

thereupon, and that the proceedings shall be continued in the name of the new executor or administrator in like manner as if the proceeding had been originally commenced by or against such new executor or administrator, but subject to such conditions and variations, if any, as such court may direct." (f^1)

Audita querela, where probate or administration repealed after judgment.

If an executor or administrator, before the repeal of the probate or administration, obtain a judgment for a debt due to the intestate, he is not entitled after the repeal to take out execution, but the defendant may avoid the judgment by an *audita querela*. (g) So where judgment was obtained by an administrator, and afterwards the administration was revoked, and the plaintiff proceeded and took the defendant in execution, the court, upon motion, held the execution * void, and that the defendant ought to be discharged. (h) But where in trover, after verdict, and before the day in bank, the defendant pleaded that the plaintiff's letters of administration were revoked, and administration committed to another, it was held no plea; for that it was a matter only wherein the defendant shall be aided by *audita querela*. (i) So on affidavit to stay execution on a judgment recovered by an administrator, because the letters of administration were repealed *before the judgment entered*, it was held that the matter did not legally come before the court, and that the defendant ought to bring an *audita querela*. (k)

The administrator under a void grant shall be recouped in damages for debts paid, &c. in the

Where the ordinary grants administration, and afterwards there appears to be an executor, if the administrator has paid debts, legacies, or funeral expenses, which the law will force the executor to pay, the administrator, in an action against him by the executor, shall recoup so much in damages, because he was compelled to pay it, and the true executor has no prejudice by it, forasmuch as he

(f^1) [See *post*, 594, and note (n). Where one, in the capacity of executor or administrator, commences an action for the benefit of the estate, he does not become personally liable for costs, because he is removed from the trust before judgment. Baxter *v.* Davis, 3 Abb. Pr. (N. S.) 249.]

(g) Dr. Drury's case, 8 Co. 144 *a*; Turner *v.* Davis, 2 Saund. 148; S. C. 1 Mod. 62; 2 Keb. 668. See, also, Beck's case, 1 Brownl. 29.

(h) Barnehurst *v.* Yelverton, Yelv. 83; S. C. 1 Brownl. 91.

(i) Ket *v.* Life, Yelv. 125.

(k) Patnell *v.* Brook, Style, 417. As to the cases where, according to the modern practice, the courts will relieve the defendant in a summary way on motion, without driving him to an *audita querela*, see 2 Saund. 148 *a*, *b*, note to Turner *v.* Davies.

himself would have been bound to pay it. (*l*) So it was holden in equity, where a widow possessed herself of the personal estate as an executrix, under a revoked will, and paid debts and legacies, but had no notice of revocation, that she should be allowed those payments. (*m*) And by stat. 20 & 21 Vict. c. 77, s. 77, it is expressly enacted, "that the executor or administrator who shall have acted under any such revoked probate or administration may retain and reimburse himself in respect of any payments made by him which the person to * whom probate or letters of administration shall be afterwards granted might have lawfully made." (*m*[1]) course of his administration. 20 & 21 Vict. c. 77, s. 77.

A defendant sued as administrator may plead, that, *pendente brevi*, administration was committed to another. (*n*) With re-

(*l*) Peckham's case, cited Plowd. 282; Bacon Abr. Exors. E. 13; and see the authorities mentioned, *ante*, 270, 271, with respect to an executor *de son tort*. But the contrary seems to have been holden in Woolley *v.* Clarke, 5 B. & Ald. 744; *ante*, 271, note (*a*); 578, [588, note (*g*).]

(*m*) Hele *v.* Stowel, 1 Chanc. Cas. 126; Bac. Abr. Exors. E. 13.

(*m*[1]) [An executor obtained letters testamentary on a will duly proved, which, a *caveat* having been entered against it, was afterwards finally adjudged not to be the will of the deceased. It was held that it was the duty of the executor to support the first probate, believing it to be genuine, and that he was entitled to retain out of the estate the expenses incurred in litigating the question of the validity of the will, the amount of funeral expenses, and also the usual commissions for managing the estate while in his hands. Bradford *v.* Boudinot, 3 Wash. C. C. 122. See *post*, 1860, note (*k*). An administrator who in good faith litigates a claim against his intestate, is entitled to credit, in his administration account, for the costs and expenses of the litigation, including the amount paid for counsel fees; and also an allowance for his time and trouble. Ammon's Appeal, 31 Penn. St. 311. See *post*, 1860, note (*k*). Where a will was proved in common form, and no executor being named therein, administration with the will annexed was granted, it was held that the grant of administration was not annulled by a subsequent revocation of probate. Floyd *v.* Herring, 64 N. Car. 409. An executor who has been removed must pay or deliver the property of the estate to his successor in the trust, not to a receiver. Schlecht's Estate, 2 Brews. (Penn.) 397.]

(*n*) Bro. Administrator, pl. 3; *ante*, 592; [Morrison *v.* Cones, 7 Blackf. 593; Broach *v.* Walker, 2 Geo. 428; Hall *v.* Pearman, 20 Texas, 168; Cogburn *v.* McQueen, 46 Ala. 551. When an administrator, who, as such, is defendant in a suit, has been removed from the office, and another has been appointed in his place and undertaken the defence, the former ceases to be a party to the suit as absolutely as if he were dead, and the action must either be prosecuted against the new representative of the estate, or it will be discontinued. The suit is, in its nature, a proceeding against the estate of the deceased. When the administrator is displaced, he ceases to have either interest in or power over that estate, and a judgment, to reach the estate, must be rendered against the party entitled to represent it. The judgment, also, must be for a sum to be levied of the goods and estate of the deceased, in the hands of the defendant administrator, to be administered. Such a judgment cannot be rendered against one who appears by

spect to the proper plea, in a case where the administration is revoked before the action commenced; the defendant in Garter *v.* Dee, (*o*) being sued as administrator, pleaded, that before the date of the writ, his administration was revoked and granted to another. Per Wilde: He ought to have set forth that he had fully administered all the goods in his hands, or else that he delivered them over to the new administrator. (*p*) If he should be sued as executor *de son tort*, (*q*) and has delivered the assets over before action brought, *plene administravit* seems to be the proper plea. (*r*)

Proper plea by administrator after administration revoked.

the record not to be administrator. Bell J. in Wiggin *v.* Plumer, 31 N. H. 251, 266. See Gray C. J. in National Bank of Troy *v.* Stanton, 116 Mass. 438; Taylor *v.* Savage, 1 How. (U. S.) 282; S. C. 2 How. (U. S.) 395; Buckingham *v.* Owen, 6 Sm. & M. 502. By provision of statute, in Massachusetts, when an executor or administrator dies or is removed from office during the pendency of a suit in which he is a party, the suit may be prosecuted by or against the administrator *de bonis non* in like manner as if it had been originally commenced by or against such last administrator. Genl. Sts. c. 128, § 12. The mode of proceeding in such case is prescribed by Genl. Sts. c. 128, § 11. By § 13 of the same chapter, provision is made for the case of the death or removal of an executor or administrator after judgment is rendered either for or against him. See Brown *v.* Pendergast, 7 Allen, 427; Grout *v.* Chamberlin, 4 Mass. 611, 613; *post*, 1883, note (g^1). Under the statutes of New York an administrator, whose letters have been revoked by the surrogate, can be cited to account, but is not subject to the orders of the surrogate otherwise than in the proceedings for accounting. Lawrence's case, 1 Tuck. (N. Y.) Sur. 68.]

(*o*) 1 Freem. 13.

(*p*) See, also, Palmer *v.* Litherham, Latch, 267; Lawson *v.* Crofts, 1 Keb. 114.

(*q*) See Turner *v.* Davies, 1 Mod. 63, by Kelynge C. J.

(*r*) See *ante*, 268.

*BOOK THE SEVENTH.

OF THE STAMP DUTIES ON PROBATES, AND ON LETTERS OF ADMINISTRATION.

By the statute 55 Geo. 3, c. 184, the stamp duties imposed on probates of wills, and letters of administration by the 48 Geo. 3, c. 149, are repealed, and the following stamp duties are imposed:

On probates of wills and letters of administration with the will annexed, to be granted in England:

Where the estate and effects for or in respect of which such probate or letters of administration shall be granted, exclusive of what the deceased shall have been possessed of, or entitled to, as a trustee for any other person or persons, and not beneficially, shall be

			£	s.
above the value of	20*l.* and under the value of	100*l.*	0	10
of the value of	100*l.* and under the value of	200*l.*	2	0
of the value of	200*l.* and under the value of	300*l.*	5	0
of the value of	300*l.* and under the value of	450*l.*	8	0
of the value of	450*l.* and under the value of	600*l.*	11	0
of the value of	600*l.* and under the value of	800*l.*	15	0
of the value of	800*l.* and under the value of	1,000*l.*	22	0
of the value of	1,000*l.* and under the value of	1,500*l.*	30	0
of the value of	1,500*l.* and under the value of	2,000*l.*	40	0
of the value of	2,000*l.* and under the value of	3,000*l.*	50	0
of the value of	3,000*l.* and under the value of	4,000*l.*	60	0
of the value of	4,000*l.* and under the value of	5,000*l.*	80	0
of the value of	5,000*l.* and under the value of	6,000*l.*	100	0
of the value of	6,000*l.* and under the value of	7,000*l.*	120	0
of the value of	7,000*l.* and under the value of	8,000*l.*	140	0
of the value of	8,000*l.* and under the value of	9,000*l.*	160	0
of the value of	9,000*l.* and under the value of	10,000*l.*	180	0
of the value of	10,000*l.* and under the value of	12,000*l.*	200	0
of the value of	12,000*l.* and under the value of	14,000*l.*	220	0
of the value of	14,000*l.* and under the value of	16,000*l.*	250	0

			£	s.
of the value of	16,000*l.* and under the value of	18,000*l.*	280	0
of the value of	18,000*l.* and under the value of	20,000*l.*	310	0
of the value of	20,000*l.* and under the value of	25,000*l.*	350	0
* of the value of	25,000*l.* and under the value of	30,000*l.*	400	0
of the value of	30,000*l.* and under the value of	35,000*l.*	450	0
of the value of	35,000*l.* and under the value of	40,000*l.*	525	0
of the value of	40,000*l.* and under the value of	45,000*l.*	600	0
of the value of	45,000*l.* and under the value of	50,000*l.*	675	0
of the value of	50,000*l.* and under the value of	60,000*l.*	750	0
of the value of	60,000*l.* and under the value of	70,000*l.*	900	0
of the value of	70,000*l.* and under the value of	80,000*l.*	1,050	0
of the value of	80,000*l.* and under the value of	90,000*l.*	1,200	0
of the value of	90,000*l.* and under the value of	100,000*l.*	1,350	0
of the value of	100,000*l.* and under the value of	120,000*l.*	1,500	0
of the value of	120,000*l.* and under the value of	140,000*l.*	1,800	0
of the value of	140,000*l.* and under the value of	160,000*l.*	2,100	0
of the value of	160,000*l.* and under the value of	180,000*l.*	2,400	0
of the value of	180,000*l.* and under the value of	200,000*l.*	2,700	0
of the value of	200,000*l.* and under the value of	250,000*l.*	3,000	0
of the value of	250,000*l.* and under the value of	300,000*l.*	3,750	0
of the value of	300,000*l.* and under the value of	350,000*l.*	4,500	0
of the value of	350,000*l.* and under the value of	400,000*l.*	5,250	0
of the value of	400,000*l.* and under the value of	500,000*l.*	6,000	0
of the value of	500,000*l.* and under the value of	600,000*l.*	7,500	0
of the value of	600,000*l.* and under the value of	700,000*l.*	9,000	0
of the value of	700,000*l.* and under the value of	800,000*l.*	10,500	0
of the value of	800,000*l.* and under the value of	900,000*l.*	12,000	0
of the value of	900,000*l.* and under the value of	1,000,000*l.*	13,500	0
of the value of	1,000,000*l.* and upwards		15,000	0

On letters of administration, without a will annexed, to be granted in England.

Where the estate or effects for or in respect of which such letters of administration shall be granted, exclusive of what the deceased shall have been possessed of or entitled to, as a trustee (*a*) for any other person or persons, and not beneficially, shall be

			£	s.
above the value of	20*l.* and under the value of	50*l.*	0	10
of the value of	50*l.* and under the value of	100*l.*	1	0
of the value of	100*l.* and under the value of	200*l.*	3	0
of the value of	200*l.* and under the value of	300*l.*	8	0
of the value of	300*l.* and under the value of	450*l.*	11	0

(*a*) See Carr *v.* Roberts, *post*, 616.

			£	s.
of the value of	450*l.* and under the value of	600*l.*	15	0
of the value of	600*l.* and under the value of	800*l.*	22	0
of the value of	800*l.* and under the value of	1,000*l.*	30	0
* of the value of	1,000*l.* and under the value of	1,500*l.*	45	0
of the value of	1,500*l.* and under the value of	2,000*l.*	60	0
of the value of	2,000*l.* and under the value of	3,000*l.*	75	0
of the value of	3,000*l.* and under the value of	4,000*l.*	90	0
of the value of	4,000*l.* and under the value of	5,000*l.*	120	0
of the value of	5,000*l.* and under the value of	6,000*l.*	150	0
of the value of	6,000*l.* and under the value of	7,000*l.*	180	0
of the value of	7,000*l.* and under the value of	8,000*l.*	210	0
of the value of	8,000*l.* and under the value of	9,000*l.*	240	0
of the value of	9,000*l.* and under the value of	10,000*l.*	270	0
of the value of	10,000*l.* and under the value of	12,000*l.*	300	0
of the value of	12,000*l.* and under the value of	14,000*l.*	330	0
of the value of	14,000*l.* and under the value of	16,000*l.*	375	0
of the value of	16,000*l.* and under the value of	18,000*l.*	420	0
of the value of	18,000*l.* and under the value of	20,000*l.*	465	0
of the value of	20,000*l.* and under the value of	25,000*l.*	525	0
of the value of	25,000*l.* and under the value of	30,000*l.*	600	0
of the value of	30,000*l.* and under the value of	35,000*l.*	675	0
of the value of	35,000*l.* and under the value of	40,000*l.*	785	0
of the value of	40,000*l.* and under the value of	45,000*l.*	900	0
of the value of	45,000*l.* and under the value of	50,000*l.*	1,010	0
of the value of	50,000*l.* and under the value of	60,000*l.*	1,125	0
of the value of	60,000*l.* and under the value of	70,000*l.*	1,350	0
of the value of	70,000*l.* and under the value of	80,000*l.*	1,575	0
of the value of	80,000*l.* and under the value of	90,000*l.*	1,800	0
of the value of	90,000*l.* and under the value of	100,000*l.*	2,025	0
of the value of	100,000*l.* and under the value of	120,000*l.*	2,250	0
of the value of	120,000*l.* and under the value of	140,000*l.*	2,700	0
of the value of	140,000*l.* and under the value of	160,000*l.*	3,150	0
of the value of	160,000*l.* and under the value of	180,000*l.*	3,600	0
of the value of	180,000*l.* and under the value of	200,000*l.*	4,050	0
of the value of	200,000*l.* and under the value of	250,000*l.*	4,500	0
of the value of	250,000*l.* and under the value of	300,000*l.*	5,625	0
of the value of	300,000*l.* and under the value of	350,000*l.*	6,750	0
of the value of	350,000*l.* and under the value of	400,000*l.*	7,875	0
of the value of	400,000*l.* and under the value of	500,000*l.*	9,000	0
of the value of	500,000*l.* and under the value of	600,000*l.*	11,250	0
of the value of	600,000*l.* and under the value of	700,000*l.*	13,500	0
of the value of	700,000*l.* and under the value of	800,000*l.*	15,750	0
of the value of	800,000*l.* and under the value of	900,000*l.*	18,000	0
of the value of	900,000*l.* and under the value of	1,000,000*l.*	20,250	0
of the value of	1,000,000*l.* and upwards		22,500	0

And by stat. 22 & 23 Vict. 36, where the value shall amount to 1,000,000*l.* or upwards, there shall be charged and paid the following duties (that is to say), "For every 100,000*l.* of the whole value of such estate and effects, and any fractional part of 100,000*l.* where the deceased shall *have left any will or testament or testamentary disposition of his personal or movable estate and effects, the stamp duty of 1,500*l.*, and where the deceased shall not have left any such will or testament or testamentary disposition, the stamp duty of 2,250*l.*"

22 & 23 Vict. c. 36. Where value amounts to 1,000,000*l.* and upwards.

By stat. 20 & 21 Vict. c. 77 (court of probate act), s. 92, nothing in that act shall affect the stamp duties now by law payable upon probates and administrations, and all the clauses, &c. in any act of parliament relating to the said duties shall be in full force, &c. for securing the duties on probates and administrations granted under that act, as if such duties had been granted by it and the said clauses, &c. were therein repeated and specially enacted.

20 & 21 Vict. c. 77 (court of probate act), c. 92. The act not to affect stamp duties on probates and administrations.

By stat. 27 & 28 Vict. c. 56, s. 4, "The said stamp duties [on probates and letters of administration] shall be charged and paid in respect of the value of any ship or any share of a ship belonging to any deceased person which shall be registered at any port in the United Kingdom, notwithstanding such ship at the time of the death of the testator or intestate may have been at sea or elsewhere out of the United Kingdom; and for the purpose of charging the said duties, such ship shall be deemed to have been at the time aforesaid in the port at which she may be registered."

27 & 28 Vict. c. 56, s. 4. Duties on ships.

5. "No stamp duty shall be chargeable on any such probate, letters of administration or inventory as aforesaid in any case where the whole estate and effects of the deceased person dying after the passing of this act (exclusive of what he shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially), shall be sworn not to exceed, and shall not actually exceed, in value the sum of one hundred pounds."

Sect. 5. Probates, &c. exempted from stamp duty where the effects do not exceed 100*l.*

Probate of will, and letters of administration of the effects of any common seaman, marine, or soldier, who

55 Geo. 3, c. 184.

shall be slain or die in the service of his majesty, his heirs or successors.

Exemptions of wills and and administrations of seamen and soldiers slain in battle.

For better securing these duties, the statute contains several enactments, which it will be necessary to notice in this place.

Sect. 37. Penalty for not proving wills, or taking letters of administration, within a given time, 100*l.*, and 10*l.* per cent. on the duty.

* By the 37th section it is enacted, "That from and after the thirty-first day of August, 1815, if any person shall take possession of, and in any manner administer any part of the personal estate and effects of any person deceased, without obtaining probate of the will or letters of administration of the estate and effects of the deceased, within six calendar months after his or her decease, or within two calendar months after the termination of any suit or dispute respecting the will or the right to letters of administration, if there shall be any such, which shall not be ended within four calendar months after the death of the deceased; every person so offending shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds per centum on the amount of the stamp duty payable on the probate of the will or letters of administration of the estate and effects of the deceased." (*b*)

Sect. 38. Ecclesiastical courts not to grant probates or letters of administration without affidavit of the value of effects.

Sect. 38. "From and after the expiration of three calendar months from the passing of this act (11th July, 1815), no ecclesiastical court or person shall grant probate of the will or letters of administration of the estate and effects of any person deceased, without first requiring and receiving from the person or persons applying for the probate or letters of administration, or from some other competent person or persons, an affidavit, or solemn affirmation in the case of Quakers, that the estate and effects of the deceased, for or in respect of which the probate or letters of administration is or are to be granted, exclusive of what the deceased shall have been possessed of or entitled to as a trustee for any other person or persons, and not beneficially, but including the leasehold estates for years of the deceased, whether absolute or determinable on lives, if any, and without deducting anything on account of the debts due and owing from the deceased, are under the value of a certain sum to be therein specified, to the best of the deponent's or affirmant's knowledge,

(*b*) See, also, stat. 5 & 6 Vict. c. 82, s. 35, as to Ireland.

information, and belief, in order that the proper * and full stamp duty may be paid on such probate or letters of administration; which affidavit or affirmation shall be made before the surrogate or other person who shall administer the usual oath for the due administration of the estate and effects of the deceased."

Sect. 39. Affidavits to be free of stamp duty, and to be transmitted to commissioners of stamps. Penalty for neglect 50*l*.

Sect. 39. "Every such affidavit or affirmation shall be exempt from stamp duty, and shall be transmitted to the said commissioners of stamps, together with the copy of the will, or extract or account of the letters of administration to which it shall relate, by the registrar or other officer of the court, whose duty it shall be to transmit copies of wills, and extracts or accounts of letters of administration to the said commissioners, for the better collection of the duties on legacies and successions to personal estate upon intestacy; and if any registrar or other officer whose duty it shall be, shall neglect to transmit such affidavit or affirmation to the said commissioners of stamps as hereby directed, every person so offending shall forfeit the sum of fifty pounds."

Section 40. Provision for the case of too high a stamp duty being paid on probates, &c.

By section 40 it is provided, "That from and after the passing of this act (11th July, 1815), where any person, on applying for the probate of a will or letters of administration, shall have estimated the estate and effects of the deceased to be of greater value than the same shall have afterwards proved to be, and shall in consequence have paid too high a stamp duty thereon, if such person shall produce the probate or letters of administration to the said commissioners of stamps within six calendar months after the true value of the estate and effects shall have been ascertained, and it shall be discovered that too high a duty was first paid on the probate or letters of administration, and shall deliver to them a particular inventory and account, and valuation of the estate and effects of the deceased, verified by an affidavit, or solemn affirmation in the case of Quakers; and if it should thereupon satisfactorily appear to the said commissioners that a greater stamp duty was paid on the probate or letters of administration than the law required, it shall be lawful for the said commissioners to cancel and expunge the stamp on the * probate or letters of administration, and to substitute another stamp for denoting the duty

which ought to have been paid thereon, and to make an allowance for the difference between them, as in the cases of spoiled stamps, or if the difference be considerable, to repay the same in money, at the discretion of the said commissioners."

Sect. 41. "From and after the passing of this act (11th July, 1815), where any person, on applying for the probate of a will or letters of administration, shall have estimated the estate and effects of the deceased to be of less value than the same shall have afterwards proved to be, and shall in consequence have paid too little stamp duty thereon, it shall be lawful for the said commissioners of stamps, on delivery to them of an affidavit or solemn affirmation of the value of the estate and effects of the deceased, to cause the probate or letters of administration to be duly stamped, on payment of the full duty which ought to have been originally paid thereon in respect of such value, and of the further sum or penalty payable by law for stamping deeds after the execution thereof, without any deduction or allowance of the stamp duty originally paid on such probate or letters of administration: Provided always, that if the application shall be made within six calendar months after the true value of the estate and effects shall be ascertained, and it shall be discovered that too little duty was at first paid on the probate or letters of administration, and if it shall appear by affidavit or solemn affirmation, to the satisfaction of the said commissioners, that such duty was paid in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the estate and effects belonged to the deceased, and without any intention of fraud, or to delay the payment of the full and proper duty, then it shall be lawful for the said commissioners to remit the before mentioned penalty, and to cause the probate or letters of administration to be duly stamped, on payment only of the sum which shall be wanting to make up the duty which ought to have been at first paid thereon."

Sect. 41. Provision for the case of too little stamp duty being paid on probates, &c.

* Sect. 42. "Provided always, that in cases of letters of administration, on which too little stamp duty shall have been paid at first, the said commissioners of stamps shall not cause the same to be duly stamped in the manner aforesaid, until the administrator shall have given such security to the ecclesiastical court or ordinary by whom the letters of administration shall have been granted, as

Sect. 42. Administrator to give the proper security to the ecclesiastical court before ad-

ministration is duly stamped.

ought by law to have been given on the granting thereof, in case the full value of the estate and effects of the deceased had been then ascertained, and also that the said commissioners of stamps shall yearly or oftener transmit an account of the probates and letters of administration, upon which the stamps shall have been rectified in pursuance of this act, to the several ecclesiastical courts by which the same shall have been granted, together with the value of the estate and effects of the deceased, upon which such rectifications shall have proceeded."

Sect. 43. Penalty on executors, &c. not paying the full duty on probates, &c. in a given time after discovery of too little paid at first, 100*l.* and ten per cent. on the duty wanting.

Sect. 43. "Where too little duty shall have been paid on any probate or letters of administration, in consequence of any mistake or misapprehension, or of its not being known at the time that some particular part of the estate and effects belonged to the deceased, if any executor or administrator acting under such probate or letters of administration shall not, within six calendar months after the passing of this act (11th July, 1815), or after the discovery of the mistake or misapprehension, or of any estate or effects not known at the time to have belonged to the deceased, apply to the said commissioners of stamps, and pay what shall be wanting to make up the duty which ought to have been paid at first on such probate or letters of administration, he or she shall forfeit the sum of one hundred pounds, and also a further sum, at and after the rate of ten pounds per centum on the amount of the sum wanting to make up the proper duty." (*c*)

Sect. 44. Ecclesiastical courts not to take surrenders of probates, &c. on the ground only of wrong duty paid thereon.

Sect. 44. "From and after the expiration of three calendar * months from the passing of this act (11th July, 1815), it shall not be lawful for any ecclesiastical court or person to call in and revoke, or to accept the surrender of any probate or letters of administration, on the ground only of too high or too low a stamp duty having been paid thereon, as heretofore hath been practised; and if any ecclesiastical court or person shall so do, the commissioners of stamps shall not make any allowance whatever for the stamp duty on the probate or letters of administration which shall be so annulled."

Sect. 45. "And whereas it has happened in the case of letters

(c) See Lacy *v.* Rhys, 4 B. & S. 873; *post*, 615.

of administration on which the proper stamp duty hath not been paid at first, that certain debts, chattels real, or other effects due or belonging to the deceased, have been found to be of such great value that the administrator hath not been possessed of money sufficient, either of his own or of the deceased, to pay the requisite stamp duty, in order to render such letters of administration available for the recovery thereof by law. And whereas the like may occur again, and it may also happen that executors or persons entitled to take out letters of administration may, before obtaining probate of the will or letters of administration of the estate and effects of the deceased, find some considerable part or parts of the estate and effects of the deceased so circumstanced as not to be immediately got possession of, and may not have money sufficient, either of their own or of the deceased, to pay the stamp duty on the probate or letters of administration which it shall be necessary to obtain;" it is enacted, "That from and after the passing of this act (11th July, 1815), it shall be lawful for the said commissioners of stamps, on satisfactory proof of the facts by affidavit or solemn affirmation, in any such case as aforesaid which may appear to them to require relief, to cause the probate or letters of administration to be duly stamped for denoting the duty payable or which ought originally to have been paid thereon, and to give credit for the duty, either upon payment of the before mentioned penalty, or without, * in cases of probates or letters of administration already obtained, and upon which too little duty shall have been paid, and either with or without allowance of the stamp duty already paid thereon, as the case may require, under the provisions of this act; provided in all such cases of credit that security be first given by the executors or administrators, together with two or more sufficient sureties to be approved of by the said commissioners, by a bond to his majesty, his heirs or successors, in double the amount of the duty, for the due and full payment of the sum for which credit shall be given, within six calendar months, or any less period, and of the interest for the same, at the rate of ten pounds per centum per annum, from the expiration of such period until payment thereof, in case of any default of payment at the time appointed; and such probate or letters of administration, being duly stamped in the manner aforesaid, shall be as valid and

Sect. 45. Commissioners of stamps may give credit for the duty on probates and letters of administration in certain cases.

available as if the proper duty had been at first paid thereon, and the same had been stamped accordingly."

Sect. 46. Commissioners may extend the credit, if necessary.

Sect. 46. "Provided always, that if at the expiration of the time to be allowed for the payment of the duty on such probate or letters of administration, it shall appear to the satisfaction of the said commissioners that the executor or administrator to whom such credit shall be given as aforesaid shall not have recovered effects of the deceased to an amount sufficient for the payment of the duty, it shall be lawful for the said commissioners to give such further time for the payment thereof, and upon such terms and conditions as they shall think expedient."

Sect. 47. Probate or letters of administration stamped on credit, to be deposited with the commissioners.

Sect. 47. "Provided also, that the probate or letters of administration so to be stamped on credit as aforesaid shall be deposited with the said commissioners of stamps, and shall not be delivered up to the executor or administrator until payment of the duty, together with such interest as aforesaid, if any shall become due; but the same shall nevertheless be produced in evidence by some officer of the commissioner of stamps, at the expense of the executor or administrator, as occasion shall require."

Sect. 48. Duty for which credit shall be given to be a debt to the crown.

* Sect. 48. "The duty for which credit shall be given as aforesaid shall be a debt to his majesty, his heirs or successors, from the personal estate of the deceased, and shall be paid in preference to and before any other debt whatsoever due from the same estate; and if any executor or administrator of the estate of the deceased shall pay any other debt in preference thereto, he or she shall not only be charged with and be liable to pay the duty out of his or her own estate, but shall also forfeit the sum of five hundred pounds."

Sect. 49. Provisions for the case of letters of administration *de bonis non*, taken out before payment of the duty for which credit shall be given.

Sect. 49. "If before payment of the duty for which credit shall be given in any such case as aforesaid, it shall become necessary to take out letters of administration *de bonis non* of the deceased, it shall also be lawful for the said commissioners to cause such letters of administration *de bonis non* to be duly stamped with the particular stamp provided to be used on letters of administration of that kind, for denoting the payment of the duty in respect of the effects of the deceased, on some prior probate or letters of administration of the same effects, in such

and the same manner as if the duty had been actually paid, upon having the letters of administration *de bonis non* deposited with the said commissioners, and upon having such further security for the payment of the duty as they shall think expedient; and such letters of administration shall be as valid and available as if the duty for which credit shall be given has been paid."

It has been decided that this section authorizes the commissioners of stamps to stamp letters of administration *de bonis non* on security given, and without payment of the duty, as well in cases where too low a duty has been paid on the original letters of administration, as when such letters of administration have been originally stamped on credit. (*d*)

Sect. 50. Directions concerning affidavits by executors, &c. residing out of England, relating to trust property.

By sect. 50 it is further enacted, in regard to probate of wills and letters of administration, "That where any part of the personal estate which the deceased was possessed of or entitled to shall be alleged to have been trust property, * if the person or persons who shall be required to make any affidavit or affirmation relating thereto, conformably to the provisions of the said act of the forty-eighth year of his majesty's reign, (*e*) shall reside out of England, such affidavit or affirmation shall and may be made before any person duly commissioned to take affidavits by the court of session or court of exchequer in Scotland, or before one of his majesty's justices of the peace in Scotland, or before a master in chancery, ordinary or extraordinary in Ireland, or before any judge or civil magistrate of any other country or place where the party or parties shall happen to reside; and every such affidavit or affirmation shall be as effectual as if the same had been made before a master in chancery in England, pursuant to the directions of the said last mentioned act."

Sect. 51. A return of duty on probates, &c. to be made in respect of debts, if claimed in three years.

Sect. 51. "Provided always, that where it shall be proved by oath or proper vouchers, to the satisfaction of the said commissioners of stamps, that an executor or administrator had paid debts due and owing from the deceased, and payable by law out of his or her personal or movable estate, to such an amount as, being deducted from the amount or value of the estate and effects of the deceased, for or in respect of which a probate or letters of administration, or a compensation of a testament, testamentary or dative,

(*d*) Doe *v.* Wood, 2 B. & Ald. 724. (*e*) See *post*, 609, 610, 611.

shall have been granted, after the thirty-first day of August, 1815, or which shall be included in any inventory exhibited and recorded in a commissary court in Scotland as the law requires, after that day, shall reduce the same to a sum, which, if it had been the whole gross amount or value of such estate and effects, would have occasioned a less stamp duty to be paid on such probate or letters of administration, or confirmation or inventory, than shall have been actually paid thereon under and by virtue of this act, it shall be lawful for the said commissioners to return the difference, provided the same shall be claimed within three years after the date * of such probate or letters of administration or confirmation, or the recording of such confirmation as aforesaid; but where by reason of any proceeding at law or in equity, the debts due from the deceased shall not have been ascertained and paid, or the effects of the deceased shall not have been recovered and made available, and in consequence thereof the executor or administrator shall be prevented from claiming such return of duty as aforesaid within the said term of three years, it shall be lawful for the commissioners of the treasury to allow such further time for making the claim as may appear to them to be reasonable under the circumstances of the case."

By stat. 5 & 6 Vict. c. 79, s. 23, after reciting that by the stat. 53 Geo. 3, c. 164, "the commissioners of the treasury are authorized to allow time for making claims for a return of stamp duty paid upon probates of wills and letters of administration, in cases where an executor or administrator hath paid debts out of the personal or movable estate of any deceased person, and it is expedient to authorize the commissioners of stamps and taxes to allow time for making such claims;" it is enacted, "That where it shall be proved by oath and proper vouchers, to the satisfaction of the said commissioners of stamps and taxes, that an executor or administrator hath paid debts due and owing from the deceased, and payable by law out of his or her personal or movable estate, (*f*) to such an amount as, being deducted (*g*) * from the amount or value of the estate and effects

5 & 6 Vict. c. 79, s. 23.

(*f*) These words mean such debts as of themselves and in their own nature and character are payable out of the personal estate, and have no relation to any provision which a testator may make in his will for their payment. Percival *v.* The Queen, 3 H. & C. 217.

(*g*) It was held in the construction of this enactment, that if two probates were taken out, the one in the province of Can-

of the deceased for or in respect of which a probate or letters of administration shall have been granted in England after the thirty-first day of August, 1815, or which shall be included in any inventory duly exhibited and recorded after that day in a commissary court in Scotland, shall reduce the same to a sum which, if it had been the whole gross amount or value of such estate or effects, would have occasioned a less stamp duty to be paid on such probate, or letters of administration or inventory, than shall have been actually paid thereon, it shall be lawful for the said commissioners of stamps and taxes, and they are hereby required, to return the difference, provided the same shall be claimed within three years after the date of such probate or letters of administration, or the recording of such inventory as aforesaid; but where, by reason of any proceeding at law or equity, the debts due from the deceased shall not have been ascertained and paid, or the effects of the deceased shall not have been recovered and made available, and in consequence thereof the executor or administrator shall be prevented from claiming such return of duty as aforesaid, within the said term of three years, it shall be lawful for the said commissioners of stamps and taxes to allow such further time for making the claim as may appear to them to be reasonable under the circumstances of the case."

By stat. 24 & 25 Vict. c. 92, s. 3, no return of duty "shall be made or allowed in respect of any voluntary debt due from any person dying after June 28, 1861, which shall be expressed to be payable on the death of such person, or payable under any instrument which shall not have been *bonâ fide* delivered to the donee thereof three months before the death of such person."

Stat. 24 & 25 Vict. c. 92, s. 3. No return of duty in respect of voluntary debts.

*Besides these enactments, it is provided by statute 55 Geo. 3, c. 184, s. 8, "That all the powers, provisions, clauses, regulations and directions, fines, forfeitures, pains and

55 Geo. 3, c. 184, s. 8. Powers

terbury, in respect of assets there, and the other in the province of York, in respect of assets there, and separate duties paid on each probate, and the executors afterwards pay debts indiscriminately out of the whole personalty, they were not entitled to add together the amount in respect of which the two probate duties were paid, deduct from the gross sum the amount of the debts, and then estimate the duty payable on the remainder, and demand back the difference between such duty and the aggregate of the sum paid on the two probates. R. *v.* Commissioners of Stamps, 9 Q. B. 637. Assets situate abroad are not to be taken into the account. Q. B. Feb. 1849; 13 Jurist, 624.

and provisions of former acts to extend to this act.

penalties, contained in and imposed by the several acts of parliament relating to the duties hereby repealed, and the several acts of parliament relating to any prior duties of the same kind or description, shall be of full force and effect with respect to the duties hereby granted, and to the vellum, parchment and paper, instruments, matters and things charged or chargeable therewith, as far as the same are or shall be applicable, in all cases not hereby expressly provided for, and shall be observed, applied, enforced, and put in execution, for the raising, levying, collecting, and securing of the said duties hereby granted and otherwise relating thereto, so far as the same shall not be superseded by, and shall be consistent with, the express provision of this act, as fully and effectually to all intents and purposes as if the same had been herein repeated and specially enacted with reference to the said duties hereby granted."

It is therefore necessary to recur to some of the provisions of the earlier statutes.

By stat. 48 Geo. 3, c. 149, s. 35, it is enacted that "The probate of the will of any person deceased, or the letters of administration of the effects of any person deceased, &c. &c. shall be deemed and taken to be valid and available by the executors and administrators of the deceased, for recovering, transferring, or assigning any debt or debts, or other personal estate or effects, whereof or whereto the deceased was possessed or entitled, either wholly or partially, as a trustee, notwithstanding the amount or value of such debt or debts, or other personal estate or effects, or the amount or value of so much thereof, or such interest therein, as was trust property in the deceased (as the case may be) shall not be included in the amount or value of the estate in respect of which the stamp duty was paid on such probate or letters of administration."

48 Geo. 3, c. 149. Probates of wills and letters of administration valid as to trust property, although the value thereof be not covered by the stamp duty.

* And by s. 36 of the same statute, it is provided, that where the executors or administrators of any person deceased shall be desirous of transferring, or of receiving the dividends of any share standing in the name of the deceased, of and in any government or parliamentary stocks or funds, transferable at the bank of England, or of and in the stock and funds of the Governor and Company of the Bank of England, or of and in the stock and funds of any

Where executors, &c. allege, that any property was vested in the deceased, as a trustee, a special affidavit thereof

other company, corporation, or society whatever, passing by transfer in the books of such company, corporation, &c. under any such probate or letters of administration, and shall allege that the deceased was possessed thereof or entitled thereto, either wholly or partially, as a trustee; the bank and any other corporation, &c. or their officers may, for their indemnity, require an affidavit (*h*) or affirmation of the fact, as in s. 37 is mentioned, if it shall not otherwise appear, and thereupon may permit such executors or administrators to transfer the stock or fund in question, and receive the dividends thereof, without regard to the stamp duty on the probate or letters. And where the executors or administrators of any person deceased shall have occasion to recover any debt or other personal estate due to the deceased, and shall allege that he was possessed thereof, or entitled thereto, either wholly or partially, as a trustee; the person liable to pay such debt may require a like affidavit as aforesaid, and thereupon make over such debt or effects to such executors, &c. regardless of such stamp duty as aforesaid; and where the executors, &c. of any person deceased shall have occasion to assign or transfer any debts due to the deceased, or any chattels real, or other personal estate, whereof or whereto the deceased was possessed or entitled, and shall allege that the same were due to, or vested in him, either wholly or partially, as a trustee, the person to whom or for whose use such debts, chattels real, &c. shall be proposed to be assigned, may require such affidavit as aforesaid, and thereupon *accept such assignment or transfer, regardless of such stamp duty as aforesaid.

may be required in the several instances specified.

And by sect. 37 of the same statute, upon any requisition as in sect. 36, such executors or administrators, or some person to whom the fact shall be known, shall make a special affidavit or affirmation of the facts, stating the property in question and that the deceased had not any beneficial interest in the same, or no other than shall be therein set forth, but was possessed of or entitled thereto, wholly or in part, in trust for some other person, whose name or other description shall be specified, or for such purposes as shall be therein specified, and that the beneficial interest of the deceased, if any, in the property in question, does not exceed a certain value, also therein specified, according to the best estimate that can be

Particulars to be stated in such affidavits by executors, &c. respecting trust property.

(*h*) See *ante*, 606.

made thereof, if reversionary or contingent; and that the value of the estate for which the stamp duty was paid on the probate or letters is sufficient to cover all such beneficial interest, as well as the rest of such personal estate of the deceased, and for which such probate or letters have been granted, as far as the same has come to the knowledge of such executors or administrators; and where such affidavit or affirmation is made by any other person than the executors or administrators of the deceased, they also shall make an affidavit or affirmation that the same is true, to the best of their knowledge, and that the property in question is intended to be applied accordingly; which affidavits or affirmations shall be sworn before a master in chancery, and shall be delivered to the party requiring the same, and be sufficient indemnity to them; and if any person making such affidavit or affirmation shall knowingly and wilfully make a false oath or affirmation of the matters therein contained, such persons shall, on conviction, be liable to the pains inflicted on persons guilty of perjury.

39 & 40 Geo. 3, c. 72. Commissioners of stamps may cancel useless probates of wills and letters of administration, and allow such stamps.

By stat. 39 & 40 Geo. 3, c. 72, s. 16, where due proof on oath is made to the commissioners of stamps (which oath one of such commissioners may administer), that any will has, through inadvertence, been proved, or that any letters * of administration have been taken out on the same property, in more than one ecclesiastical or prerogative court, or more than once in any such ecclesiastical court, and by reason thereof more than one stamp duty has been paid, such commissioners may, on delivery to them of the useless probate or letters, to be cancelled, and on production of the valid probate or letters granted on any such will or property, cancel the useless probate, &c. and stamp any vellum, &c. with stamps of the like denomination and value as those cancelled, without taking any money for the same.

41 Geo. 3, c. 86, s. 3. To prevent the double payment of duties, the stamp office shall provide a stamp for marking probates of wills or let-

By stat. 41 Geo. 3, c. 86, s. 3, after reciting that "it is expedient that the duties payable in respect of probates or letters of administration should not be paid more than once on the same estate;" it is enacted, "that it shall be lawful for the said commissioners of stamps, and they are hereby authorized and required to provide a stamp or mark distinguishable from all other stamps or marks used in relation to any stamp duties, for the purpose of stamping or marking any piece of vellum, parchment, or

paper, whereon any probate of any will or letters of administration shall be engrossed, printed, or written, in relation to any estate in respect whereof any probate or letters of administration shall have been before taken out, and the full amount of the duties payable thereon, by any act or acts of parliament then in force, according to the full value of such estate, shall have been duly paid and discharged; and in every case where any probate or probates, or letters of administration, shall have been taken out, duly stamped according to the full value of the estate in respect whereof the same shall have been granted, then and in such case any further or other probate or letters of administration as aforesaid, which shall be at any time thereafter applied for or in respect of such estate, shall and may be issued and granted upon any piece of vellum, parchment, or paper, stamped or marked with the stamp or mark provided by the said commissioners by virtue of this act for such other probates or letters of administration as aforesaid; and every * such other probate or letters of administration, which shall be duly stamped or marked with such stamp or mark as last aforesaid, shall be as available in the law, and of the like force and effect in all respects whatever, as if the vellum, parchment, or paper whereon the same shall be engrossed, printed, or written, had been duly stamped with the stamp or mark, denoting the full amount of the duties payable in respect of the probate or letters of administration taken out on the full value of such estate; anything in any act or acts, or this act, before contained, to the contrary thereof in any wise notwithstanding." (*i*)

ters of administration, relating to any estate in respect whereof any probates, &c. shall have been before taken out, and the duties then payable discharged.

By stat. 28 & 29 Vict. c, 104, s. 57, "If any person takes possession of, and in any manner administers any part of the personal estate of any person deceased, without obtaining probate of his will or letters of administration of his estate within six months after his decease, or within two months after the termination of any suit or dispute respecting the will or the right to letters of administration, if there is any such suit or dispute that is not ended within four months after the death, the commissioners of inland revenue may sue out of the court of exchequer a writ of summons commanding the person so taking possession and administering as

20 & 29 Vict. c. 104, s. 57. Summary proceedings for payment of probate duties.

(*i*) See, also, stat. 5 & 6 Vict. c. 82, s. 36.

aforesaid to deliver to the commissioner an account of the estate of the deceased and of its value, and to pay such duty as would have been payable if probate or administration had been obtained, and the costs of the proceedings, or to show cause to the contrary; and, on cause being shown, such order shall be made as seems just, and any such proceedings shall be a waiver of all penalties incurred in the premises by such person as aforesaid."

By sects. 58, 59, and 60, the court may refer the matter to the proper officer to report thereon, and may order a special case, or direct an issue to be tried by a jury, and error may be brought on the judgment of the court on a special case, &c. to the exchequer chamber, and thence to the house of lords.

Probate, &c. not properly stamped, cannot be given in evidence: the stamp must cover the claim on which the action is brought.

* A very important regulation, as to the consequences of not obtaining the requisite stamp, which was contained in the former stamp acts, and reënacted by section 8 of the stat. 55 Geo. 3, c. 184, is that no instrument not properly stamped shall be given in evidence. (*j*) Hence, where an executor or administrator brings an action, in which it is necessary for him, at the trial, to prove his representative character, if his case shows that he sues for a greater value than is covered by the stamp of his probate or letters of administration, he cannot recover; for the instrument, not being properly stamped, cannot be given in evidence; and he is therefore excluded from the only means of showing the fact of his being executor or administrator. (*k*) Nor will it make any difference, that he is suing for a doubtful claim. (*l*) Again, in a suit in equity, it should seem that a party suing as executor or administrator cannot sustain proceedings to recover a larger sum than that upon which the probate duty is calculated. (*m*)

But the grant is not *void* by reason of an original defect of stamp; and therefore a commission of bankrupt may be supported

(*j*) 3 Taunt. 116. The old statute of 9 & 10 W. 3, c. 25, s. 19, first contains the clause enacting this prohibition, and it has been continued through all the succeeding acts. Ib. The *first* act relating to probate duty is the stat. 5 W. & M. c. 21, s. 3.

(*k*) Hunt *v.* Stevens, 3 Taunt. 113.

(*l*) Ib.; Carr *v.* Roberts, 2 B. & Ad. 905; *post*, 616. See *infra*, pt. v. bk. 1· ch. 1.

(*m*) Jones *v.* Howells, 2 Hare, 342. Where A. claimed a fund in court, as his father's administrator, but the letters of administration were not stamped to a sufficient amount, the court refused to grant him a stop order, until he had procured the letters to be sufficiently stamped. Christian *v.* Devereux, 12 Sim. 264.

on a debt due to the petitioning creditor in the character of executor, although he has not obtained a probate on a sufficient stamp at the time when the commission issues, if he afterwards procures the proper stamp to be affixed to the probate. (*n*)

Grant not void by reason of an original defect of stamps.

So where letters of administration had been stamped * under the 41st sect. of 55 Geo. 3, c. 184 (*o*) (the trial of the cause having been adjourned, in order to enable the plaintiff to take advantage of that enactment), it was held that the defendant could not object that they had not been stamped within six months after the discovery of the mistake, so that a penalty had been incurred under the 43d section, (*p*) and the penalty had not been paid. (*q*)

Construction of foregoing statutes:

The executor or administrator, it should seem, is bound to take out the grant to the extent of the sum he expects to receive. (*r*)

to what amount the grant should be taken out:

In the case of Moses *v.* Crafter, (*s*) Lord Tenterden held that desperate and doubtful debts need not be included in the amount for which the probate duty is paid; and that the executor has a right to exercise his judgment fairly and *bonâ fide*, whether a debt is doubtful or bad.

as to debts due to deceased:

In Swabey *v.* Swabey, (*t*) on the death of a mortgagor, his daughter became entitled, as his heir, to the equity of redemption of an estate which he had mortgaged to the trustees of his own marriage settlement, and under that settlement she also became entitled, as *cestui que trust*, to the mortgage money. The trustees then conveyed the estate to her, subject expressly to the equity of redemption, and did not release her father's covenant for the repayment of the money. Afterwards she granted an annuity, and as a security for it, conveyed the estate and assigned the money to a trustee for the annuitant. By her will she devised the estate, but did not dispose of her personal estate; and Sir L. Shadwell held, that though, as between her devisee and her next of kin, the latter had no claim to the stock, yet she was, when she died, *cestui que trust* of her

mortgage debt belonging to the owner of the mortgaged estate:

(*n*) Rogers *v.* James, 7 Taunt. 147; S. C. 2 Marsh. 425.
(*o*) *Ante*, 601.
(*p*) *Ante*, 602.
(*q*) Lacy *v.* Rhys, 4 B. & S. 873.
(*r*) Butler *v.* Butler, 2 Phillim. 39.
(*s*) 4 C. & P. 524.
(*t*) 15 Sim. 502.

father's covenant for repayment; and that, therefore, the debt remained, and probate as well as legacy duty was payable on it.

goods in both provinces:

If there were personal estates in both the provinces of * York and Canterbury, and a probate was taken in the province of York only, the duty was paid upon the property in that province only, and it was not paid upon the other property, until a probate had been taken in the province of Canterbury. (*u*)

the stamp must be of an amount sufficient to cover the value as it stood *at the date of the grant of letters.*

The stamp must be of a sufficient amount to cover the value of the assets as it stood, not merely at the time of the death of the deceased, but also at the date of the grant of administration. Thus, in a modern case, A. being possessed of a term of years in a house and land, died intestate in 1828. In 1841, his next of kin took out administration to him. In the mean time B. had been wrongfully in possession, and had built a second house on the demised premises; and it was held that the stamp on the letters, which was sufficient to cover the value of the lease at the date of the death of the deceased, but not the improved value at the date of the grant of the administration, was insufficient. (*v*)

Case where husband's administrator seeks to enforce a right of his deceased wife.

If a married woman, entitled as next of kin to the estate of an intestate, dies without asserting her claim, leaving her husband surviving, who also dies without asserting his claim, it is necessary for the next of kin of the husband, in order to enforce the right of the wife and reduce it into possession, to take out letters of administration to both husband and wife, and pay stamp duty on the property for each grant of administration. (*w*)

What is trust property within the exemption of 55 Geo. 3, c. 184:

It will be observed that the schedule of the statute 55 Geo. 3, c. 184, imposes an *ad valorem* duty where the estate is above 20*l.* in value, exclusive of what the deceased shall have been possessed of, or entitled to, as a trustee and not beneficially. (*x*) In Carr, administratrix of Walker, *v.* Roberts, (*y*) an intestate had granted an annuity to Ann * Smith, and afterwards by deed conveyed his property to the defendant, who covenanted to indemnify him against the payment

(*u*) In re Ewin, 1 Cr. & Jerv. 153, 154, 157; S. P. S. C. 1 Tyrwh. 104, 107, by Alexander C. B. and Bayley B.

(*v*) Doe *v.* Evans, 10 Q. B. 476. See, also, Attorney General *v.* Partington, 1 H. & C. 457. Affirmed in error, 3 H. & C. 193.

(*w*) Attorney General *v.* Partington, 3 H. & C. 193.

(*x*) *Ante*, 595, 596.

(*y*) 2 B. & Ad. 905.

of the annuity. Default having been subsequently made in the payment during the intestate's lifetime, the annuitant sued his administratrix, and recovered judgment for debt and costs exceeding 20*l.*; the administratrix paid this, and then sued the defendant on his covenant for the amount. It was held that the right to recover this sum was a part of the intestate's estate, and rendered the letters of administration liable to stamp duty; and that the intestate, if he had lived, could not have been considered, in respect of this sum, as a mere trustee for the annuitant, and having no beneficial interest; Lord Tenterden, in giving judgment in this case, after stating the words of the act, observed, that this provision was made for the exemption of mere trustees, as where property is mortgaged in trust; in which case, if the mortgagee's representative were bound to pay the whole amount of the duty, great injustice would be done. Here Walker, the intestate, did not stand in the position of a mere trustee; for he had a beneficial interest in the covenant, since he was liable in the first instance to Smith, and had an interest in obtaining payment of her annuity from the defendant, to relieve himself.

the probate duty is to be regulated by the value of such part of the assets as are within the jurisdiction of the court which grants the probate or letters of administration:

The law appears to be now settled that, by the terms of the act of parliament, the amount of the probate duty is to be regulated, not by the value of all the assets which an executor or administrator may ultimately administer by virtue of the wills or letters of administration, but *by the value of such part as are at the death of the deceased within the jurisdiction of the court by which the probate of administration are granted.* (*z*)

Whatever may have been the origin of this jurisdiction, (*a*) * it is clear that it is a limited one, and can be exercised in respect of those effects only which the ordinary would have had himself to administer in case of intestacy, and which must therefore be so situated as that he could have disposed of them *in pios usus.* (*b*)

the duty is not pay-

These principles have been adopted in several important modern decisions respecting the liability to probate duty of the personal property of the testator, which, at the time

(*z*) Hence it follows that probate duty attaches on *bona notabilia* in the place where the goods happen to be situate, wholly irrespective of the question of the domicil of the testator. Fernandes's Executors' case, L. R. 5 Ch. App. 314–317.

(*a*) See *ante*, 402.

(*b*) See *ante*, 402; [Lord Abinger C. B. in Attorney General *v.* Bouwens, 4 M. & W. 191.]

able in respect of property in a foreign country belonging to a testator dying in this country, although the property be brought into and administered in this country by the executor:

of his death, is in a foreign country, but which, after his death, is brought into this country by his executor. The first of these was the Attorney General *v.* Dimond. (*c*) In that case the testator died at Leicester on or about the 10th of May, 1828, and on the 28th June, 1828, the will was proved in the prerogative court of Canterbury, by the executor. The personal property of the testator was sworn to be under the value of 5,000*l.*, and a probate duty of 80*l.* only was paid. The testator, at the time of his death, was a creditor of the French government, to the amount of the annual sum of 32,727 francs, five per cent. consolidated, inscribed in the great book of the debt public of France, called *rentes*. The personal property of the said testator, not including the said *rentes*, was under the value of 5,000*l.* After the death of the testator, in July, 1828, the executor executed a power of attorney, authorizing Messrs. Mallet, a French house, to sell out the *rentes* in question. This power of attorney, together with a notarial exemplified extract of the clause in the will appointing the executors, and a notarial copy of the probate act, and a notarial certificate of the burial of Paul Francis Benfield, the testator, were produced by Messrs. Mallet to the bank of France, and the said *rentes* were thereupon sold by them at Paris, under the said power of attorney, and the produce was received by them and transmitted by bills amounting to 27,183*l.* 9*s.* 2*d.* sterling, on account of the executor, to Messrs. Hammersley & Co. * bankers of London, and was placed by them to the account of the executor, in his character of executor; and the said Messrs. Hammersley, by his order, as executor, invested the produce of the said bills in bank three per cent. annuities, in the English funds, in the names of himself and a co-trustee appointed by him, in the room of a co-executor deceased, where the same still continued. The testator, as well as the executor, was at his death, and during his lifetime, an English subject, and resident in England. The question for the opinion of the court was, whether the executor was bound to pay a probate duty on the amount of the produce of the said French *rentes;* and the barons, after taking time to consider, decided in the negative. Lord Lyndhurst C. B. in delivering the judgment of the court, observed, that, by the terms of the act of parliament, the amount of the duty is

(c) 1 Cr. & Jerv. 356; S. C. 1 Tyrwh. 243.

regulated *by the value of the estate and effects for or in respect of which the probate is granted;* and the question therefore was, for or in respect of what estate and effects was the probate granted in the present instance; that it could not have been granted for or in respect of the property in question, because, at the time of the death of the testator, it was in a foreign country, and, consequently, out of the jurisdiction of the spiritual court; and his lordship distinguished between the liability to probate duty and that to legacy duty, (*d*) inasmuch as it is not the administration of assets which renders the probate duty payable, but the local situation of the assets at the testator's death.

There was, in effect, an appeal from this judgment to the house of lords, in the case of The Attorney General *v.* Hope, (*e*) where the same point arose with respect to moneys standing in the testator's name in the public funds or stock of the * United States of America, and debts due to him from persons in that country. But their lordships, after hearing the case very fully and ably argued, recognized and adopted the decision of the barons of the exchequer. And Lord Chancellor Brougham, in delivering his opinion to the house, stated that he had made inquiries of the judge of the prerogative court (Sir J. Nicholl) and the king's advocate (Sir H. Jenner), and that they confirmed the view he had taken of the jurisdiction and nature of the ordinary's office, viz, that probate never has been granted except for goods, which, at the time of the death of the party, were within the jurisdiction of the ordinary who makes the grant. (*f*)

These two cases, in effect, have decided that French *rentes* and American stock, which are part of the national debt of France and America respectively, and are transferable there only, and debts due from persons in America, are not assets locally situated here. So in Pearse *v.* Pearse, (*g*) the testator, who was domiciled in England, had, in the hands of his agents in India, certain securities of the Indian government, the principal and interest of which were payable in India, either in cash, or by bills on the East India Company, at the option of the creditor. Shortly

(*d*) The court had recently decided that foreign stock, the property of a testator domiciled in this country, is liable to *egacy* duty. In re Ewin, 1 Cr. & Jerv. 151; S. C. 1 Tyrwh. 91; *infra*, pt. III. bk. v. ch. II.

(*e*) 1 Cr., M. &. R. 530; S. C. 4 Tyrwh. 878; 8 Bligh, 44; 2 Cl. & Fin. 84.

(*f*) See, however, Spratt *v.* Harris, 4 Hagg. 405; *ante*, 364.

(*g*) 9 Sim. 430.

before his death, he accepted an offer made by the company to have his notes converted into stock, to be registered in England, and to be salable and transferable there. The conversion was not completed at the testator's death, nor until after his will had been proved in England; but ultimately the stock was transferred to his executors. And Sir L. Shadwell held, on the authority of the Attorney General *v.* Hope, that no probate duty was payable in respect either of the notes or the stock.

In the Attorney General *v.* Higgins, (*h*) it was held that the crown could claim duty, payable in Scotland, under the * stat. 48 Geo. 3, c. 149, s. 38, in respect of shares in certain public companies in Scotland, which belonged to a testator who was domiciled in England and whose will had been proved there and the duty duly paid thereon. This case proceeded on the ground that the shares were assets in Scotland and not in England.

probate duty on bonds of foreign state:

And in the Attorney General *v.* Bouwens, (*i*) the barons of the exchequer held that probate duty was payable upon the value of Russian, Danish, and Dutch government bonds, which were the property of the testatrix, and were, at the time of her death, in the province of Canterbury. The question was raised upon a special verdict, which gave a description of the instruments, and found that they were marketable securities within this kingdom, transferred by delivery only, and that it never had been neccessary to do any act whatever out of the kingdom of England, in order to make a transfer of any of the said bonds valid. And the barons held that these securities were to be considered as assets locally situate within the province of Canterbury at the time of the testator's death, and were, therefore, liable to the duty. Their lordships, at the same time, expressed their opinion that no ordinary in England could perform any act of administration within his diocese, with respect to debts due from persons resident abroad, or with respect to shares or interests in foreign funds payable abroad and incapable of being transferred here, and therefore that no duty would be payable on the probate or letters of administration in respect of such effects. But that, on the other hand, it was clear that the ordinary could administer all chattels within his jurisdiction: and if an instrument was created of a chattel nature, capable of being transferred by acts done here and sold for money here, there was no reason why the ordi-

(*h*) 2 H. & N. 339.

(*i*) 4 M. & W. 171.

nary or his appointee should not administer that species of property. That such an instrument was in effect a salable chattel, and followed the nature of other * chattels as to the jurisdiction to grant probate. Here were valuable instruments in England, the subjects of ordinary sale; the debtors by virtue of such instruments, if there were any, resident abroad, out of the jurisdiction of any ordinary, and, consequently, there being no fear of conflicting rights between the jurisdictions who were to grant probate. (*j*)

These principles were also recognized and acted on by Lord Langdale M. R. in Matson *v.* Swift, (*k*) where his lordship held that no probate duty was payable in respect of land directed to be converted into money. And the learned judge adverted to the twofold character of the probate, which, besides granting administration, authenticates the will, and is evidence of the character of executor; so that the probate may be required for the purpose of proving the executor's title to personal estate, which may not be comprised in the grant of administration contained in the same probate. This decision was relied on by Wigram V. C. in Custance *v.* Bradshaw, (*l*) where his honor held that the share of a deceased partner in the freehold and copyhold estates of the partnership is not personal estate for the purpose of being included in the value or amount in respect of which probate duty is payable.

the duty is not payable on land directed to be converted into money:

nor on partnerships' real property:

In supposed accordance with these decisions, the case of the Attorney General *v.* Brunning, (*m*) was decided by the court of exchequer. There a testator having by a valid contract agreed to sell a freehold estate for 115,000*l.* and * received a deposit of 15,000*l.* in his lifetime, the contract was specifically performed, and the remainder of the purchase-money paid to his executor after his death. And the barons held

secus, as to the price of land contracted to be sold.

(*j*) It may be proper to remind the readers, that judgment debts are assets for the purposes of the jurisdiction of the ordinary, where the judgment is recorded; leases where the land lies; specialty debts where the instrument happens to be; and simple contract debts where the *debtor* resides at the time of the testator's death. See *ante*, 289, note (*h*). 1 Saund. 274 *a*, note (3). The instruments in question were incorrectly called bonds, not being under seal, but being merely certificates of the right of the holders to claim the amounts therein specified from the respective governments.

(*k*) 8 Beav. 368.

(*l*) 4 Hare 315. See, also, In re De Lancey, L. R. 5 Exch. 102.

(*m*) 4 H. & N. 95.

that probate duty was not payable in respect of any portion of the 115,000*l.* as part of the personal estate of the testator.

But this decision was reversed by the house of lords, (*n*) who acted on the principle that all moneys recoverable by the executors by virtue of the probate, in whatever form recovered, whether through the agency of a court of equity or of a court of law, are part of the estate and effects of the testator, and are liable to probate duty. And Matson *v.* Swift and Custance *v.* Bradshaw were distinguished on the ground that in neither of those cases was there any change in the nature of the property created by the obligation of a binding contract, and the property in question remained real estate at the death of the testator; whereas, in the present case there was a contract binding on the testator and on the purchaser, by virtue of which the former had a right to the stipulated purchase-money on completing the purchase, the latter had a like right to the estate; so that in equity the testator at the time of his death had a claim for 115,000*l.*, in the event of a good title being made out, and that claim devolved on the executor. (*o*)

probate duty on execution of general power by will.

It was held by Sir L. Shadwell V. C. in Palmer *v.* Whitmore, (*p*) that where a party has a general power, under a settlement, over a trust fund of personalty, which he may exercise either by deed or will, and he elects to exercise it by a testamentary instrument, probate duty must be paid *in respect of the fund. So in the Attorney General *v.* Staff, (*q*) Mathew Stainton bequeathed certain stock to trustees, upon such trusts and subject to such powers, &c. as Judith Staff should by deed or will direct or appoint; and in default of appointment, upon trust to pay the dividends to her during her life, and after her decease to pay the principal amongst her children. After the testator's death she executed a deed according to the mode prescribed by the will; by which, after reciting that she was

(*n*) 8 H. L. Cas. 243. Where a testator bequeathed his personal estate to his son, who died in his father's lifetime, leaving issue, who became entitled to the bequest under sect. 33 of wills act (see *ante*, preface, p. xviii.), it was held that the executors of the son were chargeable with probate duty on the amount of the bequest in the same manner as they would have been had the son actually survived the father. Executors of Perry *v.* The Queen, L. R. 4 Ex. 27.

(*o*) See, also, Forbes *v.* Steven, L. R. 10 Eq. Cas. 178.

(*p*) 5 Sim. 178.

(*q*) 2 Cr. & M. 124; S. C. 4 Tyrwh. 14.

desirous of executing the power, she directed the trustees to transfer the fund to herself and a new trustee, upon such trusts and subject to such powers, &c. as she should by any deed, with or without power of revocation and new appointment, or by her last will, direct and appoint, with certain limitations over in default of appointment, similar to those contained in the will; in pursuance of which deed the fund was transferred into the names of herself and the new trustee. She afterwards, by will, by virtue and in execution of that power, appointed the fund to be transferred to certain persons, in trust that the same might be consolidated with and become part of her residuary estate, and follow the dispositions thereof thereinafter mentioned. It was held, by the barons of the exchequer, that the deed executed by Judith Staff being an exercise of the power under the original will, the property thereby became liable to her debts, and became her personal estate, in which she had a beneficial interest, and consequently was liable to the payment of probate duty. (*r*) Again, in Nail *v.* Punter, (*s*) where a stock was settled by deed on a wife, for her separate use for life, and with a power of appointment by will, which she exercised in favor of her husband, and appointed him executor, Sir L. * Shadwell V. C. held that, if the husband claimed the fund as his wife's executor, he must pay probate duty on it.

But in Vandiest *v.* Fynmore, (*t*) George Vandiest, by his will, dated the 12th of February, 1811, devised the residue of his property to trustees, in trust, out of the interest, dividends, or annual produce thereof, to pay to Ann Hart an annuity of 1,000*l.* for her separate use for her life; and then proceeded as follows: "I moreover empower the said Ann Hart to dispose of and bequeath the sum of 5,000*l.*, or any part thereof, out of my effects, by her will duly executed, to any person or persons, and in such manner, and under such conditions as she shall, by her said will, think proper; and my said executors shall, out of my effects, pay the said sum, or any part thereof, accordingly, in virtue of such will." The testator died on the 17th April, 1814; and probate duty was paid in respect of his estate. Ann Hart died on the 10th January, 1831, having, by her will, disposed of the 5,000*l.* in pur-

(*r*) The court seemed to be of opinion that the law is different where there is only a limited power to appoint the fund among persons named, or classes of persons. 2 Cr. & M. 134; 4 Tyrwh. 24.

(*s*) 5 Sim. 563.

(*t*) 6 Sim. 570.

suance of the power given to her by the will of the testator. Sir L. Shadwell V. C. held that probate duty was not payable a second time in respect of this fund; because here the power was given by the will of the original testator, and the appointees of Ann Hart took as if they had been named in his will. In the subsequent case of Platt *v.* Routh, (*u*) John Ramsden, by his will, dated the 10th of March, 1825, gave the residue of his personal estate to his daughter, Judith A. Platt, and three other persons, his executrix and executors, upon trust to permit his said daughter to receive the interest and dividends during her life, and after her decease, upon trust for such person or persons (other than and except the relations of her late husband and certain other specified individuals), in such parts, shares, and proportions, and in such manner and form as the said Judith A. Platt should by will appoint, and in default of appointment, in trust for the next of kin of Dyson Ramsden. The testator died in May, 1825, and after * his death, the said Judith A. Platt received the interest and dividends of his residuary estate until her death in September, 1837. In April, 1837, she made a will, and thereby, in exercise of the power under her father's will, she gave and appointed the residue of his estate to certain persons. The barons of exchequer (on a case directed by the master of the rolls) were of opinion that, although the power of appointment in this case must be treated, as far as regarded the legacy duty, as a general and absolute power, yet that no duty was payable on the probate of the will of Judith A. Platt in respect of the residuary estate of her father. Their lordships stated that they were aware that this opinion was directly opposed to the decision of the court of exchequer in the Attorney General *v.* Staff, (*v*) as also to the previous case of Palmer *v.* Whitmore. (*x*) But that those cases both proceeded on the ground that property subject to a general power of appointment forms part of the property, "for and in respect of which the probate is granted;" and it appeared to them impossible to reconcile that doctrine with the subsequent decision of the house of lords in the Attorney General *v.* Hope, (*y*) inasmuch as it was thereby decided that the probate is granted in respect of that property only which, but for the will, the ordinary would have been entitled to administer; and it being quite clear that neither the ordinary nor the executor ever could

(*u*) 6 M. & W. 756.
(*v*) *Ante*, 624.
(*x*) *Ante*, 623.
(*y*) *Ante*, 619.

have administered any part of this property; their lordships could not hold that it was property for or in respect of which probate was granted. Their lordships added, that independently of the authority of the Attorney General *v.* Hope, there would be many serious difficulties resulting from the doctrine of the Attorney General *v.* Staff, which did not seem to have occurred to the court when that case was decided; inasmuch as the executor is the party who is to pay the duty, and the only funds to which he can resort for reimbursement are the * general assets. What then was he to do in a case like the present, where the fund to be appointed is very large, and the general assets very small? It might, and probably would happen in the present case, that the duty would far exceed the whole of the assets which the executor could ever possess; and the consequence would be that he never would be able to prove at all. It was plain, from the nature of the provisions of the stat. 55 Geo. 3, c. 184, that the legislature did not contemplate the possibility of a case in which the duty could ever eventually exceed the amount of the assets realized by the executors; as it certainly might if the Attorney General *v.* Staff was followed.

This opinion of the barons was afterwards confirmed by the decree of Lord Langdale, (*z*) and finally by the decision of the house of lords. (*a*)

But now, by stat 23 & 24 Vict. c. 15, s. 4, "The stamp duties payable by law upon probates of wills and letters of administration with a will annexed in England and Ireland, and upon inventories in Scotland, shall be levied and paid in respect of all the personal or movable estate and effects which any person hereafter dying shall have disposed of by will, under any authority enabling such person to dispose of the same, as he or she shall think fit; and for the purpose of this act such personal or movable estate and effects shall be deemed to be the personal or movable estate and effects of the person so dying in respect of which the probate of the will or the letters of administration, with the will annexed, of such person are or is granted or the inventory is, or is required to be, exhibited or recorded, as the case may be; and such estate and effects, and the value thereof, shall accordingly be included in the affidavit required by law to be made

23 & 24 Vict. c. 15, s. 4. Personal estate appointed by will under general powers to be chargeable with probate and inventory duties.

(*z*) 3 Beav. 257.

(*a*) Drake *v.* Attorney General, 10 Cl. & Fin. 257.

on applying for probate or letters of administration, in order to the full and proper stamp duty being paid."

*5. "The said last mentioned duties shall be a charge or burden upon the property in respect of which the same are so payable, and shall be paid thereout by the trustees or owners thereof to the person for the time being lawfully having or taking the burden of the execution of the will or testamentary instrument, or the administration or management of the personal or movable estate and effects of the deceased, for the benefit of the persons entitled to the personal or movable estate and effects of the deceased."

Probate and inventory duties in respect thereof to be a charge on the property.

If after the probate duty has been properly paid, the executor or administrator should obtain a return of a part of it, under the statute, (*b*) by fraud on the commissioners, a question would arise, whether the debt for the duty must be considered as remitted to the same situation in which it originally stood; or whether, as the debt was once actually paid, and the commissioners have allowed themselves to be deluded, the crown has not lost its original right against the estate. This point arose in Hicks *v.* Keat, (*c*) where pending an administration, and before the accounts were taken, the attorney general presented a petition for payment out of the assets of a sum which, under false representations, had been returned to the administrator as overpaid in respect of probate duty. And Lord Langdale held that the application was, at all events, premature; and that it was, therefore, unnecessary to decide the point, which, however, his lordship appeared to treat as one of importance and difficulty.

Whether if the executor procures a return of probate duty on false representations, the crown can revert to the assets for repayment.

(*b*) See *ante*, 606, 607.

(*c*) 3 Beav. 141.

END OF PART THE FIRST.

* PART THE SECOND.

OF THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR.

BOOK THE FIRST.

OF THE TIME WHEN THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR VESTS: AND OF THE QUALITY OF THAT ESTATE.

IN considering the nature of the estate which an executor or administrator has in the property of the deceased, it is proposed to inquire, 1. At what time his estate vests; 2. The quality of his estate.

CHAPTER THE FIRST.

OF THE TIME WHEN THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR VESTS.

Estate of executor.

As the interest of an executor in the estate of the deceased is derived exclusively from the will, (*a*) so it vests in the executor from the moment of the testator's death. (*b*)

(*a*) *Ante*, 293.

(*b*) Com. Dig. Administration, B. 10; Woolley *v.* Clark, 5 B. & Ald. 745, 746; [Shirley *v.* Healds, 34 N. H. 407, 411; Johns *v.* Johns, 1 McCord (S. Car.), 132; Seabrook *v.* Williams, 3 McCord (S. Car.), 371; Lane *v.* Thompson, 43 N. H. 320, 325; Rand *v.* Hubbard, 4 Met. 256, 257; Shaw C. J. in Hutchins *v.* State Bank, 12 Met. 425; Carlisle *v.* Burley, 3 Greenl. 250. "It is an established rule of law, that all the personal property of the testator vests in the executors, for some purposes, before probate of the will, but to all intents and purposes, upon its probate. This they take, not merely as donees, by force of the gift, as *inter vivos*, but by operation of the rules of law controlling, regulating, and giving effect to wills. A trustee, therefore, who is but a legatee, can take only through the executors. If a testator were to appoint no executor, or direct that the estate should go immediately into the hands of legatees, or of one or more trustees, for particular purposes, such direction would be nugatory and void."

Thus where the demise by an executor, the lessor of the plaintiff in ejectment, was laid two years before he had proved the will under which he claimed, it was held good. (*c*) So where a testator had given a bailiff authority to distrain, but died almost immediately before the distress was taken; and, after *it had been taken in his name, his executor ratified the distress; it was held that the plaintiff might well avow as the bailiff of the executor; because the rent was due from the estate, and the law knows no interval between the testator's death and the vesting of the right in his executor; as soon as he obtains probate, his right is considered as accruing from that period. (*d*)

Estate of administrator.

On the other hand an administrator derives his title wholly from the ecclesiastical court; he has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant. (*e*)

The property must be disposed of in an orderly course of administration, which the testator cannot control. Shaw C. J. in Newcomb *v* Williams, 9 Met. 533, 534.]

(*c*) Roe *v.* Summersett, 2 W. Bl. 692.

(*d*) Whitehead *v.* Taylor, 10 Ad. & El. 210; 2 Per. & Dav. 367.

(*e*) Woolley *v.* Clark, 5 B. & Ald. 745, 646; [Rand *v.* Hubbard, 4 Met. 256, 257; Hagthorp *v.* Hook, 1 Gill & J. 276; Snodgrass *v.* Cabiness, 15 Ala. 160; *ante*, 404. Where all the parties beneficially interested in the estate of a deceased person, being of age and capable, have adjusted and settled the estate without mistake or fraud, each taking his agreed share and giving the others a discharge, and all the demands against the estate are settled, an administrator subsequently appointed, even if he is not an heir, cannot be allowed to defeat the arrangement and maintain trover against the parties for the property so received by them. But if any party has been defrauded in the settlement, "the party defrauded may avoid all that has been done, and the administrator will be entitled to administer upon the estate, perhaps, as if no settlement had been made. In such case the proper course would be for the party defrauded first to deliver the property received to the administrator." Parker C. J. in Hibbard *v.* Kent, 15 N. H. 516, 519; Clarke *v.* Clay, 31 N. H. 393; Giles *v.* Churchill, 5 N. H. 337; *post*, 650, note (*d*[1]); Harris *v.* Seals, 29 Geo. 585. And it has been held competent, in Vermont, for all the heirs of a deceased person, if they are of age, to settle and pay the debts of the estate, and divide the property among themselves, without the intervention of an administrator, and neither the creditors nor debtors of the estate have any right to complain. Taylor *v.* Phillips, 30 Vt. 328; Babbitt *v.* Bowen, 32 Vt. 437. So in Mississippi, Henderson *v.* Clarke, 27 Miss. 436; Hargroves *v.* Thompson, 31 Miss. 211. See the remarks of Bland Ch. on the necessity of a regular administration, in Hagthorp *v.* Hook, 1 Gill & J. 277 *et seq.* See Clarke *v.* Clay, 31 N. H. 393. And it has been held in Pennsylvania that a sale of personal property of the deceased by his widow and heirs before administration was taken out, cannot be disturbed by the administrator unless debts are shown. Walworth *v.* Abel, 52 Penn. St. 370. But in New Hampshire a settlement out of court between the heirs and administrator of an estate, is not a compliance with the condition of the bond, given to the judge of probate, to render an account when required in the probate court. Clarke *v.* Clay, 31 N. H. 393. And in Georgia it

Accordingly, no right of action accrues to an administrator until he has sued out letters of administration. In an action on a bill of exchange by an administrator, where the bill was accepted after the death of the deceased, and the acceptance, and also the day of payment, was more than six years before the commencement of the suit, but the granting of administration was less than six years before, it was held that the statute of limitations began to run from the date of administration, and not from the day of payment, since there was no cause of action until the administration was granted. (*f*) So where to a declaration in trover to an administrator, alleging the grant of letters of administration to the plaintiff, and that the defendant knowing the goods to have been the property of the intestate in his lifetime, and of the plaintiff as administrator since his death, afterwards, and after the death of the intestate, to wit, on, &c. converted the same goods, it was pleaded that the defendant was not guilty of the premises within six years, such plea was held bad upon special demurrer, on the ground, that although it might be true that the defendant was not guilty within six years, yet the cause of action might have accrued * to the plaintiff by the grant of letters of administration within that period. (*g*)

The proposition, however, respecting the vesting of an administrator's interest, must be taken with some qualification; for it seems clear that, for particular purposes, the letters of administration relate back to the time of the death of the intestate, and not to the time of granting them. (*h*) Thus, although it has been held

was decided that a division of a testator's estate, by the legatees under the will, by consent, is no defence to an action at law, brought by the legally appointed administrator with the will annexed, to recover the possession of the testator's property, for the purpose of a due and legal administration. Echols *v.* Barrett, 6 Geo. 443.]

(*f*) Murray *v.* E. I. Company, 5 B. & Ald. 204. See, also, Cary *v.* Stephenson, 2 Salk. 421; Perry *v.* Jenkins, 1 My. & Cr. 118; *post*, pt. v. bk. i. ch. i.

(*g*) Pratt *v.* Swaine, 8 B. & C. 285; S. C. 1 Man. & Ryl. 451; [Benjamin *v.* Degroot, 1 Denio, 151.]

(*h*) Godolph. pt. 2, c. 20, s. 6; 2 Roll. Abr. 399, tit. Relation, A. pl. 1; Bro. Abr. Relation, 29, 46; 2 Roll. Abr. 554, Trespass, T. pl. 1; Fitzh. Abr. Administrator, 2; Middleton's case, 5 Co. 28 *b*, and Mr. Fraser's note (*c*) to the last ed.; Com. Dig. Administration, B. 10; Wentw. Off. Ex. 115, 116, 14th ed.; [Alvord *v.* Marsh, 12 Allen, 603; Colt J. in Hatch *v.* Proctor, 102 Mass. 353; Lawrence *v.* Wright, 23 Pick. 128; Jewett *v.* Smith, 12 Mass. 309, 310; McVaughters *v.* Elder, 2 Brev. (N. Car.) 307; Gilkey *v.* Hamilton, 22 Mich. 283; Miller *v.* Reigne, 2 Hill (S. Car.), 592; Poag *v.* Miller, Dudley (S. Car.), 11; 2 Chitty Pl. (16th Am. ed.) 120; Hutchins *v.* Adams, 3 Greenl. 174; Shaw C. J. in Farnum *v.* Boutelle, 13 Met.

that detinue cannot be maintained by an administrator against a person who has got possession of the goods of the intestate since his death, but has ceased to hold them prior to the grant of administration, (*i*) yet an administrator may have an action of trespass (*k*) or trover for the goods of the intestate taken by one before the letters granted unto him; otherwise there would be no remedy for this wrong doing. (*l*) So where goods had been sold after the death of an intestate and before the grant of letters of administration, avowedly on account of the estate of the intestate, by one who had been his agent, it was held that the administrator might ratify the sale and recover the price from the vendee in assumpsit for goods sold and delivered. (*m*) And accordingly it should seem that whenever any one acting on behalf of the intestate's estate, and not on his own account, makes a contract with another before any grant of administration, the administration will have relation back, in order not to lose the benefit of the contract, so that the administrator may sue upon it, as made * to himself. (*n*) Further, it has been held, on the bare doctrine of relation, that in a case where the administrator might maintain trover for a conversion between the death of the intestate and the grant of administration, he may waive the tort and recover as on a contract. Thus,

159, 165, and in Wonson *v.* Sayward, 13 Pick. 404; Leber *v.* Kauffelt, 5 Watts & S. 445; Rockwell *v.* Saunders, 19 Barb. 473; Lane *v.* Thompson, 43 N. H. 320, 325; Bullock *v.* Rogers, 16 Vt. 294; Wells *v.* Miller, 45 Ill. 382. If a person dies in possession of personal property, and it comes to the hands of his administrator, the title is changed, and a factor, who may afterwards receive the goods from the administrator, cannot hold them or their proceeds, on account of advances made to the deceased in his lifetime, without the assent of the administrator. Swilley *v.* Lyon, 18 Ala. 552.]

(*i*) Crossfield *v.* Such, 8 Exch. 825.

(*k*) Tharpe *v.* Stallwood, 5 M. & Gr. 760; [Brackett *v.* Hoitt, 20 N. H. 257.]

(*l*) Long *v.* Hebb, Style, 341, by Rolle C. J.; 2 Roll. Abr. 399, tit. Relation, A. pl. 1; Anon. Comberb. 451; Foster *v.* Bates, 12 M. & W. 233, per Parke B.; Searson *v.* Robinson, 2 Fost. & F. 351; [Manwell *v.* Briggs, 17 Vt. 176; Brackett *v.* Hoitt, 20 N. H. 257; Colt J. in Hatch *v.* Proctor, 102 Mass. 353. The title of an administrator *de bonis non* relates to the death of the testator as to all assets that remain in specie and unadministered, and he may recover for an injury done to them before the date of his appointment; nor is he estopped by an illegal act of a previous administrator. Bell *v.* Speight, 11 Humph. 451; *ante*, 472, note (*d*[1]), 539, note (*b*); *post*, 915, note (*e*), 961.]

(*m*) Foster *v.* Bates, 12 M. & W. 226; [Brown *v.* Lewis, 9 R. I. 497. So a person to whose order money, belonging to an estate, was paid before an administrator was appointed, is accountable therefor, without previous demand, to the administrator when appointed, although the money or the avails of it never came to his actual use. Clark *v.* Pishon, 31 Maine, 503.]

(*n*) Bodger *v.* Arch, 10 Exch. 333; [Brown *v.* Lewis, 9 R. I. 447.]

where money belonging to an estate at the time of his death, or due to him and paid in after his death, or proceeding from the sale of his effects after his death, has, before the grant of administration, been applied by a stranger to the payment of the intestate's debts and funeral expenses, the administrator may recover it from such stranger as money had and received to his use as administrator. (*o*) So it should seem the grant of administration will have the effect of vesting leasehold property in the administrator by relation, so as to enable him to bring actions in respect of that property, for all matters affecting the same subsequent to the death of the intestate, and so as to render him liable to account for the rents and profits of it from the death of the intestate. (*p*) * Again, although an executor *de son tort* cannot plead a retainer of his own debt, yet if, even *pendente lite*, he obtains administration, he may retain; for it legalizes those acts which were tortious at the time. (*q*) And there has been already occasion (*r*) to point out other acts of an administrator before administraion granted, which the relation of the letters in some measure renders valid. But the relation of the grant of administration to the death of the intestate, shall not, it is said, divest any right legally vested in another between the

(*o*) Welchman *v.* Sturgis, 13 Q. B. 552; [Patten *v.* Van Vrauken, 36 N. Y. 619.]

(*p*) Rex *v.* Horsley, 8 East, 410, in Lord Ellenborough's judgment. So it is laid down in Selw. N. P. 717, 6th ed., that in ejectment by an administrator, the demise may be laid on a day after the intestate's death, but before administration granted; for the administration, when granted, will relate back, and show the title to have been in the administrator from the death of the intestate. This point was expressly decided accordingly, by the court of K. B. in Ireland, after a full consideration, in Patten *v.* Patten, T. 3 W. 4, 1 Alcock & Napier, 493; and Bushe C. J. in delivering judgment, regards this decision as reconcilable with that of Keane *v.* Dee (K. B. Ireland, June, 1821, 1 Alcock & Napier, 496, note (1)), in which case it had been holden that an administrator could not justify a distress for rent (accrued out of a chattel term of the intestate after his death) made before the grant of the administration, on the ground that, although letters of administration will operate by relation, to enable an administrator to recover a chattel property from the time of the death of the intestate, yet it does not effectuate a *legal proceeding*, taken before administration granted, in order to recover such property. See, however, Bacon *v.* Simpson, 3 M. & W. 87, in which case an administratrix, before she had taken out administration, had contracted to assign a term for years of the intestate in a leasehold house; and Parke B. was of opinion, that an allegation, that she was lawfully possessed of the term at the time of the making of the contract, could not be supported. See, also, *ante*, 405.

(*q*) Pyne *v.* Woolland, 2 Vent. 180; Williamson *v.* Norwitch, Style, 337; Vaughan *v.* Browne, 2 Stra. 1106; S. C. Andr. 328; Curtis *v.* Vernon, 3 T. R. 590; [Colt J. in Hatch *v.* Proctor, 102 Mass. 353, 354; Alvord *v.* Marsh, 12 Allen, 603.]

(*r*) *Ante*, 406, 407.

death of the intestate and the commission of administration. Thus, in Waring *v.* Dewbury, (*s*) a landlord, who had rent due to him, died intestate; after which the plaintiff in the action sued out execution against the defendant, who was the tenant, and levied the debt upon him; after this, administration was committed to J. S.; who thereupon came into the court, and moved for a rule on the sheriff to pay him a year's rent out of the money levied, pursuant to the 8 Ann. c. 17, urging, that though he was not administrator at the time of serving the execution yet as soon as the administration was committed, it had relation to the death of the intestate, and he might bring trover for goods taken between the death of the intestate and commission of the administration. But the court held, that relations, which are but fictions of law, should never divest any right legally vested in another, between the death of the intestate and the commission of administration; and the plaintiff in the action having duly served his execution, before the administrator had a right to demand his rent, it * was not reasonable the plaintiff should be defeated by any relation whatsoever; they did not in that case deny the authorities which gave the administrator trover, but went on a distinction between relations that are to defeat lawful acts, and such as are to punish those that are unlawful. (*t*)

Relation back of title where the deceased had only a special property.

There appears, in some instances, to be the same relation back of the title of the personal representative in cases where the deceased had only a special property in the goods as where he had the absolute property. Thus, if an uncertificated bankrupt acquired goods after his bankruptcy, and died possessed of them, having been allowed to retain possession by the assignees, his administrator might maintain trover against a third party who had sold the goods between the period of the death of the intestate and the grant of the administration; for there was a good title in the bankrupt as against all the world but the assignees, and this title passes to his administrator. (*u*) But there is no such relation back as to chattels in which

(*s*) Gilb. Eq. Rep. 223, cited by Strange, *arguendo*, in Rex *v.* Mann, S. C. 1 Stra. 97; Fortesc. 360; S. C. MS.; Viner's Abr. Executors, Q. pl. 29. It appears that in this case Powis J. dissented from Pratt C. J. and Eyre and Fortescue, JJ.

(*t*) See, also, Rex *v.* Horsley, 8 East, 405; *post*, 646, note (*d*). The rule that a party cannot be made a trespasser by relation is only applicable where the act complained of was lawful at the time. 5 M. & Gr. 760.

(*u*) Fyson *v.* Chambers, 9 M. & W. 460. It is to be observed that the devolu-

the deceased had no personal interest, but held merely as the administrator of another. The bare circumstance of his dying in possession will not enable his personal representative to maintain trover even against a mere wrong-doer; for it will be a good defence that the right to the goods in question has devolved on the administrator *de bonis non* of the original intestate. (*x*)

3 & 4 W. 4, c. 27. Administrator to claim for purposes of this act, as if he obtained the estate without interval after death of deceased.

By stat. 3 & 4 W. 4, c. 27 (entitled *An Act for the Limitation of Actions and Suits relating to Real Property, &c.*), s. 6, it is enacted, that "for the purposes of this act an administrator claiming the estate or interest of the deceased * person, of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration."

21 & 22 Vict. c. 95, s. 19. Between the death of the deceased and the grant of administration property to vest in the judge ordinary.

By 21 & 22 Vict. c. 95, s. 19, "From and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall be vested in the judge of the court of probate for the time being in the same manner and to the same extent as heretofore they vested in the ordinary." (*x*[1])

distinction between chattels real and personal as to time of vesting in possession.

All movable goods, though in ever so many different and distant places from the executor, vest in the executor in possession presently upon the testator's death; (*y*) for it is a rule of law, that the property of *personal* chattels draws to it the possession. (*z*) But it is otherwise of things immovable, as leases for years of lands or houses; for of these the executor or administrator is not deemed to be in possession before entry. (*a*) So of leases for years of a rectory,

tion of future property is now determined by the order closing the bankruptcy, and not by the certificate of discharge. See the bankruptcy act, 1869, sect. 15, sub-sect. 3, and sect. 47.

(*x*) Elliot *v.* Kemp, 7 M. & W. 306; [Reeves *v.* Matthews, 17 Geo. 449.]

(*x*[1]) [See Jewett *v.* Smith, 12 Mass. 309, 310; Lawrence *v.* Wright, 23 Pick. 128; Colt J. in Hatch *v.* Proctor, 102 Mass. 353.]

(*y*) Wentw. Off. Ex. 228, 14th ed.; 11 Vin. Abr. 240.

(*z*) 2 Saund. 47 *b*, note (1) to Wilbraham *v.* Snow.

(*a*) Wentw. Off. Ex. 228, 14th ed. See the observations of Parke B. in Barnett *v.* Earl of Guildford, 11 Exch. 32. But a *reversion* of a term, which the testator granted for a part of the term, is in the executor immediately by the death of the testator. Trattle *v.* King, T. Jones, 170.

consisting of glebe lands and tithes for years, it may be doubtful if actual possession can be without actual entry into the glebe land. (*b*) But in case of a lease for years of tithes only, it was held that the executor, though in never so remote a place, should instantly, upon the setting out thereof, be in actual possession to maintain action of trespass for taking them away. (*c*)

(*b*) Wentw. Off. Ex. 229, 14th ed.; 11 Vin. Abr. 240.

(*c*) Ib.

* CHAPTER THE SECOND.

OF THE QUALITY OF THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR.

THE interest which an executor or administrator has in the goods of the deceased is very different from the absolute, proper, and ordinary interest which every one has in his own proper goods. (*a*) For an executor or administrator has his estate as such in *auter droit* merely, viz, as the minister or dispenser of the goods of the dead. (*b*)

Therefore, if an executor or administrator be attainted of treason or felony, the goods which he has as executor or administrator will not thereby be forfeited; (*c*) and though disabled by such attaint from suing *proprio jure*, he may still maintain an action in *auter droit* as executor or administrator. (*d*)

The goods of the deceased not forfeited by attainder of executor, &c.

So, where an executor brought a *quo minus* in the court of exchequer, stating that he was not able to pay the king's debt, because the defendant detained from him 100*l.* which he owed to him as executor of J. S., it abated; because it could not be intended that the king's debt could be satisfied with that which the plaintiff should recover and receive as executor. (*e*)

Not applicable to the debts which the executor owes the crown.

So though a lord of a villain might take all the villain's * own goods, yet he might not take those which the villain held as executor. (*f*)

(*a*) Wentw. Off. Ex. 192, 14th ed.

(*b*) Pinchon's case, 9 Co. 88 *b*; 2 Inst. 236; [Sewall J. in Weeks *v.* Gibbs, 9 Mass. 75, 76.] An executor has the property only under a trust to apply it for payment of the testator's debts, and such other purposes as he ought to fulfil in the course of his office as executor. By Ashurst J. 4 T. R. 645.

(*c*) 1 Hale P. C. 251; Hawk. P. C. bk. 2, c. 49, s. 9; Smith *v.* Wheeler, 1 Freem. 10. See, also, 33 & 34 Vict. c. 23.

(*d*) *Ante*, 235. See, also, *ante*, 230, note (*n*).

(*e*) Wentw. Off. Ex. 194, 14th ed.

(*f*) Lit. l. 2, c. 11, s. 192.

Where the executor becomes bankrupt, the goods of the testator do not pass:

Upon this principle also, if the executor or administrator becomes bankrupt, with any property in his possession belonging to the testator or intestate, distinguishable from the general mass of his own property, it is not distributable under the bankruptcy. (*g*) The assignees cannot seize even money which specifically can be distinguished and ascertained to belong to the deceased, and not to the bankrupt himself. (*h*) But where a person entitled to take letters of administration neglected to do so, yet remained in possession of the goods of the intestate for twelve years, and being so in possession became a bankrupt; and a creditor of the intestate afterwards took out letters of administration, and claimed the goods from the assignees; it was held that these goods were within the stat. 21 Jac. 1, c. 19, being property in the possession, order, and disposition of the bankrupt, with the consent of the true owner; and that the assignees were therefore entitled to them. (*i*) So where an innkeeper, who was a widow, having died intestate, two of her children, a son and daughter, took possession of her furniture and stock in trade, and carried on her business in their own names for two years after her death, during which time they paid her funeral expenses and some of her debts, but without taking out administration to her estate, and, at *the end of that time, became bankrupts, the daughter having a few months previously retired from the business, and sold her share of it to the son. Another of the children then took out administration to the intestate, and claimed that part of her furniture and stock in trade which still remained in specie. But it was held that it belonged to the assignees, as having been in the order and disposition of the son at the time of his bankruptcy. (*k*)

Although an executor or administrator become bankrupt, he

(*g*) Ludlow *v.* Browning, 11 Mod. 138; Ex parte Ellis, 1 Atk. 101; Ex parte Marsh, Ib. 159; Viner *v.* Caddell, 3 Esp. 88; In Serle *v.* Bradshaw, 2 Cr. & M. 148; S. C. 4 Tyrwh. 69, where a defendant, in an action against him as administrator, being under terms to plead issuably, pleaded *plene administravit*, and for another plea, his own bankruptcy; it was held that the plaintiff might sign judgment as for want of a plea.

(*h*) By Lord Mansfield in Howard *v.* Jemmett, 3 Burr. 1369, cited by Lord Kenyon, in Farr *v.* Newman, 4 T. R. 648. Under the bankruptcy of an executor and trustee, directed by the will to carry on a trade, and a limited sum to be paid to him by the trustees for that purpose, the general assets beyond that fund are not liable. Ex parte Garland, 10 Ves. 110. See *post*, pt. IV. bk. II. ch. II. § 1.

(*i*) Fox *v.* Fisher, 3 B. & Ald. 135.

(*k*) In re Thomas, 1 Phill. C. C. 159; S. C. 2 Mont., D. & D. 294.

may have a *scire facias*, as the bankruptcy does not affect his representative character. (*l*)

he may have a *sci. fa.*:

It must be observed that if the testator were a lessee for years, and the lease contained a proviso that if the lessee, *or his executors, administrators, or assigns*, shall become bankrupt, the lease shall become void, the bankruptcy of the executor will operate as a forfeiture of the lease, notwithstanding the lease itself does not pass to his assignees. Thus in Doe *v.* David, (*m*) a lease had been granted for twenty-one years to Joseph Waters, his executors, administrators, and assigns; proviso, that if Joseph Waters, his executors, administrators, or assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him, &c. by confession or otherwise, or suffer any extent, process, or proceedings to be had or taken against him, whereby any reasonable probability might arise of the estate being extended, &c. the estate should determine and the lessor have power to reënter. Joseph Waters died during the term, and by his will devised the premises to his executors on certain trusts. The surviving executor became bankrupt; and it was held that the lessor's right of reëntering thereupon accrued.

proviso for forfeiture of lease, if lessee or his executor shall become bankrupt:

Where assignees possess themselves of effects, which belong to the bankrupt as executor only, the court on a bill filed (*n*) * will, to secure such effects, appoint a receiver to whom the assignees shall account for so much as they have got in of the testator's estate. Where a bankrupt is an executor and residuary legatee, and has paid the debts and particular legacies out of part of the assets, if he refuses to collect the rest, notwithstanding the assignees have not the legal interest vested in them, the court will assist them to get in the remainder in the name of the executor. (*o*)

receiver appointed to whom assignees shall account:

bankrupt executor residuary legatee.

Again, the goods of a testator in the hands of his executor cannot be seized in execution of a judgment against the executor in his own right. (*p*) So if an executor dies in-

The goods of the testator can-

(*l*) 2 Saund. 72 *r*, note to Underhill *v.* Devereux.

(*m*) 1 Cr., M. & R. 405; S. C. 5 Tyrwh. 125.

(*n*) Ex parte Tupper, 1 Rose, 179; 2 Madd. Chan. 641, 2d ed.

(*o*) Ex parte Butler, 1 Atk. 213.

(*p*) Farr *v.* Newman, 4 T. R. 621, where all the former authorities are collected and discussed. In this case, Buller J. dissented from the rest of the court, viz, Lord Kenyon, and Ashurst and Grose JJ. The action was against the sheriff for a false return, and the question was,

not be taken in execution for the debt of the executor.

debted, leaving to his executor goods which he had as executor, these are not assets liable to the payment of his debts, but only for the payment of the first testator's. (*q*) *But when an executrix used the goods of her testator as her own, and afterwards married, and then treated them as the property of her husband, it was held that she could not be allowed to object to their being taken in execution for her husband's debt; for where an executrix or her husband have converted the goods, it does not lie in the mouth of either of them to say they are not the property of the husband, in a case between the executrix and one of his creditors. (*r*) So after a lapse of six or seven years, equity will not restrain by injunction a creditor of an executor from taking in execution property of the testator which is assets in equity. (*s*) However, where goods of an intestate had been taken possession of, and used by an administrator, in the house of the intestate, for three months after the death of the intestate, Lord Tenterden held that they could not be taken in execution for the administrator's own debt, the time, in this case, not being sufficient to make the goods the administrator's property. (*t*)

whether certain goods of the testator, which had been seized by the sheriff under an execution against the husband of the executrix, in a house in which the husband and wife resided, and the testator had resided, *but which had not been sold* under the execution, were bound by it. In a previous case, Whale *v.* Booth, B. R. 25 Geo. 3, 4 T. R. 625, note (*a*), where the goods of the testator *had actually been sold* under a *fieri facias* against the executor for his own debt, and the executor joined in a bill of sale, it was held by the court of K. B. that the property passed by the execution, and could not afterwards be seized under a writ sued out by a creditor of the testator; upon the principle that the sale under the execution could not be distinguished from an alienation by the executor. But although the two cases may thus in some degree be reconciled, Eyre C. J. in Quick *v.* Staines, 1 Bos. & Pull. 295, considers them as entirely conflicting, and the law as still unsettled. See, also, the observations of Sir Thomas Plumer V. C. in Ray *v.* Ray, Coop. 267. However, Lord Eldon C. in M'Leod *v.* Drummond, 17 Ves. 168, adverts to Farr *v.* Newman, as having decided absolutely, that the effects of the testator cannot be taken in execution for the debt of the executor, and expresses his satisfaction of that decision. See, also, Kinderley *v.* Jervis, 22 Beav. 23, per Romilly M. R.; [Branch Bank at Montgomery *v.* Wade, 13 Ala. 427.] See *infra*, pt. III. bk. I. ch. I. as to the power of an executor to dispose by sale of the goods of his testator.

(*q*) Wentw. Off. Ex. 194, 14th ed.

(*r*) Quick *v.* Staines, 1 Bos. & Pull. 293.

(*s*) Ray *v.* Ray, Coop. Chanc. Cas. 264.

(*t*) Gaskell *v.* Marshall, 1 Mood. & Rob. 132; S. C. 5 C. & P. 31. The learned judge, upon Quick *v.* Staines being cited, observed that the marriage in that case made all the difference.

Merger: When the estate in land which a man holds as executor shall merge in that which he has *proprio jure*.

With reference also to the principle, that an executor or administrator holds the property of the deceased *in auter droit* merely, it has been laid down, that in respect to land, no merger can take place of the estate held by a man as executor in that which he holds in his own right. (*u*) But a distinguished writer (*x*) has lately, with great force, urged an important distinction with regard to this exemption from merger, viz, that when either of the two estates is an accession to the other by *act of law*, there will not be any merger; but that where the accession is *by the act of the *party* the less estate will merge. And this distinction, although opposed to what has been laid down by some very eminent lawyers, (*y*) seems to be supported by the current of authorities. Thus, if the tenant for years dies, and makes him who has the reversion in fee his executor, whereby the term for years vests also in him, or if the lessee makes the lessor his executor, (*z*) the term shall not merge; (*a*) for here the accession of the estate for years is by the act of law. But if an executor or administrator has a term for years in right of the deceased, and *purchases* the reversion, the exemption shall not prevail, but the term will merge; for here the reversion is acquired by the party, by his own act. Thus in a case in 6 Eliz. (*b*) Lord Dyer laid down, that if an executor has a term and purchases the fee simple, the term is determined. And Manwood J. said, "A woman, termor for years, takes husband, who purchases the fee; the term is extinct; for the husband has done an act which destroys the term, viz, the purchase." So in a case in Brooke, (*c*) it was said that if a termor makes the lessor his executor and dies, this is no surrender; for he had the term to another use; but

(*u*) 2 Bl. Com. 177; Jones *v.* Davies, 5 H. & N. 767.

(*x*) Mr. Preston on Conveyancing, vol. iii. p. 273 *et seq.*, 309. See, also, on the same subject, Sugden V. & P. 395, 396, 7th ed.

(*y*) Lord Holt, in Gage *v.* Acton, 1 Salk. 326; S. C. 1 Lord Raym. 520, says, "If a man hath a term in right of his wife, or as executor, and purchases the reversion, this is no extinguishment, because he hath the term in one right, and the reversion in another. In that case the difference of the rights hinders an extinguishment, because a third person is concerned and may be prejudiced, which cannot be by act of law." And Lord Kenyon, in Webb *v.* Russell, 3 T. R. 401, says, "Nothing is clearer than that a term which is taken *alieno jure*, is not merged in a reversion acquired *suo jure*."

(*z*) Co. Lit. 338 *b*.

(*a*) 2 Bl. Com. 177.

(*b*) 4 Leon. 58.

(*c*) Surrender, pl. 52.

if the executor who has a lease for years from his testator, *purchases* the freehold, the lease is clearly extinct. And in another case, (*d*) Brooke says, "a man had a lease for years as executor, and afterwards purchased the land in fee; the lease is extinct; but it shall be assets, as respecting the executor." So in a case *in Moore, (*e*) it was held by all the justices, that if a wife has a term as executrix, and takes a husband, and the husband purchases the reversion, the term is extinct as to the wife, if she survives, but in respect of all strangers it shall be accounted as assets in his hand. (*f*)

The difference taken in these two last cases with respect to assets, seems to be well founded; and accordingly L. C. Baron Gilbert (*g*) says, that, as well in case of purchase as of descent, all agree that the term would not be extinct as to creditors. And it should seem, that in no case would the term held by an executor or administrator merge in equity; for mergers are odious in equity, and never allowed unless for special reasons. (*h*)

At this day executors or administrators may have an estate of freehold in right of a testator or intestate; and there is reason to incline to the opinion, that estates of this description, when held in right of a testator or intestate are equally the objects of the exemption from merger. (*i*)

It may be observed in this place, with respect to the continuance of the privilege from merger, that, though a person is originally entitled to a term, or to an estate of freehold, as an executor or administrator, yet in process of time he may become the owner of that estate in his own right. (*k*) This happens in the case of executors when the executor is also residuary legatee, and he performs all the purposes of the will, and holds the estate as legatee; or when the *executor pays money of his own, to the value of the term, in discharge of the testator's debts, and with an intention

(*d*) Extinguishment, pl. 54.

(*e*) P. 54. Anonymous.

(*f*) The rule laid down by Mr. Preston is strongly confirmed by an authority which is not noticed by him in support of it, viz, Smith *v.* Tracy, 1 Freem. 289, where this difference was taken by Saunders, *scil.* that if a lessee for years, as executor, purchase the reversion, this shall extinguish the term, because it is his own act; but if one that hath a reversion be made executor, and hath a term that way, that shall not be an extinguishment; because the term and the reversion are conjoined by act in law. See, also, the modern cases of Stephens *v.* Bridges, Madd. & Geld. 66; Jones *v.* Davies, 5 H. & N. 767.

(*g*) Bac. Abr. tit. Leases, R.

(*h*) Philips *v.* Philips, 1 P. Wms. 41.

(*i*) Preston on Convey. 310.

(*k*) See *post*, 646 *et seq.*

to appropriate the term to his own use in lieu of the money. And in the case of administrators, when the administrator is the only person entitled to the beneficial ownership of the intestate's property, or procures a discharge from those who are to share that property with him, and all the debts of the intestate are paid. Under these and the like circumstances, the executor or administrator will have the estate in his own right; and when he has the estate in his own right, it will be subject to merger. (*l*)

Generally speaking, it is difficult to ascertain when the character of executor or administrator ceases, and the ownership, independent of that character, commences. Every case must depend on its own circumstances. (*l*[1]) This only is certain, that when the executor or administrator ceases to hold the estate in that character, he will hold the same in his own right, and it will be subject to merger. (*m*)

An executor cannot bequeath the goods of his testator to a legatee:

Since no man can bequeath anything but what he has to his own use, an executor cannot by his will dispose of any of the goods which he has as executor to a legatee; (*n*) although we have seen (*o*) that if an executor appoint an executor, the goods will pass to him as the representative of the first testator; while on the other hand, an administrator cannot transmit any interest in the property of the intestate to his own personal representative.

but an executor in his lifetime may alien the assets, and they cannot be followed by the creditors of the deceased.

But, generally speaking, an executor or administrator, in his own lifetime, may dispose of and alien the assets of the testator; he has absolute power over them for this purpose, and they cannot be followed by the creditors of the deceased. (*p*) This rule, however, is subject to some qualifications, * which will be pointed out when this treatise arrives at the general discussion of the power of executors and administrators. (*q*)

(*l*) 3 Preston on Convey. 310, 311. [The possession of personal property, which one acquires as an administrator, cannot be united to and perfect an equitable title which he holds in his private capacity, so as to defeat an action by the party having the legal estate. Gamble *v.* Gamble, 11 Ala. 966.]

(*l*[1]) [See Weeks *v.* Gibbs, 9 Mass. 74, 75.]

(*m*) 3 Preston on Convey. 311.

(*n*) Bransby *v.* Grantham, 2 Plowd. 525; Godolph. pt. 2, c. 17, s. 3.

(*o*) *Ante*, 254.

(*p*) By Lord Mansfield, in Whale *v.* Booth, 4 T. R. 625, note to Farr *v.* Newman; [*post*, 932, and note (*d*[1]); Peterson *v.* Chemical Bank, 32 N. Y. 21, 45, 49, 50.]

(*q*) See *post*, pt. III. bk. I. ch. I. [p. 932 *et seq.*]

Grant of *omnia bona sua* by an executor:

With reference to the possession in *auter droit*, it has been held, that if an executor or administrator grant *omnia bona sua*, the goods of the deceased will not pass, unless the grantor have no goods but as executor or administrator. (*r*) So if an executor releases all actions, suits, and demands whatsoever, which he had for any cause whatever, this extends only to such as he has in his own right, and not to such as he hath as executor. (*s*)

release of all demands.

How far a *feme covert* executrix, &c. entitles her husband.

Although a marriage is an unqualified gift to the husband of all the goods and personal chattels which the wife was absolutely possessed of at that time, or became so afterwards, in her own right, yet marriage makes no gift to him of the goods and chattels which belong to his wife in *auter droit* as executrix or administratrix. (*t*) Thus, if husband and wife recover judgment for a debt due to the wife as executrix, and the wife dies, the husband shall not have a *scire facias* upon the judgment, but the succeeding executor or administrator. (*u*) Still the husband is entitled to administer in his wife's right for his own safety, lest she misapply the funds, in which case he would be liable. Incident to this right, he has the power of disposition over the personal estate vested in his wife as executrix or administratrix. (*x*)

When an executor, &c. will gain a settlement by residing on the leasehold of the testator, &c.

With respect to the poor laws, it may be here observed, * that an executor or administrator will gain a settlement by estate by a residence as such upon a leasehold property of the deceased. (*y*) And a settlement will equally be gained, although the tenement to which he comes as executor or administrator be under the value of 10*l.* a year. (*z*) So it was held that the husband of an ad-

(*r*) Hutchinson *v.* Savage, 2 Ld. Raym. 1307; Wentw. Off. Ex. 193, 14th ed. But an executor may have trespass for taking goods in his time, *quare bona et catalla sua*, because of the possession. By Holt C. J. in Knight *v.* Cole, 1 Show. 155; [*post*, 876 *et seq.*]

(*s*) Knight *v.* Cole, 1 Show. 153.

(*t*) Co. Lit. 351 *a*; Thompson *v.* Pinchell, 11 Mod. 178, by Powell J.; *post*, pt. II. bk. IV. ch. I.

(*u*) Beamond *v.* Long, Cro. Car. 208, 227; S. C. W. Jones, 248; 2 Saund. 72 *m*, note to Underhill *v.* Devereux.

(*x*) See *infra*, pt. III. bk. I. ch. IV. [p. 963 *et seq.*]

(*y*) Rex *v.* Sundrish, Burr. Sess. Ca. 7; 2 Bott. 460.

(*z*) Rex *v.* Uttoxeter, Burr. Sess. Ca. 538. Even though the letters be taken out for a pauper administrator by parish officers, on purpose to create the settle-

ministratrix, entitled to the trust only of a term, gained a settlement by residence thereon for forty days. (*a*) And the executor to a tenant of an estate under 10*l.* a year gains a settlement by forty days' residence, although he does not prove the will; because the property vests in him from the death of the testator; (*b*) but a next of kin of a lessee for years, in a case where several are in equal degree of kindred, can gain no settlement by residing on the land, if he does not take out letters of administration; because no right is vested in him till that is done. (*c*) Yet in the case of a *sole* next of kin, exclusively entitled to the administration of the personal estate, who had resided more than forty days in the parish in which a leasehold tenement belonging to the intestate lay, it was held that she thereby gained a settlement, although she had not then obtained a grant of the administration; upon the ground that the exclusive right to enforce the proper means of acquiring the legal title to the property, coupled with the actual enjoyment of it, gave so much color of right to reside, as to exempt such residence from being considered a vagrant intrusion into a parish in which * the party has nothing of *his own*, within the purview and scope of the poor laws. (*d*)

3 & 4 W. 4, c. 74. Executor not to be protector.

By stat. 3 & 4 W. 4, c. 74 (*An Act for the Abolition of Fines and Recoveries, and for the Substitution of more Simple Modes of Assurance*), s. 27, it is provided and enacted, "that no bare trustee, heir, executor, administrator, or assign, in respect of any estate taken by him as such bare trustee, heir, executor, administrator, or assign, shall be the protector of a settlement."

How the effects which an

It may be proper to conclude these doctrines as to the difference between the interest which an executor or administrator has in the goods of the deceased, and such as a

ment. Rex *v.* Great Glenn, 5 B. & Ad. 188.

(*a*) Mursley *v.* Grandborough, 1 Stra. 97.

(*b*) Rex *v.* Stone, 6 T. R. 295.

(*c*) Rex *v.* Widworthy, Burr. Sess. Ca. 109; Rex *v.* North Curry, Cald. 137; S. C. 2 Bott. pl. 631; South Sydenham *v.* Lamerton, 2 Bott. 462, note (*a*); Rex *v.* Canford Magna, 6 M. & Sel. 355; Rex *v.* Okeford Fitzpayne, 1 B. & Ald. 254; Rex *v.* Berkswell, 1 B. & C. 542; Rex *v.* Barnard Castle, 2 Ad. & El. 108.

(*d*) Rex *v.* Horsley, 8 East, 405. A grant of administration will not operate by relation so as to vest a term in the administrator from the death of the intestate, and thus make a person irremovable for a time past, who, during that time, was removable. Ib. 409; and see, also, Rex *v.* Widworthy, Burr. Sess. Ca. 109; S. C. 2 Bott. 461.

executor takes as such may become his own.

man has in his own proper goods, by considering more fully a subject to which there has already been occasion to advert, (*e*) viz, how the property which the executor or administrator has at first in his representative character, may become his own to his own use, as his other goods which he has not as executor or administrator. (*f*)

As first, in regard to the ready money left by the testator; on its coming into the hands of the executor, the property in the specific coin must of necessity be altered; for when it is intermixed with the executor's own money, it is incapable of being distinguished from it, although he shall be accountable for its value; and therefore a creditor of the testator cannot, by *fieri facias* on a judgment recovered against the executor, take such money as *de bonis testatoris* in execution. (*g*)

So if the testator died indebted to the executor, or the executor not having ready money of the testator, or for any *other good reason, shall pay a debt of the testator's with his own money, he may elect to take any specific chattel as a compensation; and if it be not more than adequate, the chattel by such election shall become his own. (*h*) Consequently, if by such election he acquire the absolute ownership of the chattel, and die, his executor may defend himself in an action of *detinue* brought for the same by the surviving executor of the first testator. (*i*) Hence, if an executor pays with his own money the debts of the testator in such order as the law appoints, to the value of the whole of the personal assets, he acquires an absolute right to them; and he may dispose of them as he pleases, without being guilty of any *devastavit*. (*k*)

(*e*) *Ante*, 608. See, also, 605, 606.

(*f*) Wentw. Off. Ex. c. 7, p. 197, 14th ed.

(*g*) Wentw. Off. Ex. c. 7, p. 196, 14th ed; Toller, 238.

(*h*) Wentw. Off. Ex. c. 7, pp. 196, 199, 14th ed.; Anon. Dyer, 187 *b*; Woodward *v.* Lord Darcy, Plowd. 185; Elliott *v.* Kemp, 7 M. & W. 313, per Parke B. [In Massachusetts, if a debt claimed of the estate by the executor or administrator is disputed, he must file a statement of it in the probate court, and the same may be submitted to arbitrators, if the parties agree; if not, the judge of probate must decide the claim, and, if the case is appealed to the supreme court of probate, either party may have the claim determined by a jury; if neither party calls for a jury, then it may be determined by the court appealed to. Genl. Sts. c. 97, §§ 26, 27; Willey *v.* Thompson, 9 Met. 329; Ela *v.* Edwards, 97 Mass. 318.]

(*i*) Toller, 239.

(*k*) Merchant *v.* Driver, 1 Saund. 307; Chalmer *v.* Bradley, 1 Jac. & W. 64; Vanquelin *v.* Boward, 15 C. B. N. S. 341, 372; [*post*, 1966, note (*t*).] However, in Hearn *v.* Wells, 1 Coll. 333, Knight Bruce V. C. said he could not accede to the prop-

So if the debt due to him from the testator amount to the full value of all his effects in the executor's hands, there is a complete transmutation of the property in favor of the executor, by the mere act and operation of law. (*k*[1]) In the former case, his election, and in the latter the mere operation of law, shall be equivalent to a judgment and execution; for he is incapable of suing himself. (*l*)

So in the case of a lease of the testator, devolved on the executor, such profits only as exceed the yearly value shall be held to be assets; it therefore follows, that if the executor pay the rent out of his own purse, the profits to the same amount shall be his. (*m*)

* There are likewise other means of thus changing the property; as if the testator's goods be sold under a *fieri facias*, the executor,

osition that an executor has a right in equity to acquire as a purchaser an absolute title to specific chattels by intending so to deal with them, and by paying the testator's debts to an amount exceeding the value of those chattels. Whatever might be the rule of law upon a plea of *plene administravit*, he apprehended that not to be the rule in equity. His honor did not agree that, in equity, the executor had, under such circumstances, an absolute right to the property. [In Livingston *v.* Newkirk, 3 John. Ch. 312, 318, it was held to be the well established rule, that if an executor or administrator pays, out of his own moneys, debts to the value of the personal assets in hand, he may apply the assets to his own use towards satisfaction of his moneys so expended. And by such election, the assets became absolutely his own property. "This rule," it was said by Chancellor Kent, "has always been applied to the personal assets; and it is said (Dyer, 2. *a*) that if the executor be directed to sell the land, he cannot retain it in hand, as he may the personal assets, because the direction of the will is that it be sold. This case seems to put the distinction altogether upon the testator's intention; and if the personal assets prove deficient, and the executor pays out of his own moneys, to the value of the land, there does not appear to be any solid ground for the distinction. If this court were to direct the land to be sold in such a case, it would certainly allow the executor to retain for his indemnity. The object of the will, and the ends of justice, are equally attained, if the value of the real as well as of the personal assets, be faithfully applied in discharge of the debts." See Hill *v.* Buford, 9 Misson. 869; Haslett *v.* Glenn, 7 Harr. & J. 17; McClure *v.* McClure, 19 Ind. 185. Where an administrator pays debts of the intestate out of his own funds, and is removed before he has received assets sufficient to repay him, he should be allowed to stand in the place of the creditor whose demand he has extinguished, and assert the demand against the subsequent administrator. Smith *v.* Haskins, 7 J. J. Marsh. 502. See Munroe *v.* Holmes, 9 Allen, 244; S. C. 13 Allen, 109.]

(*k*[1]) [As to the terms on which he will take the assets, see *post*, 1966, note (*t*).]

(*l*) Plowd. 185; Toller, 239. [An executor who is also residuary legatee and has given bond for the payment of all the debts and legacies, acquires an absolute title to the estate devised and may give an indefeasible title to a *bonâ fide* purchaser. Clarke *v.* Tufts, 5 Pick. 335.]

(*m*) Went. Off. Ex. c. 7, p. 200, 14th ed.; Toller, 239.

as well as any other person, may buy such goods of the sheriff; and in case he does so, the property which was vested in him as executor shall be turned into a property in *jure proprio*. (*n*)

Again, if the executor among the testator's goods find and take some which were not his, and the owner recover damages for them in an action of trespass or trover, in this, as in all similar cases, the goods shall become the trespasser's property, because he has paid for them. (*o*)

If an executor or administrator makes an underlease of a term of years of the deceased, rendering rent to himself, his executors, &c. though he has the term wholly in right of the intestate, yet, when he makes this lease, he has power to dispose of the whole; and by making a lease of part he appropriates that to himself, and divides it from the rest, and has the rent in his own right; and if he brings an action for it, he must bring it in the *debet* and *detinet;* and if he dies, the rent will be payable to his personal representative, and not to the administrator *de bonis non* of the original deceased. (*p*)

As an executor, who is also a legatee, may, by assenting to his own legacy, vest the thing bequeathed in himself in the capacity of legatee, (*q*) so an administrator, who is also entitled to share in the residue as one of the next of kin under the statute of distribution, may acquire a legal title, in his own right, to goods of the deceased, either by taking them by an agreement with the parties entitled to share with himself under the statute, or even without such *agreement, by appropriating them to himself as his own share. (*r*)

If one of several executors or administrators alone sell any of

(*n*) Went. Off. Ex. c. 7, p. 200, 14th ed.; Toller, 239.

(*o*) Ib.

(*p*) Drue *v.* Baylie, 1 Freem. 403; S. C. Ib. 392; S. C. 2 Lev. 100; 1 Ventr. 275; 3 Keb. 298, 427, 463, 495, 549; Sury *v.* Cole, Latch, 266, 267; Skeffington *v.* Whitehurst, 3 Y. & Coll. Exch. 1. But see Cowell *v.* Watts, 6 East, 405; Catherwood *v.* Chabaud, 1 B. & C. 150; *infra*, pt. II. bk. III. ch. II. bk. IV. ch. II. [An executor acting under a will, which was afterwards set aside, leased the lands of his supposed testator for a year, and the tenant enjoyed the demised premises without interruption during that period; and it was held that neither the administrator subsequently appointed, nor the heir of the intestate, could maintain an action for use and occupation against the tenant. Boyd *v.* Sloan, 2 Bailey, 311; Logan *v.* Caldwell, 2 Missou. 373; Foltz *v.* Prouse, 17 Ill. 487; Stinson *v.* Stinson, 38 Maine, 593.]

(*q*) See *post*, pt. III. bk. III. ch. IV. § III. [p. 1380.]

(*r*) Elliott *v.* Kemp, 7 M. & W. 313, per Parke B.

the goods of the testator, he alone may maintain an action for the price, not naming himself executor. (*s*)

In a case where bills of exchange had been accepted by A., for the accommodation of B., one of the executors of C., it appeared that B., having considerable sums of money in his hands belonging to C.'s estate, which were deposited in a box in his possession, discounted the bills with such money, by taking out of the box the requisite amount, deducting the discount, and at the same time placing the bills in the box. And it was held by Alexander C. B. that B. could not sever his character of an accommodation holder of these bills from his character of executor, so as to enable him and his co-executor to sue as indorsees of the bills for a valuable consideration. (*t*)

Sale by an administrator of a pretenced title held to be within 32 H. 8, c. 9.

A sale by an administrator of a "pretenced right or title" to premises of a term in which the intestate died possessed, but of which the administrator never had possession, was held to be within the prohibition of the statute 32 Henry 8, c. 9. (*u*)

(*s*) Godolph. pt. 2, c. 16, s. 1; Wentw. Off. Ex. 224, 14th ed.; Brassington *v.* Ault, 2 Bing. 177; S. C. 9 Moore, 340.

(*t*) —— *v.* Adams, 1 Younge, 117.

(*u*) Doe *v.* Evans, 1 C. B. 717. But see now stat. 8 & 9 Vict. c. 106, s. 6; [and Parsons C. J. in Drinkwater *v.* Drinkwater, 4 Mass. 359.]

*BOOK THE SECOND.

ON THE QUANTITY OF THE ESTATE IN POSSESSION OF AN EXECUTOR OR ADMINISTRATOR.

The estate of an administrator is the same as that of an executor.

AFTER the administration is granted, the interest of the administrator in the property of the deceased is equal to and with the interest of an executor. (*a*) Executors and administrators differ in little else than in the manner of their constitution. (*b*)

The whole personal estate of

The general rule is, that all goods and chattels, real and personal, go to the executor or administrator. (*c*) By the laws of this realm, says Swinburne, (*d*) as the heir hath

(*a*) Touchst. 474; Blackborough *v.* Davies, 1 P. Wms. 43, by Holt C. J.

(*b*) Treat. Eq. bk. 4, pt. 2, c. 1, s. 1. [By Massachusetts statute 1783, c. 24, s. 10, it was provided that all estate real and personal, undevised in any will, shall be distributed as if it were intestate, and the executor shall administer upon it as such. Under this statute, in Hays *v.* Jackson, 6 Mass. 152, Parsons C. J. said: "A question has been made, whether the executor must take out administration on such undevised estate, or whether he shall administer it *ex officio* as executor. The usage has been to administer it without a letter of administration; and we are satisfied that this usage is correct. The executor, by the probate of the will, has the administration of the testate estate, *according to the will*, and on undevised estate he is also directed to administer agreeably to the provisions respecting intestate estate." Parris *v.* Cobb, 5 Rich. (S. Car.) Eq. 450; Newcomb *v.* Williams, 9 Met. 533; Venable *v.* Mitchell, 29 Geo. 566; Dean *v.* Biggers, 27 Geo. 73; Wilson *v.* Wilson, 3 Binn. 557. It has, however, been held that an administrator with the will annexed has no authority to administer upon any part of the testator's estate, not disposed of by the will. Harper *v.* Smith, 9 Geo. 461; Venable *v.* Mitchell, 29 Geo. 566; Dean *v.* Biggers, 27 Geo. 73. See Montague *v.* Carneal, 1 A. K. Marsh. 351; Owens *v.* Cowan, 7 B. Mon. 152; Montgomery *v.* Millikin, 5 Sm. & M. 151; Moody *v.* Vandyke, 4 Binn. 31; Drayton *v.* Grimke, 1 Bailey Eq. 392; Perry *v.* Gill, 2 Humph. 218.]

(*c*) Com. Dig. Biens, C.; Co. Lit. 388 *a*. The *hæres* of the civil law, answering to our executor or administrator, succeeded in *universum jus defuncti*. Godolph. pt. 2, c. 1, s. 1.

(*d*) Swinb. pt. 6, s. 3, pl. 5.

not to deal with the goods and chattels of the deceased, no more hath the executor to do with the lands, tenements, and hereditaments. (d^1) In other words, it may

the deceased vests in the executor.

(d^1) [An administrator at common law takes no interest in the real estate of the deceased; nor does an executor, unless by force of the provisions of the will. Phelps *v.* Funkhouser, 39 Ill. 401; Smith *v.* M'Connell, 17 Ill. 135; Hathaway *v.* Valentine, 14 Mass. 501; Drinkwater *v.* Drinkwater, 4 Mass. 354; Dean *v.* Dean, 3 Mass. 258; Willard *v.* Nason, 5 Mass. 240; Boylston *v.* Carver, 4 Mass. 589; Almy *v.* Crapo, 100 Mass. 218, 220, 221; Gibson *v.* Farley, 16 Mass. 280; Newcomb *v.* Stebbins, 9 Met. 540; Wilde J. in Brown *v.* Kelsey, 2 Cush. 243, 251; Hoar J. in Palmer *v.* Palmer, 13 Gray, 328; Lobdell *v.* Hayes, 12 Gray, 236; Griffith *v.* Beecher, 10 Barb. 432; McLean J. in Brush *v.* Ware, 15 Peters, 111, 112; Vance *v.* Fisher, 10 Humph. 211; Comparet *v.* Randall, 4 Ind. 55; Willcox *v.* Smith, 26 Barb. 316; Bridgewater *v.* Brookfield, 3 Cowen, 299; Hillman *v.* Stevens, 16 N. Y. 278; Breevort *v.* McJimsey, 1 Edw. Ch. 551. The rule is the same, although the estate is insolvent. *Post*, 817, note (c^1), 820, note (o); Ticknor *v.* Harris, 14 N. H. 272. It is otherwise, however, in New Hampshire, as to this last point. See Bergin *v.* McFarland, 26 N. H. 237; and as to Vermont, see McFarland *v.* Stone, 17 Vt. 165; Aldis *v.* Burdick, 8 Vt. 21. But, at common law, generally the lands of an intestate descend to the heir, subject to the payment of debts if there be a deficiency of personal estate. The administrator has no right to enter into the lands, or to take the profits. He has no interest in them, but a naked authority to sell them on license to pay the debts where the personal estate is insufficient. And lands not being liable at common law for the payment of debts, they are made liable by statute. If the lands are liable to the payment of the intestate's debts, the administrator may lawfully sell them on license, whether they are in the possession of the heir, or of his alienee or disseisor. For no seisin of the heir, or of his alienee, or of his disseisor, can defeat the naked authority of the administrator to sell on license. Thus, also, when an authority is given by the testator to his executor to sell his lands for the payment of his debts, the executor may sell notwithstanding the death or alienation of the devisee; and for the same reason, notwithstanding his disseisin. And the purchaser, by virtue of his deed, may try his title to the lands sold, on a writ of entry, if it be disputed. So the administrator has no cause to recover the possession by a suit at law, and cannot maintain a suit for that purpose. Parsons C. J. in Drinkwater *v.* Drinkwater, 4 Mass. 354, 358, 359. See Dean *v.* Dean, 3 Mass. 258, 260, 261; Lobdell *v.* Hayes, 12 Gray, 236, 238; Crocker *v.* Smith, 32 Maine, 244; Sargent J. in Lane *v.* Thompson, 43 N. H. 320, 325, 326, and cases cited; Gladson *v.* Whitney, 9 Iowa, 267; Lockwood *v.* Lockwood, 2 Root, 409; Thayer *v.* Lane, 1 Walker (Mich.), 200; Bank of Charleston *v.* Inglesby, Spears Eq. 399; Pinson *v.* Williams, 23 Missou. 64; Stillman *v.* Young, 16 Ill. 318. But an executor or administrator may maintain an action for lands which have been set off to him upon an execution recovered by such executor or administrator on a debt due to the deceased. Boylston *v.* Carver, 4 Mass. 598. See Foster *v.* Huntington, 5 N. H. 108. So as to lands mortgaged to the deceased, and taken possession of and the mortgage foreclosed by his executor or administrator after the decease of the mortgagee; unquestionably the executor or administrator is to hold the estate, until his functions touching it are performed. Parker J. in Boylston *v.* Carver, 4 Mass. 598, 610; Richardson *v.* Hildreth, 8 Cush. 225; Palmer *v.* Stevens, 11 Cush. 148. "And we cannot see," says the learned judge, "how the widow or heir in this case, or in the case of land delivered to the executor or administrator, to satisfy a debt due to

be stated, that, both at law and equity, the whole personal estate of the deceased vests in the executor or administrator. (d^2)

the estate, can have any right of entry or can maintain any action for the possession, until distribution has been made by the judge of probate according to the statute." 4 Mass. 610, 611. See Dean *v.* Dean, 3 Mass. 262; Taft *v.* Stevens, 3 Gray, 504, 507. And this distribution is to be made to the same persons, and in the same proportions, as if the land had been a part of the personal estate of the deceased. Genl. Sts. Mass. c. 96, § 14; Richardson *v.* Hildreth, 8 Cush. 225; Taft *v.* Stevens, 3 Gray, 504, 507. But until this distribution the personal representative holds the estate in trust for the persons entitled. Terry *v.* Ferguson, 8 Porter, 500; Harper *v.* Archer, 28 Miss. 212. By statute in Massachusetts, real estate held by an executor or administrator in mortgage, or taken on execution by him, may be sold, subject to the right of redemption, at any time before the right of redemption is foreclosed, in the same manner as personal estate of a person deceased, and the proceeds of the sale will be held as other personal assets of the deceased. Genl. Sts. c. 96, §§ 9, 10, 11, 12. See Baldwin *v.* Timmins, 3 Gray, 302. Where the right of redeeming real estate held by an executor or administrator in mortgage, or taken on execution by

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(d^2) See Swilley *v.* Lyon, 18 Ala. 552; Hays *v.* Jackson, 6 Mass. 149, 152; Weeks *v.* Jewett, 45 N. H. 540, 542; Ladd *v.* Wiggin, 35 N. H. 421, 430; Keating *v.* Smith, 5 Cush. 232, 237; Beattie *v.* Abercrombie, 18 Ala. 9; Sneed *v.* Hooper, Cooke, 200; Dawes *v.* Boylston, 9 Mass. 337, 352, 353; Lane *v.* Thompson, 43 N. H. 320; Shirley *v.* Healds, 34 N. H. 407; Clapp *v.* Stoughton, 10 Pick. 463; Allen *v.* White, 17 Vt. 69; Allen *v.* Simons, 1 Curtis, 124, 125; *post*, 1474, notes. All contingent as well as absolute interests in personal property pass to the executor or administrator; and in like manner all choses in action pass, although they may remain depending on a contingency during the life of the testator or intestate. Wilde J. in Clapp *v.* Stoughton, 10 Pick. 468; Ladd *v.* Wiggin, 35 N. H. 421, 430; Beecher *v.* Buckingham, 18 Conn. 110. As no title to the personal estate vests either in the widow or next of kin, as such, they can maintain no action or suit to recover it, until after administration and decree of distribution. Weeks *v.* Jewett, 45 N. H. 540; Tappan *v.* Tappan, 30 N. H. 50; Woodin *v.* Bagley, 13 Wend. 453; Beecher *v.* Crouse, 19 Wend. 306; Lawrence *v.* Wright, 23 Pick. 128; Clapp *v.* Stoughton, 10 Pick. 463. Distributees can obtain their distributive shares only through administration. Marshall *v.* King, 24 Miss. 85; Curtis J. in Allen *v.* Simons, 1 Curtis, 124. This is necessary to the transmission of the title. Whit *v.* Ray, 4 Ired. (Law) 14; Davidson *v.* Potts, 7 Ired. Eq. 272; Carter *v.* Greenwood, 5 Jones (N. Car.) Eq. 410; Sharp *v.* Farmer, 4 Dev. & Bat. (Law) 122; Alexander *v.* Banfield, 6 Texas, 400; Miller *v.* Eatman, 11 Ala. 609. A person exclusively entitled to an intestate estate cannot sue therefor, without first taking out administration on the estate; Bradford *v.* Felder, 2 McCord Ch. 168; Cochran *v.* Thompson, 18 Texas, 652; but see *ante*, 630, note (*e*); Downer *v.* Downer, 9 Penn. St. 302; nor can he hold such estate although in fact received by him, as against the administrator. Eisenbise *v.* Eisenbise, 4 Watts, 134. The executor or administrator alone can represent the personalty. Jenkins *v.* Freyer, 4 Paige, 51; Bradford *v.* Felder, 2 McCord Ch. 168; Kellar *v.* Beeler, 5 Monr. 574; Wilkinson *v.* Perrin, 7 Monr. 217. The title vests in the administrator only for the purpose of enabling him to administer the estate according to law, by paying the debts of the deceased, and making distribution or final settlement. Hall *v.* Hall, 27 Miss. 458; Dawes *v.* Boylston, 9 Mass. 352; Lewis *v.* Lyons, 13 Ill. 117.]

The personal property in which the deceased had but a joint estate or possession will survive to his companions, and his executor or administrator will not be entitled to a moiety

Personal property of which the

him, is foreclosed, such real estate can be sold for the payment of debts, legacies, and charges of administration, in the same manner as real estate of which the deceased died seised, upon obtaining license therefor as prescribed by law. Genl. Sts. Mass. c. 96, § 13. See Thomas *v.* Le Baron, 10 Met. 403. It is provided by statute in Massachusetts, that "where the personal property in the hands of an executor or administrator is not sufficient to pay the debts of the deceased, with the charges of administration, his real estate, or as much thereof as may be necessary, shall be sold for that purpose, by the executor or administrator, upon obtaining the prescribed license therefor; and the proceeds of the real estate so sold is to be treated as assets in the hands of the executor or administrator in like manner as if the same had originally been part of the goods and chattels of the deceased; and the executor or administrator, and the sureties in his administration bond, shall be accountable and chargeable therefor." Genl. Sts. c. 96, §§ 7, 8; c. 102, § 1; *post*, 1656, note (l^1). The mode of obtaining the license and the entire course of procedure in regard to making the sale are fully specified in Genl. Sts. c. 102. In certain events the executor or administrator may be licensed to sell more than is necessary for the payment of debts, and when he is so licensed, he is required to give bond with surety or sureties to the judge of the probate court for the county in which he was appointed, conditioned according to law, to account for and dispose of all proceeds of the sale remaining after payment of the debts and charges. C. 102, § 6. The sale is to be made by public auction. § 17. The real estate of the deceased, liable to be sold, includes all lands of the deceased, and all rights of entry and of action, and all other rights and interests in lands, which by law would descend to his heirs, or which would have been liable to attachment or execution by a creditor of the deceased in his lifetime. § 11. An executor or administrator, licensed to sell lands fraudulently conveyed by the deceased, or fraudulently held by another person for him, or to which he had a right of entry or of action, or a right to a conveyance, may first obtain possession thereof by entry or by action, and may sell the same at any time within one year after so obtaining possession. §§ 12, 13. A mere formal entry by him is sufficient to authorize him to sell and convey the whole title. Freeland *v.* Freeland, 102 Mass. 479. If an administrator sells land, under § 12, *supra*, to pay debts of the deceased, after recovering the land by a writ of entry from one to whom the deceased conveyed it in fraud of his creditors, but for a valuable consideration, a surplus of the proceeds remaining after paying the debts, belongs to the fraudulent grantee as against the heirs of the intestate. Allen *v.* Ashley School Fund, 102 Mass. 262, 266, 267; 2 Sugden V. & P. (8th Am. ed.) 714, note (l^1). See Tenney *v.* Poor, 14 Gray, 500. As to the law of Indiana with regard to sales of land to pay debts of deceased, see Rapp *v.* Matthias, 35 Ind. 332. An executor or administrator cannot directly or indirectly purchase at his own sale, whether made under a power in a will, or by an order or license of court, or under an execution. 2 Sugden V. & P. (8th Am. ed.) 688, note (m^1) and cases cited; Skillman *v.* Skillman, 15 N. J. Eq. 388; Froneberger *v.* Lewis, 70 N. Car. 456; Glass *v.* Greathouse, 20 Ohio, 503; McGowan *v.* McGowan, 48 Miss. 553; Boyd *v.* Blankman, 29 Cal. 19; Coat *v.* Coat, 63 Ill. 73; Rafferty *v.* Mallory, 3 Biss. 362; Brackenridge *v.* Holland, 2 Blackf. 377; Shine *v.* Redwine, 30 Geo. 780; Lathrop *v.* Wightman, 41 Penn. St. 297; Stronach *v.* Stronach, 20 Wis. 129; Miles *v.* Wheeler, 43 Ill. 123; Ely *v.* Horine, 5 Dana, 398; Prindle *v.* Beveridge, 7 Lansing, 225; Anderson *v.* Green, 46

deceased was joint tenant shall not go to the executor.

of it: (*e*) for a survivorship holds place regularly as well between joint tenants of goods and chattels in possession or in right, as between joint tenants of inheritance or freehold. (*f*) But the wares, merchandise, debts, or duties, which joint merchants have, as joint merchants or partners, shall not survive, but shall go to the executors of the * deceased; and this is *per legem mercatoriam* which is part of the laws of this realm, for the advancement and continuance of commerce and trade,

except in the case of partners in trade, &c.

which is *pro bono publico;* for the rule is, that *jus accrescendi inter mercatores pro beneficio commercii locum non habet.* (*g*) And this part of the *lex mercatoria* has been

Geo. 361; Frazer *v.* Lee, 42 Ala. 75; Newton *v.* Roe, 33 Geo. 163. Such purchase is not absolutely void, but voidable at the election of the heirs of the deceased, to be made within a reasonable time. Ives *v.* Ashley, 97 Mass. 198; Davone *v.* Fanning, 2 John. Ch. 252; 2 Sugden V. & P. (8th Am. ed.) 687, note (*a*); Blood *v.* Hayman, 13 Met. 231; Robbins *v.* Bates, 4 Cush. 104; Dunlap *v.* Mitchell, 10 Ohio, 117; Musselmen *v.* Eshleman, 10 Penn. St. 401; Moore *v.* Hilton, 12 Leigh, 1; Mercer *v.* Newson, 23 Geo. 151; Harrington *v.* Brown, 5 Pick. 519; Shine *v.* Redwine, 30 Geo. 780; Boyd *v.* Blankman, 29 Cal. 19; Miles *v.* Wheeler, 43 Ill. 123; *post,* 938; Anderson *v.* Green, 46 Geo. 361; Smith *v.* Granberry, 39 Geo. 381; Grubbs *v.* McGlawn, 39 Geo. 672. Being voidable only, an estate passes, by the conveyance, to the grantee, and if it is afterwards sold and conveyed for a valuable and full consideration, to a *bonâ fide* purchaser, who has no notice that it was bought, at the administrator's sale, for the administrator's benefit, such purchaser will hold it against the heirs of the intestate. Blood *v.* Hayman, 13 Met. 231; Robbins *v.* Bates, 4 Cush. 104. For cases where the heir permitted the executor or administrator to buy and to make valuable improvements, see Potter *v.* Smith, 36 Ind. 231; Smith *v.* Drake, 23 N. J. Eq. 302. Another method allowed to be pursued, in some states, for subjecting the lands of the deceased to the payment of his debts, is that of levying on them an execution obtained against the executor or administrator for a claim against the estate. See Graff *v.* Smith, 1 Dall. 481; Morris *v.* Smith, 1 Yeates, 238; Rowland *v.* Harbaugh, 5 Watts, 367; M'Pherson *v.* Cunliff, 11 Serg. & R. 432; Wilson *v.* Watson, 1 Peters C. C. 269; Steel *v.* Steel, 4 Allen, 417; Prescott *v.* Tarbell, 1 Mass. 204; Gore *v.* Brazier, 3 Mass. 523; Wyman *v.* Brigden, 4 Mass. 150; Drinkwater *v.* Drinkwater, 4 Mass. 354; Bigelow *v.* Jones, 4 Mass. 512; Mitchell *v.* Lunt, 4 Mass. 654; Ramsdell *v.* Creasy, 10 Mass. 170; Bells *v.* Robinson, 1 Stewart, 193; Wyman *v.* Fox, 55 Maine, 523; Nowell *v.* Bragdon, 14 Maine, 320. Provision is made for such levy and its effect by statute in Massachusetts. Genl. Sts. c. 103, §§ 53, 54, 55. But in Illinois a creditor cannot enforce collection of a debt against the deceased by levying an execution on lands left by him. Stillman *v.* Young, 16 Ill. 318.]

(*e*) Swinb. pt. 3, s. 6, pl. 1; [*post,* 843, 1740, note (*r*), 1865, note (*d*).] See *post,* pt. III. bk. III. ch. V. § 1. as to what constitutes a joint tenancy in personal property.

(*f*) Co. Lit. 182 *a;* Harris *v.* Fergusson, 16 Sim. 308; Crossfield *v.* Such, 8 Ex. 825.

(*g*) Ib.; Rex *v.* Collectors of Customs, 2 M. & Sel. 225. But with respect to *choses in action,* though the *right* of the deceased joint tenant devolves on his per-

extended to all traders (including manufacturers), (*h*) and, as it should seem, to all persons engaged in joint undertakings in the nature of trade. (*i*) Thus, if two take a lease of a farm jointly, the lease shall survive, but the stock on the farm, though occupied jointly, shall not survive. (*j*) So where two persons advance a sum of money by way of mortgage, and take the mortgage to them jointly, and one of them dies; when the money is paid the survivor shall not have the whole, but the representative of him who is dead shall have his proportion. (*k*) So if two or more make a joint purchase of land, and afterwards one of them lays out a considerable sum in repairs and improvements and dies, this shall be a lien on the land, and a trust for the representative * of him who advanced it. (*l*) But where two become joint tenants, or jointly interested, in personal property, by way of gift, there the same shall be subject to all the consequences of the law of survivorship. (*m*)

In the case of Morris *v.* Barrett, (*n*) the residue of real and

sonal representative, the *remedy* survives to his companion, who alone must enforce the right by action. See *post*, pt. II. bk. III. ch. I. § II.; pt. V. bk. I. ch. I. And it has been doubted whether the rule can in any case be enforced but in a court of equity. See Smith's Mercantile Law, 149, 3d ed.; Abbott on Shipping, 97, 7th ed. But it has been lately decided by the court of exchequer, after full consideration, that the title to partnership chattels does not survive at law. Buckley *v.* Barber, 6 Ex. 164. In the same case it was argued that the surviving partners have, at law, at all events, a *jus disponendi* as to the partnership chattels, for the purpose of winding up the partnership debts. The court, however, doubted whether they have a power to sell and give a good *legal* title to the share belonging to the executor of the deceased partner when they sell in order to pay the debts of the partnership; and the barons held that certainly the survivors have no power to dispose of his share otherwise than to pay such debts.

(*h*) Buckley *v.* Barber, 6 Ex. 164.

(*i*) Hammond *v.* Jethro, 2 Brownl. & Gold. 99.

(*j*) Jeffereys *v.* Small, 1 Vern. 217.

(*k*) Petty *v.* Styward, 1 Chanc. Rep. 31; Fonbl. Treat. bk. 2, c. 4, s. 2, note (*g*); Vickers *v.* Cowell, 1 Beav. 529.

(*l*) Lake *v.* Gibson, 1 Eq. Cas. Abr. 291, pl. 3. See, further, on this subject, Lake *v.* Craddock, 3 P. Wms. 158; Lyster *v.* Dolland, 1 Ves. jr. 434; Jackson *v.* Jackson, 9 Ves. 597, note; Crawshay *v.* Maule, 1 Swanst. 498; Dale *v.* Hamilton, 5 Hare, 369, 384; Robinson *v.* Preston, 4 Kay & J. 505; Harrison *v.* Barton, 1 Johns. & H. 287, where, on the purchase by two persons contributing equally to the costs of it, Wood V. C. held that parol evidence of surrounding circumstances and of subsequent dealings was admissible, notwithstanding the statute of frauds, to prove an intention to hold in severalty; and his honor relied on the observation of Sir W. Grant, in Aveling *v.* Knipe, 19 Ves. 441, that equity will not hold a purchase joint, if there are any circumstances from which it can be collected that a joint tenancy was not contemplated.

(*m*) 1 Vern. 217; *post*, pt. III. bk. III. ch. V. § I.

(*n*) 3 Y. & Jerv. 384.

personal estates was devised by a testator to his two sons as joint tenants; and the two sons, after the father's decease, and during the period of twenty years, carried on the business of farmers with such estates, and kept the moneys arising therefrom in one common stock, and with part of such moneys purchased other estates in the name of one of them, but never in any manner entered into any agreement respecting such farming business, nor ever accounted with each other; it was held, under the circumstances, that they continued, till the death of one of them, joint tenants of all the property that passed by the will of their father, but were tenants in common of the after purchased estates. (*o*)

Rights of executor of one of several partners.

The general rule of law is, that on the death of one of several partners, in the absence of express stipulation, his representative is entitled to have the whole concern wound up and disposed of, (*o*[1]) and if the surviving partners continue the trade, the representative of the deceased partner may elect to take his share of the profits, or may charge the survivors * with interest on the amount of capital retained and used by them. If the property of the partnership consists in part of leaseholds, the executor of the deceased partner may treat the survivors as trustees, and if they renew the lease, they are considered to do so for the benefit of the partnership. (*p*)

In what cases the

In some instances the title which the deceased had in respect of a special property only in goods is transmissible to his personal representative. Thus, if an uncertificated bank-

(*o*) See Steward *v.* Blakeway, L. R. 6 Eq. Ca. 479.

(*o*[1]) [All that can be required of the surviving partner is that he proceed at once to wind up the partnership, and account with the legal representative of the deceased partner. In the absence of any agreement, the surviving partner is entitled to no pay for his personal services in the strict discharge of his duty. But if, with the assent of the administrator of the deceased partner, he employs extra labor to finish existing contracts, if he enters into new contracts, employing the machinery, patents, and property of the firm therein, then to the extent of his personal services devoted to such extra work he is entitled to compensation. Colt J. in Schenkl *v.* Dana, 118 Mass. 236, 239, and cases cited; Washburn *v.* Goodman, 17 Pick. 519; Collyer Partn. (5th Am. ed.) § 199, note (1) and cases cited; Patton *v.* Calhoun, 4 Grattan, 138; Dougherty *v.* Van Nostrand, 1 Hoff. Ch. 88; Hite *v.* Hite, 1 B. Mon. 179; Cooper *v.* Reid, 2 Hill Ch. 549; Willett *v.* Blanford, 1 Hare, 253.]

(*p*) Clements *v.* Hall, 2 De G. & J. 173, 186; Townend *v.* Townend, 1 Giff. 201; Wedderburn *v.* Wedderburn, 22 Beav. 84, 86; [Clegg *v.* Fishwick, 1 McN. & G. (Am. ed.) 299, and note (1) and cases cited; Leach *v.* Leach, 18 Pick. 68.] As to the proper mode of taking the partnership accounts of bankers, as between a surviving partner and the estate of a deceased partner, see Bate *v.* Robins, 32 Beav. 73.

rupt had acquired goods after his bankruptcy and died possessed of them, having been allowed to retain possession by the assignees, his executor or administrator might recover them from a stranger; (*q*) for there was a good title in the bankrupt as against all the world but the assignees, and this title passed to his personal representative. (*r*) But it should seem that the bare circumstance of the deceased having died in possession of goods will not give his executor or administrator a title to them even against a mere wrong-doer, if it can be shown that, in truth, the title is elsewhere. (*s*)

title goes to the executor, where the deceased had only a special property.

Upon the death of the assignee of an insolvent appointed under the insolvent act, all the interest in the personal property of the insolvent which was vested in the deceased assignee vested, by operation of law, in his executors, until a new assignee was appointed; and when a new assignee was appointed, all the interest of the executors vested, under the act (1 & 2 Vict. c. 110), (*t*) in that new assignee; and if, in * the intermediate time, any money or other property belonging to the insolvent came to the hands of his executors, the act enabled the insolvent debtor's court (*u*) to order the executor to deliver it up to the new assignee. (*v*) But where no new assignee had been appointed, it has been held that a party, having a demand against the insolvent, but not having proved under the insolvency, might in equity sue the executors of the deceased assignee. (*w*)

On the death of an assignee of an insolvent, the estate of the insolvent vests in the first instance in the executor of the assignee.

Besides the interest which an executor or administrator in all cases takes in the whole personal estate of the testator or intestate, he may in some instances be seised of real property of the deceased as trustee, or be *ex officio* invested with a power of disposing of it. (*w*[1]) It has been

An executor may be seised of real property as trustee:

(*q*) But see now the bankruptcy act, 1869 (32 & 33 Vict. c. 91), s. 15, sub-sect. 3, and s. 47; and see *ante*, 634, note (*u*).

(*r*) Fyson *v.* Chambers, 9 M. & W. 460; *ante*, 634. See, also, Morgan *v.* Knight, 15 C. B. N. S. 669.

(*s*) Elliott *v.* Kemp, 7 M. & W. 306; *ante*, 634. [See Reeves *v.* Matthews, 17 Geo. 449.]

(*t*) But this act has, so far as it relates to insolvent debtors, been repealed by the "Bankruptcy Repeal and Insolvent Court Act, 1869," which transfers to the court of bankruptcy in London the jurisdiction of the late insolvent debtors court in relation to matters pending in that court.

(*u*) See *ante*, 653, note (*t*).

(*v*) Fulcher *v.* Howell, 11 Sim. 100.

(*w*) Ib.

(*w*[1]) [With regard to the question whether

a subject of some discussion in what cases executors take a fee

an executor qualified under the laws of one state may, by virtue of a special power given in the will, make sale of lands in another state, see Newton *v.* Bronson, 13 N. Y. 587; Crusoe *v.* Butler, 36 Miss. 150. As a general rule, a power to sell land, given by will to an executor, will not devolve upon an administrator with the will annexed. Conklin *v.* Egerton, 21 Wend. 430; S. C. 25 Wend. 224; Ross *v.* Barclay, 18 Penn. St. 179; Commonwealth *v.* Forney, 3 Watts & S. 356; Tainter *v.* Clark, 13 Met. 220; Shaw C. J. in Treadwell *v.* Cordis, 5 Gray, 359; Ashburn *v.* Ashburn, 16 Geo. 213; Smith *v.* M'Connell, 17 Ill. 135; Dunning *v.* National Bank, 6 Lansing, 296; Drury *v.* Natick, 10 Allen, 169; Greenough *v.* Welles, 10 Cush. 571; Gilchrist *v.* Rea, 9 Paige, 66; Wills *v.* Cowper, 2 Ohio, 124; Larned *v.* Bridge, 17 Pick. 339; Kidwell *v.* Brummagim, 32 Cal. 436; Hall *v.* Irwin, 7 Ill. 176, 180; Evans *v.* Chew, 71 Penn St. 47; Moody *v.* Vandyke, 4 Binn. 31; Moody *v.* Fulmer, 3 Grant, 17; Brown *v.* Hobson, 3 A. K. Marsh. 380; M'Donald *v.* King, 1 N. J. (Law) 432; Hester *v.* Hester, 2 Ired. Eq. 330; Smith *v.* McCrary, 3 Ired. Eq. 204; Knight *v.* Loomis, 30 Maine, 208; Roome *v.* Phillips, 27 N. Y. 357, 363; Owens *v.* Cowan, 7 B. Mon. 156; Bailey *v.* Brown, 9 R. I. 79; *ante*, 461, note (*c*); Vardeman *v.* Ross, 36 Texas, 111; Dominick *v.* Michael, 4 Sandf. 374. It was held in Alabama that an administrator with the will annexed cannot execute a power to sell lands conferred upon the executor appointed by will, but who failed to qualify. Lucas *v.* Doe, 4 Ala. 679. See Tainter *v.* Clark, 13 Met. 220. In Conklin *v.* Egerton, 21 Wend. 430, a power had been granted by will to an executor, to sell and dispose of real estate, and to divide the proceeds among devisees to whom the estate was given by a previous clause in the same will. The executor died without having executed the power, and it was held that the power could not be executed by an administrator *cum testamento annexo*, notwithstanding the provisions of the revised statutes of New York, that "in all cases where letters of administration with the will annexed shall be granted, the will of the deceased shall be observed and performed, and the administrators of such will shall have the rights and powers, and be subject to the same duties, as if they had been named executors in such will." "This decision is fully sustained by a well established principle of the common law as laid down in numerous authorities." Wilde J. in Tainter *v.* Clark, 13 Met. 227; Dunning *v.* Ocean National Bank of City of New York, 6 Lansing, 296, 298, 299. The same was held in Anderson *v.* McGowan, 42 Ala. 280. But in Pennsylvania, where the executors of the will of the wife, of whom her second husband was one, renounced the trust, it was held that the administrator with the will annexed had the same power to sell the estate devised which the executors would have had if they had not renounced, and that his deed passed to the purchaser a valid title to the same. Keefer *v.* Schwartz, 47 Penn. St. 503. The statute of Pennsylvania, which authorizes an administrator with the will annexed to sell where the will authorized a sale by the executor, is confined to sales for the purpose of administration, and does not extend to sales for collateral purposes. Waters *v.* Margerum, 60 Penn. St. 39. See Chew *v.* Evans, 8 Phil. (Penn.) 103. The statute of North Carolina, which authorizes the administrator with the will annexed, in case of the death of all the executors, to sell the real estate under the will, applies to the case of such an administrator rendered necessary because no executor was nominated in the will. Hester *v.* Hester, 2 Ired. Eq. 330. So under the statute of Virginia, where by a will the executors are empowered to sell the lands of the testator, "provided they will sell for as much as in their judgment will be equal to its value," and they renounce their trust, an administrator with the will

simple, in trust to sell, under a will, or are invested merely with a power of disposition. (w^2) The distinction resulting from the authorities appears to be this: that a devise of the land *to executors to sell* passes the interest in it; but a devise that *executors shall sell the land*, or that *lands shall be sold by the executors*, gives them but a power. (x) An eminent writer has concluded from an examination of all the cases, that even a devise of *land to be sold by the executors*, without giving the estate to them, will invest them with a power only, and not give them an interest. (y)

in what cases executors take the fee in trust to sell, or merely a power of disposition:

annexed may sell in pursuance of the power in the will. Brown *v.* Armistead, 6 Rand. 594. So in Kentucky, by statute. Shields *v.* Smith, 8 Bush (Ky.), 601. As to the rule in Missouri, see Dilworth *v.* Rice, 48 Misson. 124; in Kentucky, Galley *v.* Prather, 7 Bush (Ky.), 167. An administrator *de bonis non* with the will annexed, and his sureties, are liable on their administration bond for money arising out of the sale of real estate of the testator made in pursuance of the directions of the will. Commonwealth *v.* Forney, 3 Watts & S. 353; Zeigler *v.* Sprenkle, 7 Watts & S. 175; *ante*, 534, note (g^2). An executor having no interest in the real estate but the power to sell, cannot maintain an action for trespass committed since the death of the testator. The right of possession belongs to the heirs or devisees. Allboro *v.* Lowry, 23 Misson. 99; *ante*, 650, note (d^1).]

(w^2) [An authority to executors, in a certain contingency, to sell real estate and divide the proceeds among certain persons, does not vest the estate in the executors, but simply confers on them a power, and the estate passes at once to the heir if not devised, or to the devisee if devised, subject only to the execution of the power. Scott *v.* Monell, 1 Redf. Sur. 431; Martin *v.* Martin, 53 Barb. 172; Marsh *v.* Wheeler, 2 Edw. Ch. 156; Herbert *v.* Tuthill, 1 Sax. (N. J.) Eq. 141.]

(x) All the cases will be found in 1 Sugden on Powers, 128 *et seq.* 6th ed. See, also, Doe *v.* Shotter, 8 Ad. & El. 905, accord. [See Haskell *v.* House, Const. Ct. (S. Car.) 106. In Pennsylvania a power to sell real estate, given to the executors by a will, passes the interest in it to them, as fully as if it had been devised to them to be sold. Shippen *v.* Clapp, 36 Penn. St. 89. Under a power to sell, given to executors in a will, they may sell and convey in their own names, without giving any other than the ordinary executor's bond. Alley *v.* Lawrence, 12 Gray, 373.]

(y) 1 Sugden on Powers, 133, 6th ed. But see, on this subject, Co. Lit. 113 *a*, and Mr. Hargrave's note, where that learned person inclines to construe a devise that executors shall sell the land, as well as a devise of lands to be sold by executors, as investing them with a fee simple, and not merely a power. Powell on Devises, vol. 1, p. 245 *et seq.* 3d ed., takes the same view of the question as Edward Sugden. [For American cases upon this point, see Dabney *v.* Manning, 3 Ham. 321; Dunn *v.* Keeling, 2 Dev. 283; Blount *v.* Johnson, Cam. & Nor. 551; Robertson *v.* Gaines, 2 Humph. 267; Haskell *v.* House, 3 Brev. 242. It was held in Sorrell *v.* Ham, 9 Geo. 55, that a grant, in letters testamentary, of power to administer the goods and chattels, rights and credits of the testator, gave authority to administer the will also as to real estate.] In Knocker *v.* Banbury, 6 Bing. N. C. 306, a testator possessed of real and personal property desired his executors, out

* It sometimes happens that a testator directs his estate to be disposed of for certain purposes, without declaring by whom the sale shall be made. In the absence of such a declaration, *if the proceeds be distributable by the executor*, he shall have the power by implication. (y^1) Thus, a power in a will to sell or mortgage, without naming a donee, will, if a contrary intention do not appear, vest in the executor, if the fund is to be distributable by him, either for the payment of debts or legacies; (z) and it seems, that whilst the chain remains unbroken, the power, until exercised, will go from him to his executors. (a)

executors shall have a power to sell land by implication, where the proceeds are distributable by them:

of such moneys of his as might come to their hands, to purchase two annuities for A. W. and her children; and with regard to the rest of his property, of what kind soever, he desired his executors, after payment of his debts and funeral expenses, to pay and make over the whole to his daughter, and to the children of his said daughter after her decease. The court of common pleas were of opinion that the executors took no interest in the freehold property, but that they had a power to settle it upon the daughter for life, with remainder after her decease to her children and their heirs. [Where a naked power of sale is vested in executors, and the land is not devised to them, the title is in the heirs until the sale: Romaine *v.* Hendrickson, 24 N. J. Eq. 231.]

(y^1) [Wilde J. in Tainter *v.* Clark, 13 Met. 220, 228; Lippincott *v.* Lippincott, 4 Green Ch. 121; Jones's Appeal, 5 Grant, 19; Walker *v.* Murphy, 34 Ala. 591; 4 Kent, 326; Davoue *v.* Fanning, 2 John. Ch. 254. A testator, by his will, having authorized his executors to sell real estate, and appointed three persons his executors, afterwards, by a codicil, revoked the appointment of one of them, by name, and appointed another person in his place; it was held that the power to sell devolved upon the two executors who remained as appointed by the will, and the third appointed by the codicil. Pratt *v.* Rice, 7 Cush. 209. A power to sell real estate, given to executors named in a will, may be executed by one of them, if he alone accepts the office. Taylor *v.* Galloway, 1 Ohio, 282; Wood *v.* Sparks, 1 Dev. & Bat. (Law) 389; Taylor *v.* Adams, 2 Serg. & R. 534; Robertson *v.* Gaines, 2 Humph. 367; *post*, 651, note (h^1); Conover *v.* Hoffman, 1 Bosw. 214.]

(z) 1 Sugd. on Pow. 238, 6th ed., where all the cases are collected. See, also, 2 Preston on Abstracts, 264; Curtis *v.* Fulbrook, 8 Hare, 278 (correcting the report of S. C. 8 Hare, 25); [Magruder *v.* Peter, 11 Gill & J. 217.] And if the produce of the real estate is blended with the personal estate, the power to sell will vest in the executors by implication. Tylden *v.* Hyde, 2 Sim. & Stu. 238. See, also, Forbes *v.* Peacock, 11 Sim. 152; 12 Sim. 528; 11 M. & W. 630; Gosling *v.* Carter, 1 Coll. 644; Robinson *v.* Lowater, 17 Beav. 592; 5 De G., M. & G. 272; [Am. ed. note (2);] Wrigley *v.* Sykes, Rolls, 22 Jan. 1856, 20 Jurist, 78; [Gray *v.* Henderson, 71 Penn. St. 368; Dorland *v.* Dorland, 2 Barb. 63; Bogert *v.* Hertell, 4 Hill, 492; Meakings *v.* Cromwell, 2 Sandf. 512; Putnam Free School *v.* Fisher, 30 Maine, 523; Magruder *v.* Peter, 11 Gill & J. 217; Peter *v.* Beverly, 10 Peters, 532; Houck *v.* Houck, 5 Penn. St. 273; Lockhart *v.* Northington, 1 Sneed, 318.]

(a) 1 Sugd. on Pow. 138, 6th ed. So it may be exercised by the survivor of two or more executors. Forbes *v.* Peacock, 11 M. & W. 630. [When the testator by his will directs lands to be sold, without

But in Bentham *v.* Wiltshire, (*b*) where a testator bequeathed an estate to his wife for life, and directed that after her decease the estate should be sold to the highest bidder by public auction, and the money arising from such sale be disposed of among certain persons named in his will, and he appointed his wife and another person executors; it was held that the power was not given by implication to the executors; because they had nothing to do with the produce of the sale, nor any power of distribution with respect to it. (*c*)

secus, where the management of the fund is not given to them:

* In this case the vice chancellor (Leach) said that the power to the executors to sell is "necessarily to be implied from the produce being to pass through their hands in the execution of their office, as in the payment of debts and legacies." (*c*[1]) And accordingly before the case of Doe *v.* Hughes, (*c*[2]) the law had, it appears, been considered to be that the effect of a charge of the real estates with debts was to give to the executors an implied power of sale. (*c*[3]) But in that case the barons of the exchequer deliberately denied this proposition; and held that, where a testator, after charging all his real and personal estate with his

whether a mere charge of debts on land gives the executors an implied power of sale: see stat. 22 & 23 Vict. c. 35, *infra*, note (*d*).

naming the person by whom the sale is to be made, the power to sell and convey devolves upon the executors, and survives to the survivor of them. Houck *v.* Houck, 5 Penn. St. 273; Jenkins *v.* Stouffer, 3 Yeates, 163; Anderson *v.* Turner, 3 A. K. Marsh. 131; Tainter *v.* Clark, 13 Met. 220, 225–228; Magruder *v.* Peter, 11 Gill & J. 217. As to the execution by survivors of a power of sale, given in a will, coupled with an interest, see Jackson *v.* Burtis, 14 John. 391; Franklin *v.* Osgood, 14 John. 527; Jackson *v.* Given, 16 John. 167.]

(*b*) 4 Madd. 44.

(*c*) See, also, Patton *v.* Randall, 1 Jac. & W. 189; 1 Sugd. on Pow. 138, 139, 6th ed.; Allum *v.* Fryer, 3 Q. B. 442, 446, accord. [See Walter *v.* Logan, 5 B. Mon. 516.] But the authority of Bentham *v.* Wiltshire was doubted by Shadwell V. C. in Forbes *v.* Peacock, 11 Sim. 152, 12 Sim. 528, and his honor said (12 Sim. 536) that he did not think Sir John Leach would have decided as he did in that case if he had seen the case of Ward *v.* Devon, which was decided by Sir W. Grant (11 Sim. 160). See, however, Haydon *v.* Wood, 8 Hare, 279, note (*a*), and Curtis *v.* Fulbrook, Ib. 278 (correcting the report Ib. 25).

(*c*[1]) [In Going *v.* Emery, 16 Pick. 111, 112, Shaw C. J. assumed it to be the rule, "that if a testator, having a right to dispose of his real estate, directs that to be done by his executor, which necessarily implies that the estate is first to be sold, a power is given by this implication to the executor to make such sale and execute the requisite deeds of conveyance." See Lockart *v.* Northington, 1 Sneed, 318; Livingston *v.* Murray, 39 How. (N. Y.) Pr. 102.]

(*c*[2]) 6 Ex. 223.

(*c*[3]) See 17 Beav. 601, by Romilly M. R.

debts, funeral and testamentary expenses, and a certain legacy, devised the rents and profits of all his messuages and lands, except his Bala houses, to his wife for life with remainder in fee to H., and also bequeathed to his wife the whole of his personal estate and appointed her sole executrix, the Bala houses descended to the heir, subject to a charge which could only be enforced in equity; and that the executrix had no implied power to sell or mortgage them for the payment either of the debts, funeral or testamentary expenses, or legacy. (*d*)

a testator cannot turn his real estate into legal personal assets by direct-

* It is here necessary to observe, that a testator cannot alter the *legal* character of real property, by directing, either impliedly or expressly, that it shall be considered part of his personal estate. Accordingly, it may now be considered a settled rule, that where lands are devised to

(*d*) [Den *v.* Allen, 2 N. J. (Law) 45; Dunn *v.* Keeling, 2 Dev. (N. Car.) 283; In the Matter of the Will of Fox, 52 N. Y. 530.] See, however, the remarks made on this case and the authorities cited by Romilly M. R. in Robinson *v.* Lowater, 17 Beav. 601; S. C. on appeal, 5 De G., M. & G. 272; [Am. ed. note (2), and cases cited.] And, notwithstanding the decision of Doe *v.* Hughes, it is understood to be now clearly established in accordance with the stat. 22 & 23 Vict. c. 35, hereafter mentioned, that where there is a general charge of debts, and no distinct provision as to the person by whom the sale is to be made, then the executors take an implied power to sell for the payment of debts. 1 Johns. & H. 309, by Wood V. C. See, also, Wrigley *v.* Sykes, 21 Beav. 337; Sabin *v.* Heape, 27 Beav. 553; Cook *v.* Dawson, 29 Beav. 123, 126. See, also, S. C. on appeal, 3 De G., F. & J. 127; but see, also, Ib. 128, by Lord Justice Knight Bruce. But an exception, it seems, prevails where the direction that the debts shall be paid is coupled with the direction that they are to be paid by the executor, for that in such case it is assumed that the testator meant that the debts should be paid only out of the property which passes to the executor. 29 Beav. 126, 127; 3 De G., F. & J. 127. So where the estate is devised to another charged with the payment of debts, the doctrine of implying a power in the executors does not apply; for there the money is to be raised through the instrumentality of a sale by the devisee, and that devisee is the person and the only person that can make a legal title. Colyer *v.* Finch, 5 H. L. Cas. 905. So where a testator after a charge of debts devised real estates to trustees upon trusts for his daughters and their families, and after the death of the surviving daughter upon trust to sell, with power to give receipts, and to apply the proceeds after satisfying all incumbrances affecting the said real estates upon certain trusts; Wood V. C. held, on demurrer, that the trustees could make a good title without the concurrence of the executors, though the learned judge appears to have conceded that the executors would have had the power to sell previously if they had chosen so to do. Hodkinson *v.* Quinn, 1 Johns. & H. 303. But with respect to all wills which have come into operation after 13th August, 1859, the power to sell is expressly conferred on executors by stat. 22 & 23 Vict. c. 35, ss. 14, 16, where the testator has charged his real estate with the payment of his debts or legacies, and has not devised the hereditaments so charged to trustees.

executors, to be sold for the payment of debts and legacies, the money arising from the sale is to be considered equitable and not legal assets. (*e*) The distinction between these two kinds of assets, and the consequences of that distinction, will be considered hereafter, with the subject of assets generally.

ing it to be ld or herwise.

It is, however, an established doctrine in courts of equity, that things shall be considered as actually done, * which ought to have been done; and it is with reference to this principle, that land is under some circumstances regarded as money, and money as land. It was laid down by Sir Thomas Sewell M. R. in Fletcher *v.* Ashburner, (*f*) "that nothing was better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given; whether by will, by way of contract, marriage articles, settlement or otherwise, and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed. (*f*[1]) The owner of the

Doctrine of equitable conversion.

land considered as money, and money as land.

(*e*) Clay *v.* Willis, 1 B. & C. 364; 2 D. & R. 539; Barker *v.* May, 9 B. & C. 489. See Attorney General *v.* Brunning, 8 H. L. Cas. 243; *ante*, 622. [See In the Matter of Will of Fox, 52 N. Y. 530, 537.]

(*f*) 1 Bro. C. C. 497.

(*f*[1]) [Holland *v.* Cruft, 3 Gray, 162, 180. When it is the intention of a testator that his real estate shall be converted into a pecuniary fund, to be held by trustees, for purposes indicated in the will, it is deemed to be personalty from the time of the testator's death, nor is such change prevented by the death of the person entitled to the proceeds before the execution of the power. Gourley *v.* Campbell, 13 S. C. (N. Y.) 218; Hays *v.* Gourley, 8 S. C. (N. Y.) 38; Stagg *v.* Jackson, 1 Comst. 206; Marsh *v.* Wheeler, 2 Edw. Ch. 157; Bramhall *v.* Ferris, 14 N. Y. 41, 46; Phelps *v.* Pond, 23 N. Y. 69; White *v.* Howard, 46 N. Y. 162; Bunce *v.* Vandergrift, 8 Paige, 37; Clay *v.* Hart, 7 Dana, 11; Evans *v.* Kingsberry, 2 Rand. 120; Brearley *v.* Brearley, 1 Stockt. (N. J.) 21; Taylor *v.* Benham, 5 How. (U. S.) 233. See Anewalt's Appeal, 42 Penn. St. 414. Money directed to be laid out in land, and settled on A. in fee, is, though not actually laid out, descendible as real estate to the heir; is subject to tenancy by the curtesy; Sweetapple *v.* Bindon, 2 Vern. 536; Cunningham *v.* Moody, 1 Ves. 174; Dodson *v.* Hay, 3 Bro. C. C. 404; and passes by a devise of lands, tenements, and hereditaments; Lingen *v.* Sowray, 1 P. Wms. 172; Shorer *v.* Shorer, 10 Mod. 39; Harvey *v.* Aston, 1 Atk. 364; Guidot *v.* Guidot, 3 Atk. 254; Rashleigh *v.* Master, 1 Ves. jr. 201; S. C. 3 Bro. C. C. 99; Hickman *v.* Bacon, 4 Bro. C. C. 333; Green *v.* Stephens, 12 Ves. 419; S. C. 17 Ves. 64; and will not pass under a bequest purporting to include personal estate only. Gillies *v.* Longlands, 15 Jur. 570; S. C. 20 L. J. Ch. 441; Richards *v.* Attorney General of Jamaica, 13 Jur. 197; In re Pedder's Settlement, 5 De G., M. & G. 890.

fund, or the contracting parties, may make land money, or money land." (*g*) It follows, therefore, that every person claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it; (*g*[1]) and its subsequent devolution and disposition will be governed by the rules applicable to that species of property. (*h*)

So, in the converse case of real estate, being directed to be sold, and the proceeds bequeathed to A., who, after surviving the testator, happens to die before the sale, the property devolves to his personal, not his real, representative, with all the incidental qualities of real estate. Elliott *v.* Fisher, 12 Sim. 505; 1 Jarman, 550.]

(*g*) See Wheldale *v.* Partridge, 5 Ves. 396, where Lord Alvanley remarks the accuracy of this statement of the doctrine. This doctrine does not extend to the interpretation of statutes imposing duties on personal estate. In re Delancey, L. R. 4 Ex. 345, per Kelly C. B.

(*g*[1]) [Where a testator directs land to be sold, and the proceeds to be reinvested in other lands, such proceeds are to be regarded as land in the settlement of the estate, although they have not been actually reinvested. Haggard *v.* Rout, 6 B. Mon. 247; Sperling *v.* Toll, 1 Ves. 70; Pearson *v.* Lane, 17 Ves. 101; In re Pedder's Settlement, 5 De G., M. & G. 890; 1 Jarman Wills (3d Eng. ed.), 551.]

(*h*) 2 Powell Dev. 61, Jarman's ed. [See 1 Jarman Wills (3d Eng. ed.), 549; Lewin Trusts (5th Eng. ed.), 675 *et seq.*; Monroe *v.* Wilson, 6 Monr. 122; Justices &c. *v.* Lee, 1 Monr. 247; Speed *v.* Nelson, 8 B. Mon. 499; Taylor *v.* Taylor, 8 B. Mon. 419; Clondas *v.* Adams, 4 Dana, 603; Dyer *v.* Cornell, 4 Penn. St. 359; Grider *v.* M'Clay, 11 Serg. & R. 224; Pennell's Appeal, 20 Penn. St. 515; 1 Redf. Sur. 276; Nagle's Appeal, 13 Penn. St. 262; Biggert's Estate, 20 Penn. St. 17; Biggert *v.* Biggert, 7 Watts, 563; Sutter *v.* Long, 25 Penn. St. 466; Lorillard *v.* Coster, 5 Paige, 172; Kane *v.* Gatt, 24 Wend. 641; High *v.* Worley, 33 Ala. 196; Drake *v.* Pell, 3 Edw. Ch. 251; Johnson *v.* Burnett, 39 Barb. 237; Parkinson's Appeal, 32 Penn. St. 455; Bogert *v.* Hertell, 4 Hill (N. Y.), 492; Brothers *v.* Cartwright, 2 Jones Eq. 113; Clay *v.* Hart, 7 Dana, 11; Romaine *v.* Hendrickson, 9 C. E. Green, 231. Where a bequest of money is directed in the will "to be considered as land, or invested in land, upon a certain contingency," it will be treated as if it was land from the time of the happening of the contingency. Taylor *v.* Johnston, 63 N. Car. 381. See Ross *v.* Drake, 37 Penn. St. 373. But in order to work a constructive conversion, an actual sale or purchase, either immediately or in future, and either absolutely or contingently at a specified time, must be directed expressly or impliedly. Christler *v.* Meddis, 6 B. Mon. 35; Haggard *v.* Rout, 6 B. Mon. 247. A mere direction that real estate is to be considered as personal, or *vice versa*, is insufficient; Johnson *v.* Arnold, 1 Ves. 171; Attorney General *v.* Mangles, 5 M. & W. 120; since the law does not allow property to be retained in one shape, and yet devolve as if it were in another. 1 Jarman Wills (3d Eng. ed.), 551. Where there is an option to invest money, either in fee simple lands, or leaseholds, or on securities bearing interest, there will be no constructive conversion of the money into land, unless the trusts or limitations declared of the fund are such as to be solely applicable to fee simple property, and can be properly carried out only by the purchase of such property. See De Beauvoir *v.* De Beauvoir, 3 H. L. Cas. 524. Where the trusts are applicable solely to personalty, or may be adapted either to personalty or fee simple lands, the money will be deemed unconverted. 1 Jarman Wills (3d Eng. ed.), 551. For cases where money has been held to be converted, see Earlom

* Again, since equity looks upon things agreed to be done, as actually performed, it follows that, when a real estate is contracted to be sold, the vendor is regarded in equity

land contracted to be sold:

v. Saunders, Amb. 241; Johnson *v.* Arnold, 1 Ves. 169; Meure *v.* Meure, 3 Atk. 265; Cowley *v.* Harstonge, 1 Dow, 361; Hereford *v.* Ravenhill, 5 Beav. 51; Cookson *v.* Reay, 5 Beav. 22; Simpson *v.* Ashworth, 6 Beav. 412; Cookson *v.* Cookson, 12 Cl. & Fin. 121. For cases in which the question has arisen and it was held that there was no conversion, see Curling *v.* May, cited 2 Atk. 255; Van *v.* Barnett, 19 Ves. 102; Biggs *v.* Andrews, 5 Sim. 424; Walker *v.* Denne, 2 Ves. jr. 170. Sometimes there is no express trust for conversion, but the circumstances are such as to lead to an implication that conversion was intended. See Cornick *v.* Pearce, 7 Hare, 477. As to implication of conversion for convenience of division, see Mower *v.* Orr, 7 Hare, 475; Greenway *v.* Greenway, 29 L. J. Ch. 601; S. C. 2 De G., F. & J. 128; Burrell *v.* Baskerfield, 11 Beav. 525; Tily *v.* Smith, 1 Coll. 434; Pearce *v.* Gardner, 10 Hare, 287. A provision that, until land be purchased, the money shall be placed out on security at interest, does not prevent its receiving the impression of real estate *instanter* (see Edwards *v.* Countess of Warwick, 2 P. Wms. 171), this being a mere temporary arrangement; unless it appears, as of course it may from other parts of the instrument, that the arrangement is not, in fact, intended to be merely temporary, for instance, if by a final disposition of the *capital* fund, in certain events, as money, it is shown that the conversion is to take place only in the alternative events. Wheldale *v.* Partridge, 5 Ves. 388; S. C. 8 Ves. 227; 1 Jarman Wills (3d Eng. ed.), 556. It is not material that the sale or purchase is to be made only when or in case the trustees think fit or with the approbation, or upon the consent of certain persons. Doughty *v.* Bull, 2 P. Wms. 320; Robinson *v.* Robinson, 19 Beav. 494; Lechmere *v.* Earl of Carlisle, 3 P. Wms. 211; Wrightson *v.* Macaulay, 4 Hare, 497; Huskisson *v.* Lefevre, 26 Beav. 157; 1 Jarman Wills (3d Eng. ed.), 556; Arnold *v.* Gilbert, 5 Barb. 190. If the purchase is to be made on or after request, the question whether or not a conversion is intended, must be answered from a consideration of the whole instrument, and especially of the trusts to which the property is subjected, and the persons by whom the request is to be made. See Thornton *v.* Hardley, 10 Ves. 129; Triquet *v.* Thornton, 13 Ves. 345; Van *v.* Barnett, 19 Ves. 102; Taylor's Settlement, 9 Hare, 596; Davies *v.* Goodhew, 6 Sim. 585; 1 Jarman, 557, 558; Johnson *v.* Arnold, 1 Ves. 169; Sykes *v.* Sheard, 33 Beav. 114; Lewin Trusts (5th Eng. ed.), 684, 685. If the trustees decline to exercise their discretion, the court will consider the conversion as effected at the testator's death, and of course they may not frustrate the intended conversion by withholding their consent from corrupt or interested motives. Lord *v.* Wightwick, 4 De G., M. & G. 803; S. C. 6 H. L. Cas. 217; 3 Jur. N. S. 699; 1 Jarman, 558, and note (*o*). It seems that the converting effect of a trust for sale, in regard to a legatee to whom the proceeds are bequeathed, is not prevented by the fact, that in an alternative event, the testator has devised the property in terms adapted to its original state, as he may have contemplated the possibility of the contingency happening before a sale could be effected, besides which, it seems to have been considered, that the property might be real estate as to one legatee, and personal as to another, to whom it was given in an alternative event. 1 Jarman, 558; Ashley *v.* Palmer, 1 Meriv. 296, more accurately reported in 1 Jarman, 558, 559; Crabtree *v.* Bramble, 3 Atk. 680. As to partial conversion with regard to a particular interest in property, see Cowley *v.* Harstonge, 1 Dow, 381; Wall *v.* Colshead, 1 Jarman, 558, note (*o*); 2 De G. & J. 683. And though a mere

as a trustee for the purchaser of the estate sold, (*i*) and the pur-

power of sale or purchase, of course, does not change the nature of the property; Harris *v.* Clark, 7 N. Y. 242; yet, the circumstance of the clause respecting the sale or purchase being framed in the language of a power, will not prevent its producing a constructive conversion, if the context of the will shows that it is meant to be imperative, or in the nature of a trust. See Grieveson *v.* Kirsopp, 2 Keen, 653; Burrell *v.* Baskerfield, 11 Beav. 525; 1 Jarman, 560; Arnold *v.* Gilbert, 5 Barb. 190. But although, in general, the presumption is that a testator does not intend the nature of the property to depend upon the option of the person through whom the conversion is to be effected; yet, if upon the whole will it appears to have been the intention of the testator to give to such person an absolute discretion to sell or not, the property in the mean time will, as between the real and personal representatives of the persons beneficially entitled, devolve according to its actual state. See Polley *v.* Seymour, 2 Y. & Coll. 708; Taylor's Settlement, 9 Hare, 596; Harding *v.* Trotter, 21 L. T. 279, V. C. S.; Greenway *v.* Greenway, 2 De G., F. & J. 128; Yates *v.* Yates, 6 Jur. N. S. 1023; Lucas *v.* Brandreth, 6 Jur. N. S. 945. And so it was held in Romaine *v.* Hendrickson, 9 C. E. Green, 231, that where a naked power of sale is vested in executors, with no absolute direction to convert, but wholly discretionary, not only as to the time of sale, but as to whether the sale shall ever be made, the land remains land, until the sale actually takes place. Runyon Ch. in this case said: "The power of sale is not one that is to be exercised on the happening of a certain event, or at a given time, but is wholly discretionary, not only as to the time of sale, but as to whether the sale shall ever be made. It may never be exercised. It is a power and not a trust. The land was not devised to the executors, and in the mean time, until the sale, the title is in the heirs, and they have power to transfer their interest in it, at all events, so far as to entitle the alienee to all their rights, whatever disposition should be afterwards made of it. Den *v.* Snowhill, 3 Zabr. 447; Den *v.* Creveling, 1 Dutcher, 449; Herbert *v.* Tuthill, Saxton, 141; Gest *v.* Flock, 1 Green Ch. 108; Fluke *v.* Fluke, 1 C. E. Green, 478. The direction to convert not having been absolute, but wholly discretionary, the land was land and not money, until the conversion should actually have taken place. Gest *v.* Flock, *supra;* Cook *v.* Cook, 5 C. E. Green, 375; Christler *v.* Meddis, 6 B Mon. 35; Haggard *v.* Rout, 6 B. Mon. 247. Land, directed to be sold upon the occurence of a certain event, is to be treated as personal estate when that event happens. Brothers *v.* Cartwright, 2 Jones Eq. 113. But see Binehart *v.* Harrison, Baldw. 177; Rumsey *v.* Durham, 5 Ind. 71.] As to what shall, or shall not amount to a direction for conversion, see Grieveson *v.* Kirsopp, 2 Keen, 653; Biggs *v.* Andrews, 5 Sim. 424; Simpson *v.* Ashworth, 6 Beav. 412; Matson *v.* Swift, 8 Beav. 368, 374, 375, 376; Elliott *v.* Fisher, 12 Sim. 505; Tily *v.* Smith, 1 Coll. 434; Wrightson *v.* Macaulay, 4 Hare, 487; Polley *v.* Seymour, 2 Y. & Coll. Ex. 709; Flint *v.* Warren, 14 Sim. 554; Burrell *v.* Baskerfield, 11 Beav. 525; Ward *v.* Arch, 15 Sim. 389; Griffith *v.* Ricketts, 7 Hare, 299; Mower *v.* Orr, 7 Hare, 475; Cornick *v.* Pearce, 7 Hare, 477; De Beauvoir *v.* De Beauvoir, 3 H. L. Cas. 524; Shallcross *v.* Wright, 12 Beav. 505; Hardy *v.* Hawkshaw, 12 Beav. 552; Griesbach *v.* Freemantle, 17 Beav. 314; In re Taylor's Settlement, 9 Hare, 596; Lucas *v.* Brandreth, 28 Beav. 273; Greenway *v.* Greenway, 2 De G., F. & J. 128; In re Ibbitson's Estate, L. R. 7 Eq. Cas. 226; Brickenden *v.*

(*i*) Atcherley *v.* Vernon, 10 Mod. 518; Sugden's Vendors &c. ch. 4, s. 1.

Davie *v.* Beardsham, 1 Chan. Cas. 39;

chaser as a trustee of the purchase-money for the vendor. (*k*)

Williams, L. R. 7 Eq. Cas. 310. See, also, Sugden's Law of Property, 460, and the cases as to legacy duty collected *post*, pt. III. bk. v. ch. II.; [1 Jarman, 561–564, and notes.] There is no equity for the crown to call for a conversion of real property in order that it may take the produce of it. Taylor *v.* Haygarth, 14 Sim. 8; Henchman *v.* Attorney General, 3 My. & K. 485. It should be further observed, that though a new character may, by this doctrine of equitable conversion, have been impressed upon the property, yet it is in the power of any person (not personally incompetent) who is entitled to it absolutely [Sisson *v.* Giles, 32 L. J. Chanc. 606] to elect to take it in its actual state. [Shallenberger *v.* Ashworth, 25 Penn. St. 152; Trecothick *v.* Austin, 4 Mason, 39; Mandlebaum *v.* McDonell, 29 Mich. 78, 86, and cases cited; 1 Jarman, 564; Carr *v.* Ellison, 2 Bro. C. C. 56; Van *v.* Barnett, 19 Ves. 102; Robinson *v.* Robinson, 19 Beav. 494; Ashby *v.* Palmer, 1 Meriv. 296; Doncaster *v.* Doncaster, 3 Kay & J. 26; Smith *v.* Starr, 3 Whart. 62; Leiper *v.* Irvine, 26 Penn. St. 54; Baker *v.* Copenbarger, 15 Ill. 103.] Slight circumstances, and even parol declarations of such an intention, will be sufficient for this election; see 1 Roper on Leg. 473, 3d ed.; Matson *v.* Swift, 8 Beav. 375, per Lord Langdale M. R.; [Edwards *v.* Countess of Warwick, 2 P. Wms. 173; Bradish *v.* Gee, Amb. 229; Chaloner *v.* Butcher, cited 3 Atk. 685; 1 Jarman, 565;] but they must be unequivocal. Stead *v.* Newdigate, 2 Meriv. 531; Biggs *v.* Andrews, 5 Sim. 424; Meredith *v.* Vick, 23 Beav. 559; In re Pedder's Settlement, 5 De G., M. & G. 890. See, also, Harcourt *v.* Seymour, 2 Sim. N. S. 12; Griesbach *v.* Freemantle, 17 Beav. 314; Gillies *v.* Longlands, 4 De G. & Sm. 372. Changing the security of the money to be laid out in land will effectuate the purpose; Lingen *v.* Sowray, 1 P. Wms. 172; or bequeathing it as personalty; Triquet *v.* Thornton, 13 Ves. 345; [see Harcourt *v.* Seymour, 2 Sim. N. S. 12;] or making a lease of the estate directed to be sold; Crabtree *v.* Bramble, 3 Atk. 680; see Cookson *v.* Reay, 5 Beav. 22; see, also, Cookson *v.* Cookson, 12 Cl. & Fin. 121; [taking possession of deeds, Davis *v.* Ashford, 15 Sim. 42.] Preserving the property in its actual state may be sufficient. Dixon *v.* Gayfere, 17 Beav. 433. But the mere circumstance of the fund remaining unconverted in the hands of the person entitled to it at all events is not, unaccompanied by length of time, evidence of his intention to alter its new character. Kirkman *v.* Miles, 13 Ves. 338. See, also, Griffith *v.* Ricketts, 7 Hare, 299; Brown *v.* Brown, 33 Beav. 299. [It is to be observed, that in order to amount to an election to take property in its actual, as distinguished from its eventual, or destined, state, the act must be such as to absolutely determine and extinguish the converting trusts, and hence it would seem to follow, that where two or more persons are interested in the property, it is not in the power of any one co-proprietor to change its character, in regard even to his own share, for, as the act of the whole would be requisite to put an end to the trust, nothing less will suffice to impress upon the property a transmissible quality, foreign to that which it had received from the testator. 1 Jarman, 567; Elliott *v.* Fisher, 12 Sim. 505; Holloway *v.* Radcliffe, 23 Beav. 163; Griesbach *v.* Freemantle, 17 Beav. 314. But although it is not in the power of the owner of an undivided share, or any other partial interest in property which is directed to be converted, by his single act to change its character, and thereby impart to it a different transmissible quality, it does not follow that every disposition by such partial owner adapted to the property in its actual state, is nugatory. On the contrary, it is clear, that if the person entitled to a partial interest in money to be laid out in land, shows an intention to dispose thereof by will, or other-

(*k*) Green *v.* Smith, 1 Atk. 572; Pollexfen *v.* Moore, 3 Atk. 272.

Hence, the death of the vendor or vendee before the conveyance, (*l*) or surrender, (*m*) or even before the time agreed upon for completing the contract, is in equity immaterial. (*n*) If the vendor die before the payment of the *purchase-money, it will go to his executors and form part of his assets; (*o*) and even if a vendor reserve the purchase-money, payable as he shall appoint by an instrument executed in a particular manner, and afterwards exercise his power, the money will, as between his creditors and appointees, be assets. (*p*) So if the contract be valid at the death of the vendor, but the purchaser loses his right to a specific performance by subsequent *laches*, the estate belongs to the next of kin and not to the heir-at-law. (*q*) Again, if a man devises his real estate and afterwards sells it, and the purchase is not completed until after his death, the purchase-money belongs to his personal representatives, notwithstanding the stat. 1 Vict. c. 26, s.

wise, as personal estate, it will pass by such disposition; Triquet *v.* Thornton, 13 Ves. 345; though, on the death of the donee it would devolve to *his* real representative. 1 Jarman, 568. So, if the legatee of the proceeds of real estate, directed to be sold, devise the land in its character of real estate, the devisee will be entitled to the fund in question, though it would, when acquired, be personal estate in the hands of such devisee. See Hewitt *v.* Wright, 1 Bro. C. C. 86; 1 Jarman, 658; May *v.* Roper, 4 Sim. 360. Where there is no absolute indication on the part of the testator that land shall be converted into money, and the trustee under the will conveys land to the husband of the devisee, he will hold as trustee for his wife; yet, if the will may be construed as directing the whole estate of the testator to be sold, the husband of the devisee cannot, under the doctrine of equitable conversion, and in virtue of his right to take the money if he can get it, take the land as money, and hold it as he would the money itself, free from all claim of the wife. Samuel *v.* Samuel, 4 B. Mon. 245.]

(*l*) Paul *v.* Wilkins, Toth. 106.

(*m*) Barker *v.* Hill, 2 Chanc. Rep. 218.

(*n*) Sugden, *ubi supra*. See Hudson *v.* Cook, L. R. 13 Eq. Ca. 417. The rents which accrue between the vendor's death and the time for completing the contract belong to the vendor's heir and not to his executor. Lumsden *v.* Fraser, 12 Sim. 263. See, also, Shadforth *v.* Temple, 10 Sim. 184.

(*o*) Sikes *v.* Lister, 5 Vin. Abr. 541, pl. 28; Baden *v.* Earl of Pembroke, 2 Vern. 213; Bubb's case, 2 Freem. 38; Smith *v.* Hibbert, 2 Dick. 712; Foley *v.* Percival, 4 Bro. C. C. 429; Sugden, *ubi supra*; Eaton *v.* Sanxter, 6 Sim. 517. [A contract for the sale of land passes to the executor or administrator, as between him and the heir or devisee, as personal estate. Moore *v.* Burrows, 34 Barb. 173; Adams *v.* Green, 34 Barb. 176. The unpaid purchase-money, however secured, goes to the executor or administrator, and is to be distributed as personal property, without reference to the source from which the land is derived. Henson *v.* Ott, 7 Ind. 512; Anthony *v.* Peay, 18 Ark. 24; Loring *v.* Cunningham, 9 Cush. 87; Sutter *v.* Ling, 25 Penn. St. 466; 1 Sugden V. & P. (8th Am. ed.) 175, 177; 1 Story Eq. Jur. § 64 *g*; Craig *v.* Leslie, 3 Wheat. 563, 577.]

(*p*) Thompson *v.* Towne, 2 Vern. 319; Sugden, *ubi supra*.

(*q*) Curre *v.* Bowyer, 5 Beav. 6, note (*b*).

23, (*r*) and not to his devisee. (*s*) So where, after making a will devising a specific estate and bequeathing the personal residue to other persons, a testator entered into a contract, giving an option of purchase over part of the estate, which option was exercised after the death; it was held by Wood V. C. that the property was converted, from the date of the exercise of the option, and went to the residuary legatee. (*t*)

money covenanted to be laid out in land:

*On the same principle, money covenanted to be laid out in land will descend to the heir. (*u*) Nor will it make any difference that the covenant is a voluntary one. Therefore, if a man, without any consideration, covenant to lay out money in a purchase of land to be settled on him and his heirs, a court of equity will compel the execution of such contract, though merely voluntary. (*v*) But where a person covenants to lay out money in land, and afterwards himself becomes solely entitled to it, so that the obligation to lay out, and the right to call for the money, centre in the same person, the money, it should seem, is considered as discharged; as where a man, on his marriage, covenants to lay out a sum of money in the purchase of land, to be settled for the use of himself for life, remainder to his intended wife for life, remainder to the first and other sons of the marriage in tail, remainder to the daughters in tail, remainder to his own right heirs, and the husband does not lay out the money, and survives his wife, who dies without issue; it has been held that the money, though once bound by the articles, became free again by the death of the wife without issue, and the consequent failure of the objects of the several limitations, and was, therefore, at the death of the settlor, his personal estate. (*x*)

(*r*) The new wills act. See preface.

(*s*) Farrer *v.* Winterton, 5 Beav. 1. See, also, Moor *v.* Raisbeck, 12 Sim. 123. The law is the same where the sale was by contract under the compulsory powers of a railway company. In re The Manchester & Southport Railway, 19 Beav. 365. See, also, Richards *v.* Attorney General of Jamaica, 6 Moore P. C. 381. On the general question whether the proceeds of compulsory sales, under acts of parliament, are to be considered real or personal estate, see In re Horner, 5 De G. & Sm. 483; In re Taylor, 9 Hare, 596; In re Stewart, 1 Sm. & G. 32, and the cases cited *post*, 669.

(*t*) Weeding *v.* Weeding, 1 Johns. & H. 424.

(*u*) Edwards *v.* Countess of Warwick, 2 P. Wms. 171. See Barham *v.* Clarendon, 10 Hare, 126.

(*v*) 2 P. Wms. 171.

(*x*) Chichester *v.* Bickerstaff, 2 Vern. 295. This decision was questioned by Lord Talbot in Lechmere *v.* Lechmere, Cas. temp. Talb. 90, and by Joseph Jekyll in Lechmere *v.* Earl of Carlisle, 3 P. Wms. 221; but confirmed by Lord Thur-

conversion "out and out" by will:

So a testator has the power, by his will, to change the nature of his real estate, to all intents and purposes, so as to preclude all questions between his real and personal representatives after his death. (*y*) This has been sometimes described as "a conversion out and out." (*z*) And * when it clearly appears (*z*[1]) to have been his intention thus to impress on it the character of personal estate to all intents and purposes, the mere appointment of an executor will be sufficient to carry that property to him, (*a*) either for his own benefit, in cases where he is beneficially entitled to the personal estate; or as a trustee for the next of kin, in cases where he holds the personal estate on the like trust. (*b*) But this doctrine has been qualified by modern

low, in Pulteney *v.* Lord Darlington, 1 Bro. C. C. 238, and the determination of the house of lords in the same case, 7 Bro. P. C. 530, Toml. ed. See 2 Powell Dev. 73, Jarman's ed.

(*y*) Johnson *v.* Woods, 2 Beav. 409, 413, by Lord Langdale. [Lands devised to be sold will be treated in equity as money; and if the wife of a person is entitled to the proceeds of such land, and she dies after it is sold, her surviving husband is entitled to the same portion which he would be authorized to receive of any other personal estate left by her. Hurtt *v.* Fisher, 1 H. & Gill, 88; Collier *v.* Collier, 3 Ohio St. 369; Ferguson *v.* Stewart, 14 Ohio, 140; Thomas *v.* Wood, 1 Md. Ch. 296; Maddox *v.* Dent, 4 Md. Ch. 543; Willing *v.* Peters, 7 Penn. St. 287; Binehart *v.* Harrison, Baldw. 177.]

(*z*) As to this expression, see 10 Beav. 175; 12 Beav. 508.

(*z*[1]) [See Chew *v.* Nicklin, 45 Penn. St. 84; Edwards's Appeal, 47 Penn. St. 144.]

(*a*) By Sir Wm. Grant, in Berry *v.* Usher, 11 Ves. 91; [Mathis *v.* Guffin, 8 Rich. Eq. 79; Wilkins *v.* Taylor, 8 Rich. Eq. 291.]

(*b*) See *infra*, pt. III. bk. III. ch. V. § II. and 1 Rop. Leg. 455, 3d ed. [In Hammond *v.* Putnam, 110 Mass. 235, 236, Morton J. said: "The general rule is recognized in all of the English and American cases, that where it unequivocally appears from the will that the intention of the testator was to convert real estate into personal estate, the law will consider the conversion as actually made at the death of the testator, and treat the estate as personal for all purposes to which the intention of the testator clearly extends." "He who takes the estate under the will takes it with the character which the will has impressed upon it." See 1 Jarman Wills (3d Eng. ed.), 549 *et seq.*; Martin *v.* Sherman, 2 Sandf. Ch. 341; Craig *v.* Leslie, 3 Wheat. 563; Wurts *v.* Page, 19 N. J. Eq. 365; Scudder *v.* Varnarsdale, 13 N. J. Eq. 109; Forsythe *v.* Rathbone, 34 Barb. 388; Conly *v.* Kincaid, 1 Wins. (N. Car.) 44; Ex parte Bebee, 63 N. Car. 332; Harcum *v.* Hudnall, 14 Grattan, 369; Smith *v.* McCrary, 3 Ired. Law, 204; Phelps *v.* Pond, 28 Barb. 121; S. C. 23 N. Y. 69. If it appears from the will that the testator intended that his executors should sell, though they are not absolutely directed so to do, the property will be regarded as converted into money. Phelps *v.* Pond, 28 Barb. 121; S. C. 23 N. Y. 69. Where it clearly appears that the testator intended by a direction to sell certain real estate, an absolute conversion of such real estate for all the purposes of the will, the proceeds will be assets in the hands of the executor for the payment of legacies, as well as of the debts and funeral expenses in terms directed by testator to be paid out of such proceeds. Smith *v.* First Presby-

decisions; and it is now fully established, that in order to exclude the heir, it is not enough that the testator shows an intention that his real estate should become money *after* his death; it must also be apparent that he meant it to be treated as if it had been personal estate *before* his death. For if the property in question was real estate at his death, the *onus* is on the next of kin to show a devise of it in his favor; and though the will may determine in what quality the property shall be taken by those on whom it may devolve, yet if it does not also determine who are the persons to take, the original right of the heir-at-law must prevail. (*c*) Therefore, the testator's declaration, however explicit, that the estate shall be absolutely converted, *e. g.* a direction that it shall be sold and deemed part of his personal estate, will not exclude the heir; because such a direction does not, generally speaking, amount to a gift by implication to the next of kin. (*d*) And the law is the same, even where the direction is accompanied by a declaration that the proceeds of the land to be converted shall not, nor shall any part thereof, in * any event lapse or result for the benefit of the heir, (*e*) or where the direction itself is, that the proceeds shall be considered, "to all intents and purposes," as part of the personal estate; (*f*) except, perhaps, where there is no further disposition; in which case it might be inferred that such a direction was intended to operate as a gift to the next of kin. (*g*)

conversion for particular purposes which fail:

It is plain, therefore, that where the conversion of land into money is directed by the testator for a particular purpose, which fails (as in the case of the death of a party intended to be benefited), so much of the estate, or of its produce, as remains undisposed of, will result to the heir. (*h*) And it is further established, that where a testator

terian Church in Bloomsbury, 11 C. E. Green, 132.]

(*c*) Fitch *v.* Weber, 6 Hare, 149; [1 Jarman Wills (3d Eng. ed.), 590.] A different view must be taken where the question arises on a *deed* which has altered the character of the property before the death of the author of the deed. Griffith *v.* Ricketts, 7 Hare, 299; Biggs *v.* Andrews, 5 Sim. 424.

(*d*) Johnson *v.* Woods, 2 Beav. 409; Flint *v.* Warren, 16 Sim. 124; Fitch *v.* Weber, 6 Hare, 145; Bromley *v.* Wright, 7 Hare, 334; Shallcross *v.* Wright, 12 Beav. 505; Taylor *v.* Taylor, 3 De G., M. & G. 190 (overruling Phillips *v.* Phillips, 1 My. & K. 649); [Williams *v.* Williams, 5 L. J. N. S. Ch. 84.]

(*e*) Fitch *v.* Weber, 6 Hare, 145.

(*f*) Robinson *v.* Governors of the London Hospital, 10 Hare, 19.

(*g*) Fitch *v.* Weber, 6 Hare, 154; 10 Hare, 27.

(*h*) Ex parte Pring, 4 Y. & Coll. Ex. 507; [Henderson *v.* Wilson, 1 Dev. (N. Car.) Eq. 309; Wilson *v.* Major, 11 Ves.

directs his real estate to be sold, and the mixed fund arising from the produce of the real estate and the personal estate to be applied to certain specified purposes; if any part of the disposition fails, either by lapse or otherwise, then to the proportional extent in which the real estate would have contributed to that disposition, it is to be considered as failing for the benefit of the heir-at-law, and as so much real estate in that event undisposed of. (*i*) A different point arises where there is a general residuary bequest of personal estate in the same will in which there is a direction for the conversion of the real estate. In such a case it should seem that if there is a declaration in the will that the money to * arise from the sale shall be deemed part of the testator's personal estate, the undisposed of residue of the proceeds will pass under the gift of the residue, but not, generally speaking, without such a declaration. (*j*) As to specific sums given out of the proceeds, it has been a subject of

mixed fund from produce of sale of real estate and personal estate.

205; 1 Jarman Wills (3d Eng. ed.), 586, 587; Taylor *v.* Taylor, 3 De G., M. & G. (Am. ed.) 190, and note (1) and cases cited; Bogert *v.* Hertell, 4 Hill, 492; Hawley *v.* James, 5 Paige, 318; S. C. 7 Paige, 213; Tazewell *v.* Smith, 1 Rand. 313; Evans *v.* Kingsberry, 2 Rand. 120; Rinehart *v.* Harrison, Baldw. 177; Lorillard *v.* Coster, 5 Paige, 172; Drake *v.* Pell, 3 Edw. Ch. 251; Bunce *v.* Vandergrift, 8 Paige, 37; Wood *v.* Keys, 8 Paige, 365; Marsh *v.* Wheeler, 2 Edw. Ch. 156; King *v.* Woodhull, 3 Edw. Ch. 79; Pratt *v.* Taliaferro, 3 Leigh, 419; Stevens *v.* Ely, 1 Dev. Eq. 493; Wood *v.* Cone, 1 Paige, 472; Wright *v.* Trustees Meth. Epis. Church, 1 Hoff. 203; Kane *v.* Gott, 24 Wend. 641; Proctor *v.* Ferebee, 1 Ired. Ch. 143; Smith *v.* M'Crary, 3 Ired. Ch. 204; Lindsay *v.* Pleasants, 4 Ired. Eq. 321, 323; Byrne *v.* Stewart, 3 Desaus. 135; Estate of Tilghman, 5 Whart. 44; Snowhill *v.* Snowhill, 1 Green Ch. 30; Jackson *v.* Jansen, 6 John. 73; White *v.* Howard, 46 N. Y. 144; McCarty *v.* Terry, 7 Lansing, 236, 238, and cases cited; Hill *v.* Cock, 1 Ves. & B. 173.] And conversely, where a testator directs his personal estate to be converted into real estate for several purposes, some of which fail, the heir is not, after satisfying the purposes which can take effect, entitled to the personalty as being impressed with the character of realty. Hereford *v.* Ravenhill, 1 Beav. 481; 5 Beav. 51; Head *v.* Godlee, Johns. 536; Reynolds *v.* Godlee, Johns. 582; [Cogan *v.* Stephens, 5 L. J. N. S. Ch. 17.] It is personal estate in the hands of the next of kin. Ib. See, also, Longley *v.* Longley, L. R. 13 Eq. Cas. 133.

(*i*) Ackroyd *v.* Smithson, 1 Bro. C. C. 503; Johnson *v.* Woods, 2 Beav. 409; Hopkinson *v.* Ellis, 10 Beav. 169; Taylor *v.* Taylor, 3 De G., M. & G. 190; Cooke *v.* Dealey, 22 Beav. 196; Edwards *v.* Tuck, 23 Beav. 268; Bective *v.* Hodgson, 10 H. L. Cas. 656.

(*j*) See 1 Jarman Wills, 531 *et seq.*, 2d ed. See pp. 592, 609, 3d ed.; [Maugham *v.* Mason, 1 Ves. & B. 410; Dixon *v.* Dawson, 2 Sim. & Stu. 327; Collis *v.* Robins, 1 De G. & S. 131. As to the expressions in a residuary devise which have been considered sufficient to carry the surplus proceeds of real estate directed to be sold, see Mallabar *v.* Mallabar, Cas. temp. Talb. 78; Griffiths *v.* Pruen, 11 Sim. 202; Bromley *v.* Wright, 7 Hare, 334; 1 Jarman Wills (3d Eng. ed.), 593.]

controversy, whether the circumstance of the produce of the real estate being blended by the testator with the general personal estate in one residuary gift, constitutes a ground for excluding the heir from lapsed or void legacies by applying to the mixed fund the rule applicable to personalty (viz, that the residuary legatee takes what is not effectually disposed to other persons). (*k*) A very eminent writer (*l*) has expressed his opinion that it is difficult to discover any solid reason why the blending of the two funds should produce this consequence. But he further observes that the state of the authorities is not such as to justify the hope of all litigation being at an end on this perplexing subject.

Whether the property so resulting to the heir shall be considered as land or money in his hands, is a question of some nicety. The principle seems to be, that where the purpose of the testator still requires a sale of the whole land, and there is only a partial disposition of the produce, the surplus belongs to the heir as money and not land, and will go to his personal representative; but where no purpose of the devisor demands, in the events that have happened, that the whole land shall be converted into money, there the heir shall take the resulting property as land, and it shall descend as such to his heir. Thus, where a devisor directs his land to be sold, and the produce divided between A. and B., the obvious purpose of the testator is, that there shall be a sale * for the convenience of division; and if A. dies in the lifetime of the devisor, and the heir stands in his place, the purpose of the testator still applies to the case; therefore the heir will take the share of A. as money and not as land. But if A. and B. both die in the lifetime of the testator, and the whole interest in the land descends to the heir, the purpose of the testator, that there shall be a sale for the convenience of division, has no application, and the heir will, therefore, take the whole interest as land. (*m*)

(*k*) The principal modern cases on the subject are Amphlett *v.* Parke, 2 Russ. & M. 221; Green *v.* Jackson, 2 Russ. & M. 238; Salt *v.* Chattaway, 3 Beav. 576. As to wills made or republished since the new wills act, 1 Vict. c. 26, see sect. 25 of that statute. *Ante*, preface.

(*l*) 1 Jarman Wills, 540–547, 2d ed.; [3d Eng. ed. 602.]

(*m*) Smith *v.* Claxton, 4 Madd. 492, 493; Davenport *v.* Coltman, 12 Sim. 610, 613. See, also, on this subject, Hewit *v.* Wright, 1 Bro. C. C. 86; Wright *v.* Wright, 16 Ves. 188; Dixon *v.* Dawson, 2 Sim. & Stu. 340; Jessopp *v.* Watson, 1 My. & K. 665; Hatfield *v.* Pryme, 2 Coll. 204; Burley *v.* Evelyn, 16 Sim. 290; In re Cooper's Trusts, 4 De G., M. & G. 757; Wall *v.* Colshead, 2 De G. & J. 683; Clarke *v.* Franklin, 4 Kay & J. 257; [Pierce *v.* Lee, 9 Gray, 42, 43, 44; Byam *v.* Munton, 1 Russ. & M. 503; Wildes *v.* Davies,

So where a * testator devises his real estate in trust to be sold to pay debts and legacies, and dies intestate as to the excess, his heir

1 Sm. & Gif. 482; White *v.* Smith, 15 Jur. 1096; 1 Jarman Wills (3d Eng. ed.), 594, 595; Carr *v.* Collins, 7 Jur. 165; Baker *v.* Copenbarger, 15 Ill. 103;] Bagster *v.* Fackerell, 26 Beav. 469, in which last case the testator expressly directed a conversion for the purpose of giving a life interest to his widow, and after her death there was a gift to a charity which was void, and it was held that the heir of the testator took the produce (subject to the life estate) in the character of personalty. It should be observed that "conversion must be considered in all cases to be directed for the purposes of the will, and is limited by the purposes and exigencies of the will. If, therefore, the real estate is directed to be sold with a view to a disposition made by a will, and that disposition fails, although the real estate has *de facto* been sold, yet the proceeds will retain the quality of real estate for the purpose of ascertaining the ownership, *i. e.* the title of the heir, although it is true that when you pay it over to the heir, in the hands of the heir it has the character of money, and no longer the character of real estate." [Davenport *v.* Coltman, 12 Sim. 610; Carr *v.* Collins, 7 Jur. 165; 1 Jarman Wills (3d Eng. ed.), 595.] "So in like manner, if money is directed to be invested in land, and the land is disposed of by the will, and the money is so invested, but the disposition fails, the investment thus made for the purposes of the will has no effect in altering the quality of the property; but the property, even in the shape of lands, retained its pristine and original quality of personal estate for the purposes of determining the ownership." Bective *v.* Hodgson, 10 H. L. Cas. 667, by Lord Westbury C. The cases cited in the earlier part of this note appear to establish the distinction, that if all the purposes of an intended conversion of land into money fail, the conversion fails, and the heir would take such unconverted estate as land; but if there is only a partial failure, the heir-at-law would receive the benefit of such partial failure and take the property as moneys, and not as land. The rule, it appears, is different as to a partial undisposed of interest in personal estate directed to be laid out in land. Head *v.* Godlee, Reynolds *v.* Godlee, *ante*, 663, note (*h*); [1 Jarman Wills (3d Eng. ed.), 595–597. In Holland *v.* Cruft, 3 Gray, 180, Shaw C. J. said: "It is immaterial by what mode real estate is converted into personal, — whether by a trustee with power to sell and hold and apply the proceeds, or by a devisee for life with power to sell and take the income for his own life, by decree or license of any court of competent jurisdiction, or, even when such conversion is constructively effected, by articles stipulating to lay out money in land and convert land into money to particular uses. Whatever be the mode, the fund takes place of the land which yielded it, and is liable to stand in its place, and be applied and ultimately disposed of in the same manner until the object is accomplished. The general doctrine is stated and illustrated in many cases. Lechmere *v.* Earl of Carlisle, 3 P. Wms. 211; Elwin *v.* Elwin, 8 Ves. 547; Thornton *v.* Hawley, 10 Ves. 129; Wheldale *v.* Partridge, 5 Ves. 388; Craig *v.* Leslie, 3 Wheat. 563; Emerson *v.* Cutler, 14 Pick. 120. So, when land held in trust is taken for public use, under the right of eminent domain, the money paid for it stands in its place, subject to the same trust and to the same ultimate disposition. Gibson *v.* Cooke, 1 Met. 75. The principle, therefore, appears to be fully settled, both upon well-considered reasons of justice and expediency, and upon a series of authorities, that where land is devised as real estate, and, either by the direction of the testator himself or by operation of law, such real estate is converted into money for the purpose of better investment, or for any other purpose consistent with the design and pur-

will take it as land. (*n*) In such a case, also, if any of the legacies lapse, they will result to the heir as land; for the purpose of

pose of the ultimate destination to which the real estate was appropriated, there the money is substituted for and stands in the place of the devised real estate, and shall go to the same persons and in the same proportions, and vest in possession and enjoyment at the same times and upon the same contingencies, which would have affected the real estate had it remained specifically in real estate." And in this case it was held that where real estate, specifically devised by a will which authorizes the executor or administrator with the will annexed to sell any of the testator's real estate and reinvest the proceeds in personal estate, but does not manifest any intent thereby to alter the disposition of the property,' is otherwise legally converted into personalty, the proceeds are to go to the same persons and in the same proportions as if it had remained real estate. In Holland *v.* Adams, 3 Gray, 188, it was decided that where real estate, devised to the widow of the testator for life, with remainder to his children and the heirs of their bodies, is converted into money, either under a power of sale conferred by the will, or under a resolve of the legislature passed on a petition of the tenant for life and the remainder-man, reciting the devise, and praying for a sale and for an investment of the proceeds, the income to be paid to the tenant for life, and at her decease to the remainder-man according to the will, the money, on the death of the tenant for life, in equity as well as at law, goes absolutely to the then tenant in tail. In this case Shaw C. J. said: "As a general rule to be deduced from the cases, we think that in case of such conversion of real into personal estate, to stand in the place of the real, as more beneficial to the parties, without changing the beneficial destination, the character thus impressed on the money will attach to it, until it reaches one who, if it had remained real estate, would take it beneficially, that is, to his own use absolutely, or with a power, like that of a tenant in tail in possession, to dispose of it absolutely, or make it his own to all purposes, and it will then be his absolutely." In Emerson *v.* Cutler, 14 Pick. 108, it was decided that, where real estate devised to a female infant was sold pursuant to a license of court, and she afterwards married and died under age, the proceeds of the real estate were personal estate, and consequently that her husband was entitled to the same; and the same was decided with respect to damages paid for land of such infant taken for public use as a highway. The distinction between these different classes of cases was thus stated by Shaw C. J. in the above case of Emerson *v.* Cutler, 14 Pick. 120: "It is true that in many cases in equity money shall be deemed land, and the land money, for the purpose of fixing the beneficial interest; as where money is given to trustees to be laid out in land and settled on a person, and before the settlement such person dies, the heir who would have been entitled to the land, and not the administrator, shall have it. So where land is directed to be sold and the proceeds given in a particular way, though not sold, the person intended to be benefited by the proceeds shall be deemed the equitable owner of the land. All this goes upon the rule of equity, that what is directed to be done with property by one having the power of disposal, shall be deemed to be in fact done, and that beneficial interests shall be regarded, and not be deemed to be defeated by a mere contingency. But these rules do not apply. In distributing real and personal estate respectively, the law does not look to the funds from which it was obtained, but to its character at the time when the right to distribution accrues. If at that time a

(*n*) By Sir W. Grant, in Wright *v.* Wright, 16 Ves. 191. [But see Sharpley *v.* Forwood, 4 Har. (Del.) 336; Baker *v.* Copenbarger, 15 Ill. 103.]

the testator does not require a sale of so much of the real property. (*o*)

Real estate purchased with partnership capital.

It has been laid down that in equity all property, whether real or personal, whatever may be its nature, purchased with partnership capital for the purposes of the partnership trade, continues to be partnership capital, and to have as between the real and personal representative of a deceased partner the quality of personal estate. (*p*) Where, however, a new partner was taken into the firm, and the real property continued to be used for the partnership purposes, but a rent was paid for it, under the terms of the partnership, to the old partners by the new firm, it was held that, on the death of one of the old partners, the property was to be considered as part of his real estate. (*q*)

Property altered in

Another example of land being considered as money, and *vice versa*, may be found in the cases where guardians or trustees alter the nature of the property committed to

sum of money stands in place of land, by an actual disposition to that effect, not yet executed, he who would be entitled to the land shall have the money; and so conversely, where land is directed to be sold and converted into money, by a disposition not executed. These rules have no bearing on the present case, because here the whole power was actually executed, and the disposition entire and complete, in the one case, by the public in taking, and in the other by the guardian in selling the land, and in both the money was paid. It was paid to the guardian merely because the minor had no legal capacity to receive the money and give a discharge, but it was the minor's interest and property, legally and beneficially, and the guardian was the mere agent, established by law, to act for her and supply the legal capacity." This case was referred to in Holland *v.* Adams, 3 Gray, 190, 191; and see Williams *v.* Hichborn, 4 Mass. 189.]

(*o*) See 1 Rop. Leg. 471, 3d ed.

(*p*) Phillips *v.* Phillips, 1 My. & K. 649; Broom *v.* Broom, 3 My. & K. 443; Morris *v.* Kearsley, 2 Y. & Coll. Ex. 139; Bligh *v.* Brent, 2 Y. & Coll. Ex. 268; Darby *v.* Darby, 3 Drew. 495; [Collyer Partn. (5th Am. ed.) § 135 *et seq.*; Dyer *v.* Clark, 5 Met. 562; Howard *v.* Priest, 5 Met. 582, 585; Deveney *v.* Mahoney, 8 C. E. Green, 247; Bank of England case, 3 De G., F. & J. (Am. ed.) 645, 658, 659, and cases in notes; Parsons Partn. (1st ed.) 363 *et seq.*, 373, 374; Fowler *v.* Bailey, 14 Wis. 125; Winslow *v.* Chiffelle, 1 Harp. (S. Car.) Ch. 25; Abbott's Appeal, 50 Penn. St. 234; Smith *v.* Tarlton, 2 Barb. Ch. 336; Delmonico *v.* Guillaume, 2 Sandf. Ch. 366; Hill *v.* Beach, 12 N. J. Eq. 31; Cilley *v.* Huse, 40 N. H. 358; Benson *v.* Ela, 35 N. H. 420; Jarvis *v.* Brooks, 27 N. H. 66; Buffum *v.* Buffum, 49 Maine, 108; Lane *v.* Tyler, 49 Maine, 252; Matlock *v.* Matlock, 5 Ind. 403; Nicoll *v.* Ogden, 29 Ill. 323; Sigourney *v.* Munn, 7 Conn. 11; Lang *v.* Waring, 25 Ala. 625; Andrews *v.* Brown, 21 Ala. 437; Piatt *v.* Oliver, 3 McLean, 27.] But see Randall *v.* Randall, 7 Sim. 271; Cookson *v.* Cookson, 8 Sim. 529; Houghton *v.* Houghton, 11 Sim. 491. In those cases, Shadwell V. C., it seems, did not consider that the property had become partnership property. 3 Drew. 502, 503.

(*q*) Rowley *v.* Adams, 7 Beav. 548.

them. Thus the lands purchased by the guardian of an infant with his personal estate will, in case of his death during his minority, be considered still as his personal property. (*r*) So where the trustees of an infant's estate having a considerable * sum of money in their hands, out of the profits of his estate, laid it out in a purchase of lands lying near the estate, with the consent of his guardian, and by the conveyance to the trustee, it was declared that they stood seised in trust for the infant, in case, when he came of age, he should agree to it; the infant dying within age, the trustees were held accountable to the administrator of the infant for the sum laid out, and his heir was declared to have no title to the land. (*s*) So where an executor in trust for an infant of a lease for ninety-nine years, determinable on three lives, on the lord's refusal to renew but for lives absolutely, complied with his requisition, and changed the years into lives; on the infant's dying under twenty-one, this was held to be a trust for his administrator, and not for his heir. (*t*)

nature by trustees of an infant:

Again, where the committee of a lunatic invested part of his personal estate in the purchase of lands in fee, it was held that this should be taken as personal estate, and at his death should not go to his heir-at-law. (*u*) So where the grantee of the custody of a lunatic, with the rents and profits of the estate purchased lands, the lunatic dying, the question was between the heir and administrator, who should have the benefit of the purchase; and the court was of opinion that the administrator should have it, and not the heir; for if the money had not been laid out, it had been clear that the administrator should have had it; and if laying out of the money would alter the case, then it would be in the power of the grantee of the custody to prefer the heir or the administrator as he pleased. (*x*) But it must be observed, that in the management of a lunatic's estate, it is his benefit, solely, which is considered; and, therefore, if it be clearly for his advantage that the nature * of one part of his estate

by committee of a lunatic:

(*r*) Gibson *v.* Scudamore, 1 Dick. 45.

(*s*) Lord Winchelsea *v.* Norcliffe, 1 Vern. 435; S. C. 2 Freem. 95.

(*t*) Witter *v.* Witter, 3 P. Wms. 99.

(*u*) Awdley *v.* Awdley, 2 Vern. 192. [So on the other hand where a sale was made under a decree of court, of the real estate of a lunatic for the payment of his debts, it was held that the surplus money arising from the sale was not converted, but remained real estate, to be distributed as such according to the rules of dissent. Lloyd *v.* Hart, 2 Penn. St. 473. See, *ante*, 650, note (*d*[1]); *post*, 668, note (*z*).]

(*x*) Lord Plymouth's case, 2 Freem. 114.

should be altered for the improvement of the other, such alteration will be directed by the court of chancery; (*y*) and when such alteration is made, there is no equity between the real and personal representatives, at the lunatic's death, to have the nature of the property restored. (*z*)

By stat. 16 & 17 Vict. c. 70, s. 116, certain provisions are made for the sale or mortgage of the lunatic's property for debts, maintenance, and other purposes. And by sect. 119, on any moneys being so raised, "the person whose estate is sold, mortgaged, charged, or otherwise disposed of, and his heirs, next of kin, devisees, legatees, executors, administrators, and assigns, shall have such and the like interest in the surplus remaining after the purposes for which the moneys have been raised shall have been answered, as he or they would have had in the estate if no sale, mortgage, charge, or other disposition thereof had been

16 & 17 Vict. c. 70.

(*y*) Ex parte Phillips, 19 Ves. 123; Ex parte Bromfield, 3 Bro. C. C. 510; S. C. 1 Ves. jr. 453; Ex parte Tabbart, 6 Ves. 428. See Clarendon *v.* Barham, 1 Y. & Coll. C. C. 688, accord.

(*z*) Oxendon *v.* Lord Crompton, 2 Ves. jr. 69; S. C. 4 Bro. C. C. 231; In re Leeming, 3 De G., F. & J. 43. ["The general rule is, that if land be sold for a specific purpose, the surplus money shall, as between the heirs and next of kin, be considered as land so far as to vest in the persons who would have been entitled to it had it remained unconverted. But, after it has so vested in the persons entitled, it is to be treated as money in his hands; and in case of his subsequent death, goes to his personal representatives as personal estate. It cannot retain its original character forever. It has no earmark by which it can be distinguished from the other personal estate with which it is mingled. To identify and follow it throughout an indefinite number of successions, would, in most cases, be absolutely impossible, and in all cases so inconvenient as to forbid the undertaking, unless required by the high necessities of justice. But the distribution of the estate of a decedent among persons who never gave value for it, and who have no title to it, whatever, except that which is founded upon the law and its policy, involves no principle of justice, and stands entirely uninfluenced by its dictates. The necessity of a perfect conversion, at some period, being apparent, and neither justice nor policy requiring that a fiction should be substituted for the fact, the proper time for it is when the money has vested in the party entitled to it after the actual conversion. Grider *v.* M'Clay, 11 Serg. & R. 224; Biggert *v.* Biggert, 7 Watts, 563; Dyer *v.* Cornell, 4 Penn. St. 359. The rule stated by Chief Justice Tilghman, in Grider *v.* M'Clay, is, that 'surplus money arising from the sales of land by order of the orphans' court, whether it belong to an infant, or *feme covert*, or male of full age, is to be considered simply as money and nothing else.' The rule has the support of common sense, and is well sustained by authority. Every departure from it will lead to inconvenience, without advancing either general or individual justice." Lewis J. in Pennell's Appeal, 20 Penn. St. 515; *ante*, 658, cases in note (*h*); Bogert *v.* Furman, 10 Paige, 496; Sweezey *v.* Willis, 1 Bradf. Sur. 495; Cox *v.* McBurney, 2 Sandf. 561; Horton *v.* McCoy, 47 N. Y. 21; Foreman *v.* Foreman, 7 Barb. 215; Sweezey *v.* Thayer, 1 Duer, 286; Davidson *v.* De Freest, 3 Sandf. Ch. 456; Hoey *v.* Kinney, 10 Abb. Pr. 400.]

made, and the surplus moneys shall be of the same nature and character as the estate sold, mortgaged, charged, or otherwise disposed of."

Compulsory sale of lunatic's land under lands clauses act.

In Ex parte Flamank, (*a*) Lord Cranworth V. C. held that money paid into court by a railway company for land taken under the lands clauses act (7 & 8 Vict. c. 18), from a person who was in a state of mental imbecility, and who continued in that state till his death, but was not the subject of a commission of lunacy, was not to be reinvested in or considered as land, but to be paid to his executors; for that the effect of the 7th section of the act was to make the contract as good as if he had been *compos mentis*. And his lordship distinguished the case from the Midland Counties Railway *v.* Oswin, (*b*) where Knight Bruce V. C. * had come to a contrary decision, inasmuch as his honor's decision turned on the express terms of the local act on which the case before him arose. (*c*)

What is personal estate.

In pursuing the complicated inquiry, of what shall be accounted personal estate, it may be advisable to consider the subject in the divisions employed by Godolphin and the author of the Office of an Executor, viz, first to divide the effects of the deceased into things actually in his possession, and things not so, usually called *choses in action;* and to subdivide the first class into chattels real, and chattels personal.

(*a*) 1 Sim. N. S. 260.

(*b*) 1 Coll. 80.

(*c*) See Cramer's case, 1 Sm. & G. 32, and Re Harrop's Estate, 3 Drew. 726, for instances where money paid into court under certain local acts was treated as realty.

* CHAPTER THE FIRST.

OF THE INTEREST OF THE EXECUTOR OR ADMINISTRATOR IN THE CHATTELS REAL OF THE DECEASED.

SECTION I.

The Executor's or Administrator's Right to Chattels Real, generally.

What are chattels real.

THE general rule is, that chattels real shall go to the executor or administrator, and not to the heir. Chattels real are such as concern or savor of the realty; (*a*) or, in other words, they are chattel interests issuing out of, or annexed to, real estates. (*b*) Thus, while the military tenures subsisted, wardship in chivalry was accounted such an interest, and accrued to the executor or administrator, and not to the heir; because it was in respect of a tenure of land or other hereditament, and was for years, viz, during the minority, or till marriage had. (*c*)

Next presentation to a church.

If one be seised in his natural capacity of an advowson in gross, or in fee appendant to a manor, and the church becomes void, the void turn is a chattel personal, like rent due, or any other fruit fallen; and if the patron dies before he presents, the avoidance does not go to the heir, but to the executor. (*d*) And the heir in tail shall not have a presentment * fallen

(*a*) Co. Lit. 118 *b*.

(*b*) 2 Bl. Com. 386.

(*c*) Godolphin, pt. 2, c. 13, s. 2; Wentw. Off. Ex. 126, 14th ed. So a villain for years (as by grant for a term from him that had the inheritance) was a chattel real. Ib.

(*d*) F. N. B. 33, P.; The Queen & Archbishop of Canterbury's case, 4 Leo. 109; Stephens *v.* Wall, Dyer, 282 *b*; Earl of Lincoln's case, 1 Freem. 98; Co. Lit. 388 *a*; Com. Dig. Esglise, H. 2; Wats. C. L. 72, 4th ed. But if a king's tenant by knight service *in capite* died after a vacancy, the heir within age, the king presented by right of wardship. Co. Lit. 388 *a*.

in the life of the tenant in tail, but his executor. (*e*) Again, if the patron, whether a natural or politic person, grant the next presentation of a church before avoidance, to D., in this case, if D. dies, his executor shall have it as a chattel, and not the heir; (*f*) for it is a chattel real, till a vacancy has happened, and afterwards the vacancy turns it into a chattel personal. (*g*) Nor will it differ the case, if the grant is to the grantee *and his heirs;* for where the thing is a chattel, the word "heirs" cannot make it an inheritance. (*h*) Likewise, if a man grants the two next presentations of a church, those are chattels, and if the grantee dies, the executor shall have them, and not the heir. (*i*) So of an advowson granted to one and his heirs for 100 years. (*k*) Again, if a church become void during the life of a husband, who is tenant by the curtesy, and he die before the church is filled, the husband's executor shall have the turn, and not the wife's heir. (*l*)

And it is now settled that the executor has the same right, where a person seised of an advowson in a *politic* capacity dies during a vacancy. Thus, in a case in K. B., in error from the common pleas, it was held by Littledale, Holroyd, and Bayley JJ. (Lord Tenterden C. J. *dissentiente*), that where a prebendary, having an advowson of a rectory in right of his prebend, died while the church was vacant, his personal representative had the right of presentation for that turn; and the judgment of the court of common pleas *was reversed. (*m*) This decision of the K. B. was afterwards affirmed in the house of lords. (*n*)

But if the incumbent of a church be also seised in fee of the advowson of the same church and dies, his heir, and not his executor, shall present; for although the advowson does not descend to the heir till after the death of the ancestor, and by his death the church is become void (so that the presentation in this case may be said to be severed from the advowson before it descends to the heir, and to be vested in the executor), yet both the descent to the heir and this fall of the avoidance happened all in one instant;

(*e*) F. N. B. 34; Godolph. pt. 2, c. 13, s. 6.

(*f*) Godolph. pt. 2, c. 13, s. 3; admitted by Lord Tenterden, in Rennell *v.* Bishop of Lincoln, 7 B. & C. 193.

(*g*) Wentw. Off. Ex. 131, 132, 14th ed.

(*h*) Bro. Chattels, pl. 6.

(*i*) Bro. Chattels, pl. 20.

(*k*) Wentw. Off. Ex. 136, 14th ed.

(*l*) Wats. C. L. 71, 4th ed.

(*m*) Rennell *v.* Bishop of Lincoln, 7 B. & C. 113. In the common pleas, Gaselee J. dissented from Burrough and Park JJ. and Best C. J. See 3 Bing. 223.

(*n*) 8 Bing. 490; 1 Cl. & Fin. 527.

and where two titles concur, the elder right shall be preferred. (*o*) In the case of an advowson of a *donative* benefice where A. B., being seised, the church in his lifetime became void; then A. B. died, and the executors brought a *quare impedit;* after two arguments in C. B., the whole court was clearly of opinion that the right of donation descended to the heir of A. B., and that the executor had no title, as he would have had, if it had been a presentative benefice. (*p*) So if the parson of a church ought to present to a vicarage, if the vicarage becomes void during the vacancy of the parsonage, the patron of the parsonage, and not the executor of the deceased parson, shall present. (*q*) And in the case of a bishop, the void turn of a church, the advowson whereof belongs to him in right of his bishopric, by his death does * not go to his executor, although the church was void when the bishop died, but the king shall present by reason of his custody of the temporalities. (*r*)

If the testator presents, and (his clerk not being admitted before his death) then his executors present their clerk, the ordinary is at his election, which clerk he will receive. (*s*)

The options of an archbishop pass to his executors, &c.

Every bishop, whether created or translated, is bound immediately after confirmation, to make a legal conveyance to the archbishop of the next avoidance of one such dignity or benefice belonging to his see as the said archbishop shall choose or name, which is, therefore, commonly called an *option*. (*t*) And if the archbishop dies before the avoidance

(*o*) Holt *v.* Bishop of Winchester, 3 Lev. 47. Where a parson, who had the inheritance of the advowson, devised that his executor should present after his decease, and devised the inheritance to another in fee, it was held that this was a good devise of the next avoidance. Pynchyn *v.* Harris, Cro. Jac. 371.

(*p*) Repington *v.* Tamworth School, 2 Wills. 150. No reason is assigned, in the report of this case, for the distinction taken, nor is it easy to suggest one. See the remarks of the judges in Rennell *v.* Bishop of Lincoln, 7 B. & C. 113.

(*q*) 2 Roll. Abr. 346, tit. Presentment, F. pl. 4; 1 Burn E. L. 139, 8th ed.

(*r*) 2 Roll. Abr. Presentment, 345, E. pl. 4; Co. Lit. 90 *a;* Co. Lit. 388 *a;* Wats. C. L. 73, 4th ed. But where a tenant held land of a bishop, in right of his bishopric, by knight's service, and the tenant died, the heir being within age, and the bishop, either before or after seizure, died; neither the king nor the successor of the bishop was entitled to the wardship, but his executor. Co. Lit. 90 *a;* and see Mr. Hargrave's note, upon this difference.

(*s*) Smallwood *v.* Bishop of Lichfield, 1 Leon. 205; S. C. Savil. 95, 118; Wats. C. L. 72, 225, 4th ed.

(*t*) 1 Gibbs. Cod. 115; 1 Burn E. L. 239, 8th ed. But it has been considered that such assignments have been rendered illegal by reason of the stat. 3 & 4 Vict. c. 113, s. 42, and that the archbishop's options have thus been destroyed.

shall happen, the right of filling up the vacancy shall go to his executors or administrators. (*u*)

Estates for years:

All leases and terms of lands, tenements and hereditaments, of a chattel quality, are chattels real, and will go to the executor or administrator; but he has no interest in the freehold terms or leases. (*x*) The general rule for distinguishing these two kinds is, that all interests for a shorter period than a life, or, more properly speaking, all interests for a *definite* space of time, measured by years, months, or *days are deemed chattel interests; in other words, testamentary, and of the nature, for the purposes of succession, of other chattels or personal property. (*y*) Thus, not only on a term of one's own life, or for the life of another, is deemed a freehold; but if a man grant an estate to a woman *dum sola fuit*, or *durante viduitate*, or *quamdiu se bene gesserit*, or to a man and woman during the coverture, or as long as the grantee shall dwell in such a house, or so long as he pays 10*l.*, &c. or until the grantee be promoted to a benefice, or for any like *uncertain* time; in all these cases the lessee has an estate of freehold in judgment of law; (*z*) while a lease for 10,000 years is not a freehold, but chattel interest.

Term for a certain number of years if A. B. so long live:

If an estate be limited to A. B. and his assigns during C. D.'s life, it is a freehold interest; but if it be limited to A. B. and his assigns for a certain number of years, if C. D. shall so long live, it is a chattel, and will go to his executors or administrators.

If a lessee for years of a carve of land grants to another a rent out of the said carve for the life of the grantee, that is a good

(*u*) Potter *v.* Chapman, Ambl. 98; 1 Burn E. L. 240, 8th ed.

(*x*) [Lewis *v.* Ringo, 3 A. K. Marsh. 247; Murdock *v.* Ratcliff, 7 Ohio, 119; Payne *v.* Harris, 3 Strobh. Eq. 39.] Estates for years have one quality of real property, viz, immobility, but want the other, viz, a sufficient legal indeterminate duration, the utmost period for which they can last being fixed and determined. 2 Bl. Com. 386.

(*y*) 1 Preston on Estates, 203. On the other hand, an estate of freehold may be defined to be "an estate in possession, remainder, or reversion, in corporeal or incorporeal hereditaments held for life or for some uncertain interest, created by will or by some mode of conveyance, capable of transferring an estate of freehold, which may last the life of the devisee or grantee or of some other person." See Watk. on Conveyancing, by Morley & Coote, 63.

(*z*) Co. Lit. 42 *a*. So where A. leases to B. till A. makes J. S. baily of his manor; adjudged a freehold. Ib. Hal. MSS. See, also, Beeson, App., Burton, Resp. 12 C. B. 647.

lease for life made] by lessee for years:

charge during the term, if the grantee so long live; but in such a case the grantee hath but a chattel. (*a*)

lease for A.'s life, and if he die within a certain time to his executor for the rest of that term.

A. made a lease to B. for life by indenture, in which was a proviso, that if the lessee died before the end of sixty years then next ensuing, his executor should have and enjoy, as in the right and title of the lessee, for term of so many of the years as amounted to the whole number of sixty, so that the *commencement of the said sixty shall be accounted from the date of the said indenture. The lessee made two executors, and died. One of them entered into the land. And the opinion of the court was, that no lease for years was made by this proviso in the lease, nor by remainder in his executor; because nothing of the said term was limited to the lessee for life as remainder to him and his executors. (*b*)

Estates by statute staple, statute merchant, and by *elegit*.

There are certain interests in land, which although of an uncertain duration, and, therefore, in that respect participating of the nature of freehold, are nevertheless chattels. These are interests created by the statute law, and are securities for the payment of debts, namely, estates by statute merchant, statute staple, and by *elegit*, the possessors of which are said to hold their lands as freehold, but whose interests are really chattel, and will go to their executors and administrators. (*c*)

A lease for years made to one and his heirs shall go to the executor of the devisee:

Since an estate of freehold or inheritance cannot be derived out of a term for years, no words of limitation can alter the nature of the latter with respect to the purposes of succession. Thus if a lease for years be made to a man and his heirs, it shall not go to his heirs but his executors. (*d*)

A lease for years made to a sole corporation and his succes-

So if a lease for years be made to a bishop, parson or other *sole* corporation, and his successors, yet it will go to the executors of the lessee; because a term for years being a chattel, the law allows none but personal repre-

(*a*) Butt's case, 7 Co. 23 *a*; Saffery *v.* Elgood, 1 Ad. & El. 191.

(*b*) Gravenor *v.* Parker, Anders. 19; S. C. cited in Lloyd *v.* Wilkinson, Moore, 480; *sed quære*, and see *ante*, 660, 661.

(*c*) Co. Lit. 42 *a*; 2 Saund. 68 *f*, note to Underhill *v.* Devereux; Watk. on Conveyancing, by Morley & Coote, 63. See, also, Wentw. Off. Ex. 133–135, 14th ed.

(*d*) Co. Lit. 46 *b*. So if a termor for years grant a rent out of the land to A. and his heirs, the same shall go to the executor and not to the heir; for being derived out of a chattel, it must be itself a mere chattel. *Partus sequitur ventrem*. Wentw. 136, 14th ed.

sentatives to succeed thereto, nor can this mode of succession be altered by any limitation of the party. (*e*)

sors will go to his executors:

* Again, it is a principle of law, that a limitation of a personal estate to one in tail vests the whole in him. (*e*[1]) Therefore, where a term for years is devised to one and the heirs of his body, or to the heirs male of his body, the term, at the death of the devisee, shall go to the executor and not to the heir. (*f*)

personal lease for years, devised to a man in tail shall go to his executors:

* So if a lease for years is given to A. and the heirs male of his body, and for default of such issue, to B. and the heirs male of his body, these words give to A. the absolute property in the whole estate and interest transmissible to his personal representatives. (*g*) In a modern case, the testator devised his real estates to A. for

(*e*) Co. Lit. 46 *b*; Fulwood's case, 4 Co. 65 *a*. See Dollen *v*. Batt, 4 C. B. N. S. 760, as to what reservations make a freehold, and what a chattel lease.

(*e*[1]) [See *post*, 1106, and note (*w*).]

(*f*) Leonard Lovie's case, 10 Co. 87 *b*; Wentw. Off. Ex. 136, 14th ed.; 1 Prest. on Estates, 32. See *post*, pt. III. bk. III. ch. II. § II. (B.). In Leonard Lovie's case, Coke C. J. took a difference between a devise of a term in gross, and a devise of a term *de novo* out of the inheritance, viz, that in the former case the term shall vest absolutely in the devisee, and if he die without issue, shall go to his executors, but that in the latter case it shall cease on failure of issue. Lord Keeper Finch, in Burgis *v*. Burgis, 1 Mod. 115, said he did deny Lord Coke's opinion in Leonard Lovie's case, which saith, that in case of a lease settled to one and the heirs male of his body, when he dies, the estate is determined. And Lord Nottingham, in the Duke of Norfolk's case, 3 Cas. in Chanc. 30, said it was Lord Coke's error in Leonard Lovie's case to say, that if a term be devised to one and the heirs male of his body, it shall go to him or his executors no longer than he shall have heirs male of his body; for these words are not a limitation of the time, but an absolute disposition of the term. So Fearne, Cont. Rem. 463, observes, that the decision in the Duke of Norfolk's case seems to contravene the opinion of Lord Coke. That, however, does not appear to be so; for the decision in that case (vide 2 Swanst. 454), viz, that if a term *de novo* be limited it trust for H. in tail, but if T. die without issue male in the life of H. then H. to have no further benefit, but the benefit thereof to go to C. in tail, &c. the limitation to C. is good, is perfectly consistent with Lord Coke's doctrine. Mr. Serjeant Hill, in a note in his copy of Viner, in Lincoln's Inn Library, Devise, B. *b*, pl. 5, after observing, that if one possessed of a term of years devises it to one and the heirs male of his body, it had been held, that on the death of the devisee the term would go to the executors, and not to the heir, and such a decision was good law, says, "it is very different from the case in 10 Co. in which Lord Coke gave his opinion, though it is confounded therewith by the authorities cited by Viner, from Mod. and Sel. Cases in Chancery, which, however, are nothing to the purpose for which they are cited, being cited in opposition to the opinion of Lord Coke in 10 Co. which was mistaken by Lord Finch, or more probably by the reporters." Note (F) by Mr. Fraser to 10 Co. 87 *a*. Vide Preston on Estates, p. 33; Touchstone, 445, ed. Preston.

(*g*) Leventhorpe *v*. Ashbre, 1 Roll. Abr. 611, L. pl. 1; Donn *v*. Penny, 1 Meriv. 20.

life, without impeachment, &c. with remainder to trustees to preserve contingent remainders, with remainder to the heirs of the body of A. By codicil, reciting the after purchase of a leasehold estate, he devised the same to the trustees named in his will, "for such estates and estates and in such manner and form" as his real estates were given by will. It was held that A., taking an estate tail in the real estates under the will, was nevertheless entitled to the absolute interest in the leasehold bequeathed by the codicil. (*h*)

A lease for years given to A. for life, and afterwards to his heirs general or special, will go to his executors.

With respect to the limitation of real estates, where an estate for life is given to the ancestor, followed by a subsequent limitation to his heirs general or special, the subsequent limitation, as in the case just stated, vests in the ancestor, and the heir takes not by purchase. So in the limitation of leasehold estates, generally speaking, if a term for years be devised to one for life, and afterwards to the heirs of his body, these words are words of limitation, and the whole vests in the first taker, and is transmissible to his executor.

Thus, in Theebridge *v.* Kilburne, (*i*) where a term was limited in trust for S. for life, and immediately from and after her decease, to the heirs of the body of S. lawfully to be begotten, if the term should so long endure, and in default of such issue, then to B.; Lord Hardwicke expressed himself of opinion that the whole term vested in S. Again, in Garth *v.* Baldwyn, (*k*) where real and personal estates were devised to trustees, in trust to pay the profits to G. * during his life, and afterwards to pay the same to the heirs of his body, Lord Hardwicke held, that the personal estate vested absolutely in G. by this limitation. So in Lord Verulam *v.* Bathurst, (*l*) where a testatrix bequeathed a leasehold house and 3,000*l.* stock to trustees, in trust to permit her daughter to receive the rents and interest for life for her separate use, and, from and immediately after her daughter's decease, she gave the rents and interest to the heirs of the body of the daughter lawfully begotten, but in case her daughter should happen to die without any lawful issue living at the time of her decease, she gave the house and the stock over; it was held by Sir L. Shadwell V. C. that the daughter took the property absolutely.

(*h*) Brouncker *v.* Bagot, 1 Meriv. 271.
(*i*) 2 Ves. sen. 233.
(*k*) 2 Ves. sen. 646.
(*l*) 13 Sim. 374.

However, if there appears any other circumstance or clause in the will, to show the intention that these words should be words of purchase, and not words of limitation, then it seems the ancestor takes for life only, and his heir will take by purchase to the exclusion of his executor. (*m*)

Leases of incorporeal hereditaments.

The chattels real which go to the executor or administrator are not confined to terms or leases of lands, but extend to chattel interests in incorporeal hereditaments, such as leases for years of commons, tithes, fairs, markets, profits of leets, corodies for years, and the like. (*n*)

Estate of tenant from year to year goes to his executor, &c.

In the case of a tenancy from year to year as long as both parties please, since the death either of the lessor or lessee does not determine it, the interest of the tenant is transmissible to his executor or administrator. (*o*) Therefore due notice to quit must be given to the latter before the lessor or his representative can recover in ejectment; (*p*) and the * executor or administrator of the lessee may maintain ejectment; and it was held no objection that the demise in the declaration was stated to be for seven years. (*q*) So where W. H., being tenant from year to year to Lady H., died, leaving his widow in possession; and J. H. some time afterwards took out administration to the deceased, but the widow continued in possession, paying rent to Lady H. with the knowledge of J. H., who never objected to such payment or made any demand of rent; it was held, that there was no evidence of a determination of the tenancy from year to year by operation of law, and that the administrator was entitled to recover possession from the widow. (*r*)

The title accrued to the crown upon attainder of felony, where the party held not of the king, viz, the *annum diem et vastum*,

(*m*) See Fearne, Cont. Rem. 490 *et seq.* 7th ed.; Doe *v.* Lyde, 1 T. R. 393; Knight *v.* Ellis, 2 Bro. C. C. 570; Ex parte Sterne, 6 Ves. 156; *post*, pt. III. bk. III. ch. II. § II.

(*n*) Wentw. Off. Ex. 131, 14th ed.; Godolph. pt. 2, c. 13, s. 3.

(*o*) Doe *v.* Porter, 3 T. R. 13; James *v.* Dean, 11 Ves. 393; S. P. S. C. 15 Ves. 241.

(*p*) Parker *v.* Constable, 3 Wils. 25. But where a tenant from year to year died, and a regular notice to quit was served on the widow, who remained in possession, it was held by Littledale J. that the landlord might recover in ejectment, unless it were shown that some other person, and not the widow, was the executor or administrator of the tenant; and that it was not incumbent on the landlord to show that the widow was either executrix or administratrix. Rees *v.* Perrot, 4 C. & P. 230.

(*q*) 3 T. R. 13.

(*r*) Doe *v.* Wood, 14 M. & W. 682.

Annum diem et vastum goes to the executors of a grantee.

that is, power not only to take the profits for a year, but to waste and demolish houses, and to extirpate and eradicate woods and trees, is but a chattel; and therefore, though granted to one and his heirs by the king, yet shall go to the executor and not to the heir. (*s*)

Leases held in joint tenancy do not pass to the executor, &c.

If a lease be made to several for a term of years, and one of the joint tenants dies, his interest accrues to the survivors, and his executors or administrators shall take none. (*t*)

It may be advisable here to remark, that even when a term for years is specifically devised, it will, in the first instance, vest in the executor, by virtue of his office, for the usual purposes to which the testator's assets shall be applied, * and the legatee has no right to enter without the executor's special assent. (*u*)

Terms for years vest in the executor though specifically devised:

If the testator had a term for years, this vests in the executor or administrator, and he cannot refuse it though it be worth nothing; for the executorship or administratorship is entire, and must be renounced *in toto*, or not at all. (*x*)

he cannot waive a lease though it be worth nothing.

Generally speaking, the courts of equity follow the rules of law in their construction of equitable interests; and, consequently, the beneficial interests in a term, where the person entitled to it has no higher interest in the estate, is treated as a chattel interest, and is transmissible to the personal representatives in the same manner as the legal estate. There is, however, a particular sort of term, usually called a "Term attendant upon the inheritance," the beneficial interest in which is regarded in equity in a peculiar way; and considered as completely consolidated with the freehold and inheritance, so as to follow the fee in all the various modifications and charges to which it may be subjected by the acts of law or of the owner. (*y*) The consequence is, that this interest is not looked

Equitable interests in terms.

Terms attendant on the inheritance.

(*s*) Wentw. Off. Ex. 132, s. 36, 14th ed.; Godolph. pt. 2, c. 13, s. 5.

(*t*) Co. Lit. 182 *a*. See *ante*, 650 *et seq.*

(*u*) See *infra*, pt. III. bk. III. ch. IV. § III.

(*x*) Billinghurst *v.* Spearman, 1 Salk. 297; Bolton *v.* Canham (*alias* Boulton *v.* Canon), Pollexf. 125; S. C. 1 Ventr. 271; 1 Freem. 337; Com. Dig. Adminis. B. 10; Ackland *v.* Pring, 2 M. & Gr. 937. As to his liability to pay the rent and perform the covenants of his lease, notwithstanding he has no assets, see *post*, pt. IV. bk. II. ch. I. § II.

(*y*) See an excellent note upon this subject by Messrs. Morley & Coote, in Watk. Convey. 45 *et seq.*

upon in equity as a chattel; it is not assets in the hands of the executor or administrator, nor was it formerly liable to the simple contract debts of the deceased, but is, together with the fee, real assets. This subject will be pursued in the proper stage of this treatise. (*z*)

When estates *pur autre vie* go to executor, &c.

By the common law, if lands had been limited to A. for the life of B., and A. had died in the lifetime of B., an estate arose by general occupancy; for as the lands could not go * to the heir for want of words of inheritance, nor to the executor or administrator in respect of the estate being freehold, there is no legal owner; wherefore the law gave it to the first person who could enter; and in the hands of such general occupant, the estate was not subject to the debts of the grantee *pur autre vie*. (*a*) If, however, the estate was limited to A. *and his heirs* during the lifetime of B., and A. died in B.'s lifetime, the heir was held to be entitled, not as heir, (*b*) but as special occupant. In like manner, if the estate was limited to A. and his executors and administrators during the life of B., the more established opinion (although contrary to some high authority) appears to be, that the executors and administrators were entitled, as special occupants, provided the estate consisted of *corporeal* hereditaments; for although the heir might be a *quasi* special occupant of incorporeal, it seems clear that executors or administrators could not, nor could there be any general occupant. (*c*)

It was held, generally, that an estate *pur autre vie* was * not

(*z*) *Post*, pt. IV. bk. I. ch. I.

(*a*) Raggett *v.* Clerke, 1 Vern. 233.

(*b*) And therefore there no estate by the curtesy issuing out of such an estate. Stead *v.* Platt, 18 Beav. 50.

(*c*) The authorities on this subject will be found collected in Sugden on Powers, p. 98, note, 4th ed., and in a note of Messrs. Morley & Coote, to their edition of Watkins on Conveyancing, pp. 69, 70. See, also, Mr. Cox's note (D) to Low *v.* Burron, 3 P. Wms. 264, and the observations of Tindal C. J. in Bearpark *v.* Hutchinson, 7 Bing. 187; *post*, 683. However, in Northen *v.* Carnegie, 4 Drew. 587, Kindersley V. C. expressed a clear opinion, that though where the property is incorporeal there cannot be a general occupant, there was nothing to prevent special occupancy, and the learned judge proceeded to say that he should have no hesitation in coming to the conclusion that an executor may be a special occupant of an incorporeal hereditament. In the case before his honor, there was a limitation of an incorporeal hereditament to A., his heirs and assigns for lives, and A. conveyed it to trustees, their executors and administrators, upon contingencies which never happened; and it was held that he had parted with his whole estate *at law*, but with a resulting beneficial interest in him, insomuch as he had limited on the contingencies.

devisable. And in order to remedy this, and to prevent as well the inconvenience of scrambling for estates, and getting the first possession after the death of the grantee, as also for preserving and continuing the estate during the life of the *cestui que vie*, it was enacted by the statute of frauds (29 Car. 2, c. 3, s. 12), that "from henceforth any estate *pur autre vie* shall be devisable by a will in writing, signed by the party so devising the same, or by some other person in his presence, and by his express directions, attested and subscribed in the presence of the devisor by three or more witnesses. And if no such devise thereof be made, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of a special occupancy, as assets by descent, as in case of lands in fee simple. And in case there be no especial occupant thereof *it shall go to the executors or administrators of the party that had the estate* thereof by virtue of the grant, and shall be assets in their hands."

29 Car. 2, c. 3, s. 12 (repealed as to wills made on or after January 1, 1838, and persons dying after that date. See *post*, 686).

A question has arisen, viz, to whom the estate *pur autre vie* would go, if limited to a man, *his heirs*, *executors*, *and administrators;* and it was argued in favor of creditors generally, that the administrator was entitled; but the court decided for the heir. (*d*) In another case, (*e*) where a tenant in fee conveyed lands to "H., *her heirs* and assigns, *to hold* to H. *and her assigns* during the life of G.;" it was held that, after H.'s death, G., who was her heir, was entitled to hold for his life as special occupant, and that the land did not pass to H.'s executors by the words in the *habendum* "to H. and her assigns," but that these words must be disregarded, as being repugnant to the words in the premises.

Executors of grantee *pur autre vie* of a rent entitled:

A question has been raised upon the construction of this statute, whether, if a *rent* be limited to a man, his executors and administrators, *pur autre vie*, and the grantee die, living *cestui que vie*, and without having disposed of it in his lifetime, * it is not determined, notwithstanding the statute; on the ground that it was intended to apply to those estates only in which executors or administrators, if named, might take as special occupants, and consequently not to incorporeal

(*d*) Atkinson *v.* Baker, 4 T. R. 229. This was the case of a deed. But the same has also been held in the case of a will. Carpenter *v.* Dunsmure, 3 El. & Bl. 918. [See *post*, 686, note (*u*).]

(*e*) Doe *v.* Steele, 4 Q. B. 663.

hereditaments. (*f*) The better opinion appears to be, that the statute nevertheless gives the estate to the executors or administrators; (*g*) but to avoid the doubt, it has been usual to limit the rent to the grantee, his executors and assigns, for a certain number of years, determinable on the death of the *cestui que vie*.

Since these remarks were written, the court of common pleas has, it should seem, settled the point. In Bearpark *v.* Hutchinson, (*h*) it was held by that court, after taking time to consider, that where a rent-charge was granted to a man during the life of another, without further words, and the grantee died during the life of the *cestui que vie*, the right to the rent-charge vested in the personal representative. And Tindal C. J. in delivering the judgment of the court, observed, with respect to the objection that the statute is limited to such estates as were capable, before the statute, of occupancy, that "special occupant of rent" was a legal phrase, in common use and possessing a known meaning, before the statute, as descriptive, not of the person who should enter and occupy, but who should receive or take rent; and that, therefore, the sounder construction of the second branch of the statute was to make it include the grantee of rent, since such estates were held in common parlance to be the subject of special occupancy.

administrator *de bonis non* of grantee:

If the executor should die intestate, it may be doubted whether the estate would, under this statute, go to his administrator, or to the administrator *de bonis non*. (*i*)

partial devisee of estates *pur autre vie*:

* Under the above statute, the owner of an estate *pur autre vie* may devise it to several in succession, so as to designate who shall occupy till *cestui que vie* dies, and to leave no interval or chasm. (*k*) But a question may arise, as to what shall become of the estate, if it be only partially devised, *i. e.* if it be devised for a period which expires before the estate *pur autre vie* ends. In Doe *v.* Robinson, (*l*) the court of K. B. decided that the residue, whereof there is no devise, belongs to the representatives of the devisor. There the tenant of lands which

(*f*) See Watk. on Convey. 73, note by Morley & Coote. But see Northen *v.* Carnegie, *ante*, 681, note (*c*).

(*g*) Ib. See Cox's note (D) to Low *v.* Burron, 3 P. Wms. 264; Kendal *v.* Micfield, Barnard Chan. Ca. 46; Jenison *v.* Lexington, 1 P. Wms. 555.

(*h*) 7 Bing. 178; S. C. 4 M. & P. 848.

(*i*) Oldham *v.* Pickering, Carth. 376; Ripley *v.* Waterworth, 7 Ves. 445, 451.

(*k*) 3 P. Wms. 262.

(*l*) 8 B. & C. 296; S. C. 2 Man. & Ryl. 249.

had been granted "to him and his heirs," *pur autre vie*, devised them to A. B. without saying more, and A. B. died, living *cestui que vie*. And it was held that the heir of the devisor was entitled as special occupant. (*m*) In that case, the court held that the words used were not sufficient to pass the whole interest. If the devise had been of the whole term itself, or of the whole interest of the devisor, to A. B., without more, the representative of A. B. would have been entitled, notwithstanding no words of limitation were used in the devise. (*n*) Whether the real or the personal representative would have been the person to take, is a point on which the authorities appear to be conflicting. In Doe *v.* Lewis, (*o*) where the estate had been demised to the grantee, his heirs and assigns, for lives, and he devised the premises, during the residue of the lease, to W. J. L., *and his assigns*, who died intestate, it was held by *the barons of the exchequer, that the estate did not go to the heir of W. J. L., but to his personal representative; for that the devise by the original grantee defeated the title of his own heir as special occupant, and his devisee, W. J. L., took the estate to hold to him and his assigns for the residue of the term; and on the death of W. J. L., as there was no devise of the estate, nor special occupant thereof, it passed to the executors or administrators of W. J. L. ("the party that had the estate thereof") within the express words of the statute of frauds. But in Wall *v.* Byrne, (*p*) where a lessee of lands which had been demised to him, his heirs and assigns, *pur autre vie*, devised all his real freehold and personal property to his wife and children, share and share alike; and one of the children, who survived the testator, died intestate; it was held by Sugden, lord chancellor of Ireland, that the heir-at-law of such child, and not his personal representative, was entitled to his share of the estate *pur autre vie*. And the learned judge said,

devise of the whole estate, without words of limitation, by grantee *pur autre vie* to him and his heirs.

(*m*) See Barron *v.* Barron, Cas. temp. Napier, 393, note (*a*). It should seem that, in the case of a will, made after the year 1837, the whole interest would pass to the devisee under the words of the bequest used in Doe *v.* Robinson, by reason of the stat. 1 Vict. c. 26, s. 28. (See preface.) And it has been doubted whether the words used in Doe *v.* Robinson, were not sufficient, even before the act, to pass the whole term; and the authority of that decision has been questioned. See Hayes's Convey. 3d ed. 162 *a*, 409 (62), and the cases collected in Lyne on Leases, 13 *et seq.*

(*n*) Williams *v.* Jekyl, 2 Ves. sen. 681.

(*o*) 9 M. & W. 662, cited by Lord Campbell, 2 De G., F. & J. 595.

(*p*) 2 Jones & Lat. 118.

that if ever a point was closed by decision, it was this: that where a man had an estate *pur autre vie* limited to him and his heirs, and devises that estate by words, which, without words of limitation, would pass the *quasi* inheritance, and the devisee dies intestate, the persons to take are the heirs, and not the personal representative of the devisee; that the point was so decided in Ireland many years since, (*q*) and that decision had been followed in England; (*r*) and many opinions had been given upon it; and he must, therefore, decline to hear the question argued. His lordship distinguished the case of Doe *v.* Lewis, on the ground that there the devise was to a man and *his assigns*, which, it was held, did not mean *heirs;* whereas in the case before him the devise was in general terms, and in words which were sufficient to pass the entire interest of the testator under the lease to his devisees; and that both law and good sense required that * the devisee should take the same interest which he himself had. This distinction, however, does not appear to reconcile the two decisions satisfactorily, nor to afford any answer to the reasoning on which the court of exchequer proceeded.

By stat. 1 Vict. c. 26, s. 3 (which, however, does not extend to any will made before January 1, 1838), estates *pur autre vie* may be disposed of by will, executed as required by that act, whether there shall or shall not be any special occupant thereof, and of whatever tenure they shall be, and whether the same shall be a corporeal or incorporeal hereditament. (*s*) 1 Vict. c. 26.

And with respect to the estate, *pur autre vie*, of any deceased person, *who shall not have died before the first day of January*, 1838, the same statute (after repealing the above mentioned statutes of Car. 2 and Geo. 2), proceeds to enact, by sect. 6, that if no disposition shall be made thereof by will, and in case there shall be no special occupant thereof, it shall go (whether freehold or customary freehold, tenant right, customary or copyhold, (*t*) or of any other tenure, *and whether a corporeal or incorporeal hereditament*), to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come

(*q*) Blake *v.* Jones dem. Blake, 1 Hud. & Bro. 227, note.

(*r*) See Phillpotts *v.* James, 3 Dougl. 425.

(*s*) See this enactment, *verbatim*, in preface.

(*t*) The statute of Car. 2 does not extend to copyholds. Zouch *v.* Forse, 7 East, 186.

to the executor or administrator, either by reason of special occupancy, or by virtue of this act, it shall be assets in his hands, and shall go in the same manner as the personal estate. (*u*)

Mortgages:

* With respect to the title of an executor or administrator of a mortgagee to the mortgaged property, it is obvious that, at law, this will depend on the fact whether the mortgage is in fee or for years; in the former case the legal estate in the land will descend to the heir; and in the latter, it will go, like any other term for years, to the executor. But with regard to the money due upon the mortgage, it is now fully established in equity, that, in every case, it is to be paid to the executor or administrator of the mortgagee; by reason of the rule of equity that the satisfaction shall accrue to the fund that sustained the loss. (*x*) Doubts seem to have at one time existed on this head in cases in which the mortgage was in fee, and there was neither bond nor covenant for payment of the money; or where the consideration for redemption was upon payment to the mortgagee, his heirs or executors; (*y*) but the law is now clearly settled, that whatever be the form of the mortgage, it will be part of the personal estate of the mortgagee. (*z*) Consequently, if the mortgage be in fee, the heir or devisee of the

considered part of the personal estate:

(*u*) See this enactment, *verbatim*, *post*, pt. IV. bk. I. ch. I. In the construction of it, in a case where leasehold estates *pur autre vie* were devised in trust for A., his heirs, sequals in right, executors, administrators, and assigns, and A. survived the devisor, and being illegitimate, died without heirs and intestate, living the *cestui que vie*, it was held that the section applied to equitable estates in land, and that the devised estates passed under it to A.'s administrator (the nominee of the crown). Reynolds *v.* Wright, 2 De G., F. & J. 590; 25 Beav. 100. [The assignee of a lessee for life holds an estate *pur autre vie*, which by statute in New York is a freehold during the assignee's life, but on his death, a chattel real and assets in the hands of his administrator. Mosher *v.* Youst, 33 Barb. 277.]

(*x*) Thornbrough *v.* Baker, 1 Chanc. Cas. 283; S. C. 3 Swanst. 628; Winne *v.* Littleton, 2 Chanc. Cas. 51; S. C. 1 Vern. 3; Canning *v.* Hicks, 2 Chanc. Cas. 187; Tabor *v.* Tabor, 3 Swanst. 636.

(*y*) Coote on Mortg. 617, 2d ed.

(*z*) Ib. A Welsh mortgage is so considered. Longuet *v.* Scawen, 1 Ves. sen. 406. [This is the general rule in the American States. Smith *v.* Dyer, 16 Mass. 18; Fay *v.* Cheney, 14 Pick. 399; Chase *v.* Lockerman, 11 Gill & J. 185; Burton *v.* Hintrager, 18 Iowa, 348. In Massachusetts the interest and title of a mortgagee of real estate or of an assignee of such mortgagee vest at his decease, not in his heirs-at-law, but in his executor or administrator. Before the mortgage is foreclosed, the mortgaged premises, and the debt secured thereby, are personal assets in the hands of the executor or administrator, to be administered and accounted for as such. The executor or administrator may take possession of the mortgaged premises by open and peaceable entry, or by action, or, under a mortgage with power of sale,

mortgagee will be a trustee of the land for the executor or administrator; and will, upon application, be directed to convey to him. (*a*) So if the land becomes irredeemable in the hands of the heir, either by the length of possession, or by his purchasing the equity of redemption, or foreclosing, it will nevertheless belong to the personal representative, and the heir will be a trustee for him. (*b*)

in what case the heir entitled:

But the mortgagee may, as between his real and personal representative, by a manifest declaration of his intent, convert * the mortgage, as well as any other part of his personal estate, into land, and make it pass accordingly. (*c*) So if a man purchase an estate, which afterwards proves to be subject to an equity of redemption, and dies, the money will belong to his heir, and not to his executor. (*d*) Again, if mortgage money be articled to be laid out in land and settled, the money will be bound by the articles. (*e*) So if the mortgagee in

may sell the premises, in like manner as the deceased might have done if living. If the money is paid, the executor or administrator is to receive it and discharge the mortgage. If possession has been taken by the deceased in his lifetime, or by the executor or administrator after his decease, the executor or administrator will be seised of the mortgaged premises in trust for the same persons, creditors or otherwise, who would be entitled to the personal estate. If not redeemed by the mortgagor, or sold by the executor or administrator for the payment of debts, it is to be assigned and distributed to the same persons and in the same proportions as if it had been part of the personal estate of the deceased. Genl. Sts. c. 96, §§ 9, 10, 14; Thomas J. in Taft *v.* Stevens, 3 Gray, 504, 505, 506; Smith *v.* Dyer, 16 Mass. 18; Richardson *v.* Hildreth, 8 Cush. 225; Boylston *v.* Carver, 4 Mass. 598, 610; Palmer *v.* Stevens, 11 Cush. 147, 150; Baldwin *v.* Timmins, 3 Gray, 302, 303; Johnson *v.* Bartlett, 17 Pick. 477; Steel *v.* Steel, 4 Allen, 417; Sheldon *v.* Smith, 97 Mass. 34, 35; Collins *v.* Hopkins, 7 Iowa, 763; Haskins *v.* Hawkes, 108 Mass. 379. But see Webber *v.* Webber, 6 Greenl. 133. The executor or administrator of the mortgagee is the proper person to enforce the mortgage. Coffer *v.* Wells, Saxton Ch. Rep. 10; Gibson *v.* Bailey, 9 N. H. 168; Haskins *v.* Hawkes, 108 Mass. 379, 381. The executor or administrator of the mortgagee may assign the mortgage. Crooks *v.* Jewell, 31 Maine, 306; Clark *v.* Blackington, 110 Mass. 369, 374, 375; Ladd *v.* Wiggin, 35 N. H. 321, 329, 330; Burt *v.* Ricker, 6 Allen, 77; Neil *v.* Newbern, 1 Murph. 133; Shoalbred *v.* Drayton, 2 Desaus. 246; Clapp *v.* Beardsley, 1 Vt. 167; Williams *v.* Ely, 13 Wis. 1. One of two executors may assign a mortgage belonging to the testator's estate. George *v.* Baker, 3 Allen, 326, note.]

(*a*) Ellis *v.* Guavas, 2 Chanc. Cas. 50.

(*b*) Ib.; Canning *v.* Hicks, 2 Chanc. Cas 187; Tabor *v.* Grover, 2 Vern. 367. But it should seem that if the heir chooses, he may pay off the mortgage money to the executor, and retain the land. Clerkson *v.* Bower, 2 Vern. 66. [See Demarest *v.* Wynkoop, 3 John. Ch. 129.]

(*c*) Noys *v.* Mordaunt, 2 Vern. 581; S. C. Gilb. Eq. Rep. 2 Prec. Chanc. 265; *ante*, 658.

(*d*) Cotton *v.* Iles, 1 Vern. 271; Coote on Mortg. 618, 2d ed.

(*e*) Lawrence *v.* Beverley, cited 3 P. Wms. 217, in Lechmere *v.* Carlisle.

his lifetime obtain a release of the equity of redemption, or obtain an absolute decree of foreclosure, and enter into possession, and after his death, the foreclosure shall be opened, or the release set aside, the heir, and not the executor, will be entitled to the money. (*f*)

when a mortgage merges:

If the mortgagee becomes entitled to the land in fee simple, as if it descends upon, or is devised to him, a question may arise between his heir and executors, whether the charge is to be considered as subsisting for the benefit of his personal representatives, or is merged for the benefit of the person taking the land. The rule in these cases is, that if it be indifferent to the party in whom this union of interest arises, whether the charge be kept on foot, or not, it will be extinguished in equity upon the presumed intention, unless an act declaratory of a contrary intention, and consequently repelling such presumption, be done by him. (*g*) * But if a purpose, beneficial to the owner, can be answered by keeping the charge on foot, as if he be an infant, so that the charge would be disposable by him, though the land would not; (*h*) or a beneficial use might have been made of it against a subsequent incumbrancer, (*i*) or the other creditors of the person from whom the party derived the onerated estate; (*k*) in these, and similar cases, equity will consider the charge as subsisting, notwithstanding that it may have been merged at law; (*l*) and

(*f*) Lawrence *v.* Beverley, cited 3 P. Wms. 217, in Lechmere *v.* Carlisle.

(*g*) 2 Powell Dev. 146, Jarman's ed.; Price *v.* Gibson, 2 Eden, 115; Donisthorpe *v.* Porter, Ib. 162; S. C. Ambl. 600; Compton *v.* Oxendon, 2 Ves. jun. 261; Grice *v.* Shaw, 10 Hare, 76. When the owner of an estate has also a charge on it, and there is some intermediate charge or estate between his own charge and his ownership in fee, it may be reasonable to say that, without some special act, no presumption can be made of an intention to merge the charge in fee; for that might be against the interest of the owner by letting in the intermediate estate or incumbrance. But where the intermediate interest is created by the act of the owner himself, this reasoning has no application. Johnson *v.* Webster, 4 De G., M. & G. 474, 488, by Lord Cranworth.

(*h*) Thomas *v.* Kemeys, 2 Vern. 348; S. C. 1 Eq. Cas. Abr. 269, pl. 9; Powell Dev. *ubi supra*. This was before the new wills act, and while an infant might bequeath personal estate. See *ante*, 15.

(*i*) Gwillim *v.* Holland, cited 2 Ves. jun. 263.

(*k*) Forbes *v.* Moffat, 18 Ves. 384.

(*l*) Powell, Dev. *ubi supra*. See, also, Lord Clarendon *v.* Barham, 1 Y. & Coll. C. C. 688; Swabey *v.* Swabey, 15 Sim. 106, 502; Faulkner *v.* Daniel, 3 Hare, 217; Byam *v.* Sutton, 19 Beav. 556. [The general rule is, that where the legal title by a mortgage becomes united with the equitable title, so that the owner has the whole title, the mortgage is merged and extinguished by the unity of possession. But if the owner of the legal and equitable titles has an interest in keeping those titles distinct, he has a right so to keep

the rule is adopted in favor of the creditors of the person in whom these interests centre. (*m*)

Where a mortgage deed contains a power of sale, with a direction that the surplus produce shall be paid to the mortgagor, his executors or administrators, if a sale takes place in the lifetime of the mortgagor, the surplus is personal estate; but if after his death, it is real estate, as the equity of redemption descends to the heir-at-law. (*n*)

Title of executor or mortgagor in case of a mortgage with power of sale.

At common law, where a man devises land to his executors for payment of his debts, or until his debts are paid, or till a particular sum shall be raised out of the rents or profits, the executors take thereby only a chattel interest, *i. e.* an estate for so many years as are necessary to raise the sum required; (*o*) and this interest determines when the rents or profits would have raised the sum, although the executors * may have misapplied them. (*p*) But by stat. 1 Vict. c. 26, s. 30, where any real estate (other than a presentation to a church), shall be devised to any trustee or executor, such devise [if the will be made on or after January 1, 1838] shall pass the fee simple or other the whole estate of the testator, unless a definite term of years, or an estate of freehold, shall thereby be given to him expressly or by implication. (*q*)

Devise of land to executors for payment of debts.

them, and the mortgage will not be extinguished. Wilde J. in Loud *v.* Lane, 8 Met. 518, 519; Evans *v.* Kimball, 1 Allen, 240, 242; Hunt *v.* Hunt, 14 Pick. 374; Gibson *v.* Crehore, 3 Pick. 475; 5 Pick. 150. See Brien *v.* Smith, 9 Watts & S. 78; Richards *v.* Ayres, 1 Watts & S. 485; Moore *v.* Harrisburg Bank, 8 Watts, 138; Lockwood *v.* Sturdevant, 6 Conn. 373; Marshall *v.* Wood, 5 Vt. 250; Smith *v.* Higbee, 12 Vt. 113.]

(*m*) Powell *v.* Morgan, cited 2 Vern. 206; Powell Dev. *ubi supra.*

(*n*) Wright *v.* Rose, 2 Sim. & Stu. 323; Bourne *v.* Bourne, 2 Hare, 35; [Cox *v.* McBurney, 2 Sandf. 561; Sweezy *v.* Willis, 1 Bradf. Sur. 495; Moses *v.* Murgatroyd, 1 John. Ch. 119; Bogert *v.* Furman, 10 Paige, 496. If land be sold on an execution against the deceased testator, the surplus is payable to the executor and not to the heir. Vincent *v.* Platt, 5 Harr. (Del.) 164; Garlick *v.* Patterson, 1 Cheves (S. Car.), 27.]

(*o*) Cordall's case, Cro. Eliz. 316; Corbet's case, 4 Co. 81 *b*; Manning's case, 8 Co. 96 *a*; Co. Lit. 42 *a*; Hitchens *v.* Hitchens, 2 Vern. 404; Ackland *v.* Lutley, 9 Ad. & El. 879; Ackland *v.* Pring, 2 M. & Gr. 937.

(*p*) Carter *v.* Barnadiston, 1 P. Wms. 509, 519; Ackland *v.* Lutley, 9 Ad. & El. 879.

(*q*) See this enactment, *verbatim*, in preface; and see, also, sect. 31, Ib.

SECTION II.

Right of Executors and Administrators to Chattels Real, with Relation to Husband and Wife.

Before quitting the inquiry as to the interest which executors and administrators have in the chattels real of the deceased, it is proper to consider the subject as it bears on the relation of husband and wife. It is therefore proposed to investigate, 1st, when the wife survives the rights of the executor or administrator of the husband to her chattels real; 2d, when the husband survives the rights of the administrator of the wife to the same.

1. The right of the husband's executor, &c. to the wife's chattels real: if they remain in *statu quo*, and she survive, she will be entitled, and not her husband's executors:

1. The law gives a qualified interest to the husband in the chattels real of which the wife is or may be possessed during marriage, viz, an interest in his wife's right, with a power of divesting her property during the coverture. (*r*) If, therefore, he so disposes of his wife's terms, or other chattels real, by a complete act in his lifetime, her right by survivorship will be defeated; (*s*) but if he leave them in * *statu quo*, and the wife be the survivor, she will be entitled to them, to the exclusion of the executors or administrators of her husband. (*t*)

what amounts to a disposition of the wife's chattels real by

It becomes, therefore, necessary to inquire what shall amount to such a disposition of the wife's chattels real by the husband, as will exclude her title by survivorship; and as the object of this treatise is merely to show what interest the executor or administrator of the husband

(*r*) 1 Roper Husband & Wife, 173, by Jacob.

(*s*) And since the same rule of property must prevail in equity as in law, if the wife be entitled to a term for years, held *in trust* for her benefit, the assignment or alienation of it by her husband will bind her surviving him; Sir Edward Turner's case, 1 Vern. 7; Bates *v.* Danby, 2 Atk. 207; 1 Preston on Abstracts, 344; Bacon Abr. Baron & Feme, C. 2; 1 Roper Husband & Wife, 177, 2d ed.; unless the husband, before marriage, consent to the settlement of the term for her benefit. 1 Vern. 7; Draper's case, 2 Freem. 29; 1 Roper, 178; 1 Preston on Abstr. 343, 344. (See, as to trusts for her separate use, *post*, pt. II. bk. II. ch. II. § III.) So the contingent reversionary interest of the wife in the trust of a term for years may be sold by the husband; and the wife surviving will be bound by such sale though the husband dies before the contingency is determined or the reversion falls into possession. Donne *v.* Hart, 2 Russ. & M. 360. *Secus*, where the interest cannot possibly vest during the coverture. Duberley *v.* Day, 16 Beav. 33; [Rogers *v.* Aneaster, 11 Ind. 200, and see Sale *v.* Saunders, 24 Miss. 24.]

(*t*) 1 Roper Husband & Wife, 173, 2d ed.

takes by the defeat of the wife's claim, the instances selected will be confined to cases where the question is between her and the executor or administrator, and not between her and an alienee. The general principle is, that the transaction must be of a description to effect a complete alteration in the nature of the joint interest of the husband and wife in the wife's chattels real. (*t*[1])

the husband, so as to bar her right by survivorship:

The will of the husband cannot dispose of the chattels real of the wife, against her surviving him; for as that does not take effect till *after* his death, the law takes precedence, and vests the term in the wife immediately upon his decease. (*u*)

the husband's will does not:

If husband and wife be ejected of a term which he enjoyed in her right, and he commences an action of enjectment *in his own name*, and obtains judgment, the recovery will change the wife's property in the term, and vest it in the husband. (*x*)

effect of husband's proceedings at law in his own name for the wife's term:

* It seems that if there is a dispute between the husband, claiming a term of years in right of his wife, and another person, relative to the title, and they refer the matter to arbitration, and an award is made of the term to the husband, the property in it will be changed by the arbitrament, so as to amount to a reduction of the term into possession, which will defeat the wife's right by survivorship. (*y*)

effect of husband's submitting the title to his wife's term to arbitration:

(*t*[1]) [See Adams *v.* Brackett, 5 Met. 280; Phelps *v.* Phelps, 20 Pick. 556; Hayward *v.* Hayward, 20 Pick. 517; Foster *v.* Fifield, 20 Pick. 67; Daniels *v.* Richardson, 22 Pick. 565; Estate of Miller, 1 Ashm. 323; Siter's Accounts, 4 Rawle, 468; Hind's Estate, 5 Whart. 138; Pitts *v.* Curtis, 4 Ala. 350; Wade *v.* Grimes, 7 How. (Miss.) 425; 1 Dan. Ch. Pr. (4th Am. ed.) 115–121, and notes; 1 Chitty Contr. (11th Am. ed.) 226, and cases in notes; 1 Chitty Pl. (16th Am. ed.) 36, and cases in note (*k*); Dunn *v.* Sargent, 101 Mass. 336.]

(*u*) Anon. Poph. 5; Co. Lit. 351 *a*; 2 Bl. Com. 434; Bacon Abr. Baron & Feme, C. 2; 1 Roper Husband & Wife, 174, 2d ed.; 1 Preston on Abstracts, 343. [A note and mortgage made to a husband and wife shall go to the wife, in case she survives him, and not to his administrator as assets. Draper *v.* Jackson, 16 Mass. 480; Burleigh *v.* Coffin, 22 N. H. 118; Hawkins *v.* Craig, 6 Monr. 254; Turner *v.* Davis, 1 B. Mon. 151.]

(*x*) Co. Lit. 46 *b*; Com. Dig. Baron & Feme, E. 2; Bacon Abr. tit. Baron & Feme, C. 2; but see Bret *v.* Cumberland, 1 Roll. Rep. 359; S. C. 3 Bulstr. 163, in which Coke C. J. says, "A man hath a term in right of his wife; he is ousted of it, and brings his action, and recovers the same again, and hath his judgment; he shall have it *in statu quo*." See, also, note (6) to Co. Lit. 46 *b*, Hal. MSS.

(*y*) 1 Roll. Abr. 245, Arbitrament, D.; but see Mr. Roper's note, vol. i. 185, 2d ed., and Hunter *v.* Rice, 15 East, 100; [Scott

effect of the husband taking a new lease of the land in which the wife has a term:

If the wife, at the time of her marriage, were a lessee for years, and her husband purchases or takes a lease of the lands for both their lives, that act will amount to a disposition of the term; because, by the acceptance of the second lease, the term is surrendered by operation of law, which surrender the husband is enabled to make under his general authority to dispose of the wife's leases in possession. (*z*)

effect of an alienation of wife's term by husband on a condition which is broken and the land reëntered:

If the husband alone assign a term of which he is possessed in right of his wife, *subject to a condition*, and enter for the condition broken during the coverture, the husband will be again possessed in right of his wife as before; and the wife being the survivor may be entitled. (*a*)

But if the husband die before the condition broken, his executors or administrators must enter for the breach of the condition, and will hold discharged of the title of the wife. (*b*)

effect of husband's mortgaging his wife's chattels real:

If the husband mortgages the wife's term, and by payment * of the money at the day, the estate of the mortgagee ceases, it seems that the interest of the wife in the term will not be affected. (*c*) If the money be not paid at the day, the estate of the mortgagee becomes absolute, and the alienation of the term being complete at law, the wife's legal right, by survivorship, is defeated; and if the equity of redemption were reserved to the husband alone, it has been said that her right will also be defeated in equity, by analogy to the cases in which it has been held that she is bound by the husband's voluntary assignment of her equitable chattels real. (*d*) But if the equity of redemption were reserved to the husband and wife, she would be entitled to survivorship. (*e*) And unless his inten-

v. Perley, 98 Mass. 511; Thorpe *v.* Eyre, 1 Ad. & El. 926, 932; 1 Chitty Pl. (16th Am. ed.) 168.]

(*z*) 2 Roll. Abr. Surrender, F. p. 495, pl. 8; Bacon Abr. Baron & Feme, C. 2; and 1 Roper Husband & Wife, 183, 2d ed.

(*a*) 1 Roll. Abr. 344, l. 45–50; Bac. Abr. tit. Baron & Feme, C. 2; 1 Prest. on Abstr. 345.

(*b*) Co. Lit. 46 *b*; Bac. Abr. tit. Baron & Feme, C. 2.

(c) Young *v.* Radford, Hob. 3; 1 Roper Husband & Wife, 184, Jacob's ed.

(*d*) 1 Roper Husband & Wife, 184, Jacob's ed.; 1 Prest. on Abstr. 345. The latter writer adds "*sed quære.*"

(*e*) Pitt *v.* Pitt, 1 Turn. Chan. Rep. 180. In that case a *feme sole* made a mortgage of a leasehold house and afterwards married; the mortgage was then transferred; the husband joined in the transfer, and covenanted to pay the money; and the equity of redemption was reserved to the

tion to defeat her right can be collected from the particular instruments of mortgage, it may be doubted whether it will be defeated by the reservation of the equity of redemption to him alone; for that this mere circumstance is not enough to rebut the ordinary presumption that nothing more is intended by the usual mortgage deed than that which is necessary to make the estate a security for the money advanced. (*f*) If in any case the husband, after the estate of the mortgagee has become absolute, pays the money, and takes an assignment to himself, the property will be altered, and the term will go to the executors of the husband, to the exclusion of the wife. (*g*)

effect of husband making an underlease of the wife's term for years:

*The power which the law gives the husband to divest the whole interest of his wife in her chattels real, necessarily authorizes him to divest it partially. (*h*) If, therefore, the husband be possessed of a term for years in right of his wife, and he alone grants an underlease for a portion of the term, reserving rent, he becomes the actual owner, to the extent of the term so granted, and the rent will form part of his executor's estate; (*i*) but the residue of the original term will belong to her, as undisposed of by her husband. (*k*)

effect of husband's *agreement* for an under lease.

Whether the husband's *agreement* to make an underlease of his wife's term for years will produce the same effect as an actual lease, has never been expressly decided. The point was discussed in Druce *v.* Denison, (*l*) though it became unnecessary to decide it. But Lord Eldon (*m*) intimated an opinion that the agreement would be good against the wife, and that the rent would form part of the husband's es-

husband and wife, their executors, administrators, and assigns. It was held that the wife's right by survivorship was not affected. But on a bill by the wife to redeem the mortgage, the redemption was decreed on the terms, that the husband's estate should stand in the place of the mortgagee, for sums paid by him out of his property in reduction of the mortgage debt.

(*f*) Clark *v.* Burgh, 2 Coll. 221.

(*g*) 1 Prest. on Abstr. 346.

(*h*) Bac. Abr. tit. Baron & Feme, C. 2.

(*i*) 6 Ves. 394, by Lord Eldon in Druce *v.* Denison. See, also, Co. Lit. 46 *b*; Loftus's case, Cro. Eliz. 279; 1 Prest. on Abstr. 344, 345. Had the husband and wife joined in the lease, the rent would have been incident to the reversion, as well after the death of the husband as during his life, and would have belonged to the wife. 1 Prest. on Abstr. 345; 1 Roper Husband & Wife, 174, 175, 2d ed.

(*k*) Co. Lit. 46 *b*; Sym's case; Cro. Eliz. 33; Loftus's case, Ib. 279. See *post*, pt. II. bk. III. ch. I. § III. as to the party entitled to arrears of rent reserved on a lease of the wife's estate.

(*l*) 6 Ves. 385.

(*m*) 6 Ves. 394.

tate. He observed that as to actual leases there was no doubt that, to the extent of the terms granted, the husband became owner; as to the agreements for leases his apprehension was, that in a court of equity the husband was to be considered owner of those interests, and he compared it to an assignment of the wife's choses in action, which, though conferring no legal title, is supported in equity. (*m*[1]) On the case coming on again, his lordship said that he should wish a search to be made on the point, whether it had ever been decided that an agreement would or would not bind * the wife; and if it would, whether the rent was to be paid to her or her husband. If that point was untouched by decision, he thought it would be found that the analogy to other cases would make out that an assignment in equity was to this purpose as good as an assignment at law, and he referred to Steed *v.* Cragh (*n*) as stating the principle.

2. Rights of wife's administrator to her chattels real:

those vested during coverture go to the husband *jure mariti*:

2. The rights of the administrator of the wife to her chattels real when her husband survives. If the husband do not alien them in her lifetime, and he survive her, the law gives them to him, at least all those of which he had possession *jure uxoris* during the coverture, not as the administrator of his wife, but as a marital right. (*o*) No administration to her, therefore, need be taken out by him for this purpose. (*p*)

Consequently, should the husband die without exercising his exclusive right of taking out administration to her, (*q*) her chattels real in possesssion will go to his administrator, and not to the administrator of his wife. (*r*)

secus, of those not vested.

But to entitle the husband to the chattels real of the wife, which were not vested in his possession in her right in her lifetime, he must make himself her representative, by be-

(*m*[1]) [But see Putnam J. in Page *v.* Estes, 19 Pick. 271; Udall *v.* Kenney, 3 Cowen, 590; 1 Dan. Ch. Pr. (4th Am. ed.) 90, note (4); Hartman *v.* Dowdel, 1 Rawle, 279; Siter's Accounts, 4 Rawle, 470; Miller's Estate, 1 Ashm. 323.]

(*n*) 9 Mod. 43; S. C. 2 Eq. Cas. Abr. 37.

(*o*) *Secus*, as to a lease whereof the wife and another were joint tenants; for it shall survive to her companion, inasmuch as he has the elder title to that of the husband. Co. Lit. 185 *b*.

(*p*) 1 Roll. Abr. Baron & Feme, H. 8; Wrotesley *v.* Adams, Plowd. 122; Hauchet's case, Dyer, 251 *a*; Co. Lit. 46 *b*; Ib. 351 *a*; Wan *v.* Lake, Gilb. Eq. Rep. 234; Bedell *v.* Constable, Vaughan, 185, by Vaughan C. J. 2 Eq. Cas. Abr. 138, pl. 4; 1 Roper, 173. And the same of an equitable term. Rex *v.* Holland, Aleyn, 15, by Rolle; 1 Prest. on Abst. 343.

(*q*) See *ante*, 409.

(*r*) Doe *v.* Polgrean, 1 H. Bl. 535.

coming her administrator. As if a *feme sole* be possessed of a chattel real, and be thereof dispossessed, and then take husband, and die before recovery of possession, this right will not survive to the husband, but go to the personal representative of the wife. (*s*) Therefore, if the husband die without obtaining letters of administration, the right will * not pass to his administrator, but to the administrator of his wife. (*t*) However, such administrator will be considered in equity as a trustee for the representative of the husband. (*u*)

If the husband be seised of an advowson in right of his wife, and the church become vacant during the coverture, the wife shall have the void presentation if she survive him, and the husband if he survive her, (*x*) even though, by reason of her not having issue, he be not tenant by the curtesy; (*y*) but if the church fell vacant *before* coverture, the husband shall not have the turn; (*z*) *i. e.* it may be considered, he shall not have it as a marital right; but still it will go to him as her administrator. (*a*) It will be observed that the next presentations to vacant churches are not properly chattels real, but chattels personal, and, therefore, in strictness, do not belong to this part of the subject of the estate of an executor or administrator.

SECTION III.

Of the Estate of an Executor or Administrator in Chattels Real by Condition, Remainder, or Limitation.

An executor or administrator may become entitled to chattels real by condition. As where a lease for years has been granted by the testator, upon condition that if the grantee did not pay such a sum of money, or do other acts as the testator appointeth, &c. and the condition is not performed after the testator's death, now is the chattel real come back to the executor. (*b*) By condition.

(*s*) Co. Lit. 351 *a*.

(*t*) *Ante*, 411, 412.

(*u*) *Ante*, 412; Cart *v.* Rees, 1 P. Wms. 381, cited in Squib *v.* Wyn; Humphrey *v.* Bullen, 1 Atk. 458; S. C. 11 Vin. Abr. 88; Elliott *v.* Collier, 3 Atk. 526; S. C. 1 Ves. sen. 15; 1 Wils. 168; [Weeks *v.* Jewett, 45 N. H. 540, 541; Hayward *v.* Hayward, 20 Pick. 517; Earley *v.* Sherwood, Dudley (Geo.), 7; M'Kay *v.* Allen, 6 Yerger, 44.]

(*x*) Co. Lit. 351 *b*.

(*y*) Wats. C. L. 71, 72.

(*z*) Co. Lit. 351 *b*.

(*a*) See *infra*, pt. II. bk. III. ch. I. § III.

(*b*) Wentw. Off. Ex. 181, 14th ed.

So where the condition is, * that the testator or his executors shall pay the money to avoid the grant, as where he mortgaged a lease for years and before the day limited for redemption he dies, his executor is entitled to redeem at the time and place appointed. (*c*)

By remainder.

Likewise a chattel real may accrue to an executor or administrator by remainder. Thus a remainder in a term of years, though it never vested in the testator in possession, and though it continue a remainder, shall go to his executor. Where a lease for years is bequeathed by will to A. for life, and afterwards to B., who dies before A., although B. never had the term in possession, yet it shall devolve on his executor. (*d*)

Contingent and executory interests.

With respect to contingent and executory interests, it is established, that contingent and executory estates and possibilities in chattels real, accompanied by an interest, are transmissible to the personal representative of a person dying before the contingency upon which they depend takes effect. (*e*) Thus, in the case above put, where a lease for years is bequeathed to A. for life, and after his death to B. for the residue of the term, B. has only an executory interest during the life of A.; but this interest is transmissible to B.'s executors or administrators. (*f*)

Lease for life remainder to the executors of lessee.

Lord Coke says that "if a man make a lease for life to one, the remainder to his executors for twenty-one years, the term of years shall vest in him; for even as ancestor and heir are *correlativa* as to inheritance (as if an estate for life be made to A., the remainder to B. in tail, the remainder to the right heirs of A., the fee vested in A., as it had been limited to him and his heirs), even so are the testators and executors *correlativa* as to any chattel. And, therefore, if a * lease for life be made to the testator, the remainder to his executors for years, the chattel shall vest in the lessee himself, as well as if it had been limited to him and his executors. (*g*) And in accordance with this doctrine is the case of Sparke *v.* Sparke (40 & 41 Eliz.), in the common pleas, (*h*) where the lessor leased for eighty

(*c*) Wentw. Off. Ex. 181, 14th ed.; Toller, 164.

(*d*) Wentw. Off. Ex. 189, 14th ed.

(*e*) Fearne, 554; 2 Saund. 388 *n*, note (9) to Purefoy *v.* Rogers. See *post*, pt. II. bk. II. ch. III.

(*f*) Manning's case, 8 Co. 95; Lampet's case, 10 Co. 46; and see Mr. Fraser's notes in his edition of Coke's Reports; [Dunn *v.* Sargent, 101 Mass. 336, 338, and cases cited; *post*, 889.]

(*g*) Co. Lit. 54 *b*.

(*h*) Cro. Eliz. 666; S. C. Owen, 125; Hal. MS. note (4) to Co Lit. 54 *b*.

years, if the lessee should live so long, remainder after his decease to the executors and assigns of the lessee for forty years; and the whole court was of opinion that this term vested in the lessee, and should go to his executors or administrators as assigns in law.

On the other hand, in a later case of Sparke *v.* Sparke, K. B. 43 Eliz. (*i*) (where the facts are stated to be that the lessor let the land to the lessee for ninety years, if he should live so long, and, further, by the same deed *vult et concedit* that, after the decease of the lessee, the said land should remain to the executors and assigns of the lessee for forty years), according to the report in Croke, although the court did not deliver any certain opinion, Popham J. said a stronger case had been adjudged, 17 Eliz., where a lease was made to two for life, remainder to him who should survive of those two, and to his executors for forty years; they both joined in a grant for this, yet the grant was merely void, because the term was not vested in any of them. And Gaudy J. seemed to incline, that this term did not vest in the intestate, but it was to be to the executor as a purchaser. And in the reports of the case in Moore (*k*) and Yelverton, (*l*) it is said to have been *adjudged* that the lease never vested in the lessee, and therefore did not pass to his administrator, though it would have gone to his executor if he had made one, as a purchaser. So in Cranmer's case, (*m*) where the Archbishop Cranmer had made a feoffment to the use of himself for life, and after his decease, remainder for twenty * years to the use of his executors, and afterwards the archbishop was attainted; it was held that the remainder for years was not forfeited, because it was never vested in Cranmer in his lifetime. In the earlier case of Sparke *v.* Sparke, (*n*) Walmsley J. attempted to reconcile the two cases. The difference between them, he says, was, that in Cranmer's case it was limited by way of use, and that by the party himself; so he shows himself his own intent, that it should not vest in himself but in his executor; but in the present case the limitation was by a stranger wherein no intention appears, but that it should vest in the lessee himself. This distinction seems to be supported by two other cases, both of which are reported in Moore. (*o*) The first

(*i*) Cro. Eliz. 840; S. C. Noy, 32.
(*k*) Moore, 666.
(*l*) Yelv. 9.
(*m*) Dyer, 309; S. C. 1 And. 19; 2 Leon. 5; 3 Leon. 20; Moore, 100; Bendl. 113.
(*n*) Cro. Eliz. 666.
(*o*) "This, though called a conceit in

is Finch *v.* Finch. (*p*) The case, on special verdict, appeared to be the following: *Feme sole* levied a fine to the use of herself for life, and after her death to the use of her executors for five years, with remainder over; and then she married, and with her husband granted the term of five years to the plaintiff, and then she and her husband levied a fine *sur conusance de droit tantum.* The first question was, whether the use to the executors was good; and the court agreed unanimously in the affirmative; and that if the possession were not disturbed, it would arise accordingly. The second question was, whether the *feme* could grant it during her life, and they held not; and they further held that it could not be forfeited. In the next place, they agreed that it might be extinguished by fine, and therefore, that the fine *sur conusance de droit tantum* had extinguished it. The other case is Remington *v.* Savage, (*q*) where J. S. levied a * fine to the use of himself for life, remainder to his wife for life, remainder to his executors for years; and then he levied a second fine to the same uses, omitting the estate for years; it was held the term being in abeyance was extinguished. (*r*) But the application of this distinction will not reconcile the decision of Sparke *v.* Sparke, in C. B., with the subsequent one in K. B., nor some other contradictory authorities to be found in the older reports. (*s*)

Perhaps the only point for which the case of Sparke *v.* Sparke, when in K. B., is really an authority, is, that where a lease is made for ninety-nine years, if the lessee lives so long, *and if he dies within that term*, remainder to his executors and assigns for forty years, in such case this term shall not vest in the lessee, but his executors are purchasers, because it is a conditional limitation, and a mere possibility to vest; for there is a condition precedent that it shall not be a lease, unless he died within the term, which peradventure would not be, for he might survive the term. (*t*)

Wentw. Off. Ex. (189, 14th ed.), is the only way in which the judgment in Cranmer's case can be reconciled to Co. Lit. 54 *b* and several other authorities; and this conceit was strongly urged in the argument of the case in 2 Leon. 6, 7." MS. Serjeant Hill, in his copy of Vincr, in Lincoln's Inn Library, tit. Executors, B.

(*p*) Moore, 339; S. C. *nom.* Finch *v.* Bodyll, 2 And. 91.

(*q*) Moore, 745.

(*r*) Chambers on Landlord & Tenant, 167.

(*s*) See Gravenor *v.* Parker, Anders. 19; S. C. Benloe, 74; Anon. 3 Leon. 32; *ante*, 675. See, also, Wentworth's Off. Ex. 189, 14th ed.

(*t*) As the law is now established, the mere possibility that a life in being may endure for eighty years to come, does not

This case was put by the court, and agreed upon, according to the report in Croke, (*u*) but their judgment on the principal case was not given; and in Yelverton and Moore, this case, which was merely a supposed one according to Croke, is reported as containing the actual facts before the court; and the report in Yelverton concludes by stating that the chief reason for their decision was, because the term to the executors is but a possibility.

Since these remarks were sent to the press, the writer has had the good fortune to find some important MS. observations on the subject by Mr. Serjeant Hill, in his copy of * Viner, in Lincoln's Inn Library. They are appended to tit. Executors, vol. ii. p. 406, B. pl. 4, where the *dictum* of Anderson J. that the executors should take as purchasers, is stated, according to the report of Sparke *v.* Sparke, in Owen, p. 125, and are as follows: "This is not law, and was improperly inserted by Viner; for though the opinion in Owen, 125, was as here cited, yet the judgment in the principal case, which in effect is the same with that here put by Anderson, was contrary; and Owen concludes the case in p. 126, thus: 'At last judgment was given, that the administrator should hold it (viz, the term) for forty years, as a thing vested in the testator.' And Rolle, in several parts of his Abridgment, viz, 1 Rol. Abr. 916, Y. 3, 2 Rol. Abr. 47, pl. 6, 418, pl. 6, and Lord Coke, in 1 Inst. 54 *b*, cite the case agreeable to that judgment; and Cro. Eliz. 666, reports the case to have been adjudged the same way, and is more full and clear than Owen; for he states the question, and that all the justices delivered their opinion severally that the term vested in the intestate, and shall go to his executors as assigns in law, and not as a perquisite by themselves; and, therefore, Anderson must have changed the opinion he gave at another time before judgment. And yet afterwards in Cro. Eliz. 840, the same point between the same parties, in a different action and court, came again in question, and the court seemed to be of a different opinion; but Croke says the court did not deliver any opinion certainly therein, because none was there to argue on the other part. Vid. Moore, 666, pl. 911, Yelv. 9, who both report the last case as of Mich. 44 & 45 Eliz. B. R., which was an action of debt; whereas Owen reports the case in ejectment, Mich. 40 &

amount to a degree of uncertainty sufficient to constitute a contingent remainder. See Fearne, 20 *et seq.*

(*u*) Cro. Eliz. 841.

41 Eliz. C. B.; and in Co. Lit. 54 *b*, the case is cited as of Mich. 40 & 41 Eliz. in C. B. in trespass; and in 2 Rol. Abr. 47, pl. 6, 418, pl. 6, the case is also cited as of Mich. 40 & 41 El. B., and all of them refer to the same roll, viz, Rot. 2215; so that there can be no doubt but the case in Cro. Eliz. 840, Moore, 666, Yelv. 9, is a later and a different * case from the former, though on the same point and between the said parties, and though adjudged contrary; but *quære* the law. In Yelverton, 9, it is admitted, that if the term had been limited to the executors for payment of debts, it would have vested in the testator. N. B. that Lord Coke and Rolle took the law to be agreeable to the first judgment, and take notice of the last, which it is extraordinary they should not have done, if it was adjudged as reported by Moore and Yelverton; and in 1 Roll. Abr. 916, Y. 3, the case is referred to as of Tr. 43 Eliz., which is the same term when, as Croke, p. 840, reports the last case; and yet Rolle there says it was admitted that the administrator should have the term within the intent of the grant, which seems directly contrary in substance to what is said to have been agreed in Cro. Eliz. 841. As to the report of the case in Noy, 32, it is short, and of Tr. 43 El.; and the point does not there appear. On the whole the difference seems to be this: that if a lease be made for life or years, with a remainder to the executors of the lessee, it shall be a vested interest in the lessee, and consequently, if he dies intestate, shall go to his administrator; but if there be a lease for ninety-nine years, if the lessee live so long, with a proviso, that if he die within the term, that it should be to his executors for forty years, this last term shall not vest in the lessee, but in his executors by purchase; because it is a conditional limitation, and a mere possibility to vest; for this is the point agreed in Cro. Eliz. 841. *Quære tamen*, whether it would not now be considered as more than a possibility, and see Fearne, 16, 17."

Administrator cannot take as assignee by purchase.

In these cases it was several times laid down, that if a remainder be limited to a man's *executors and assigns*, as purchasers, there his administrator cannot take as assignee. (*x*)

(*x*) Owen, 125; Cro. Eliz. 840, 841

*CHAPTER THE SECOND.

OF THE ESTATE OF AN EXECUTOR OR ADMINISTRATOR IN THE CHATTELS PERSONAL OF THE DECEASED IN POSSESSION.

CHATTELS personal are, properly and strictly speaking, things *movable;* which may be annexed to, or attendant on, the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and everything else that can be properly put in motion, and transferred from place to place. (*a*) All these, and other things of the same nature, generally speaking, belong to the estate of the executor or administrator. What are chattels personal.

It is proposed to consider this subject in the usual divisions. 1. Into chattels animate. 2. Chattels vegetable. 3. Chattels inanimate.

SECTION I.

Of the Estate of an Executor or Administrator in Chattels Animate.

Chattels animate may be subdivided into such as are domestic and such as are *ferœ naturæ.* In such as are of a nature tame and domestic (as horses, kine, sheep, poultry, and the like), a man may have an absolute property, and they are therefore capable of being transmitted, like any other personal chattel, to his executor or administrator. Also hounds, greyhounds, and spaniels and the like, as they may be valuable, and may serve not only for delight but profit, shall go to the executors or administrators. (*b*) In *those of a wild nature, *i. e.* such as are usually found at liberty and wandering at *Domitæ naturæ.* *Ferœ naturæ:*

(*a*) 2 Bl. Com. 387, 388.

(*b*) 4 Burn E. L. 297. It is said, indeed, in Swinburne, pt. 7, s. 10, pl. 8, p. 929, 7th ed., and in Noy's Maxims, p. 107, that hawks and hounds shall go to the heir with the estate. But it seems clear at this day, that they would go to the executor or administrator as chattels per-

large, generally speaking, a man can have no property transmissible to his representatives. (*c*)

property *per industriam* in animals *feræ naturæ* goes to executors:

But a qualified property may subsist in animals of the latter class, *per industriam hominis*, by a man's reclaiming them and making them tame by art, industry, or education, or by so confining them within his own immediate power, that they cannot escape and use their natural liberty; (*d*) and the animals so reclaimed or confined belong to the executor or administrator. Thus, if the deceased have any tame pigeons, deer, rabbits, pheasants, or partridges, they shall go to his executors or administrators. So, though they were not tame, yet if they were kept alive, in any room, cage, or such like place; as fish in a trunk. (*e*) But if at any time they regain their natural liberty, the property instantly ceases, unless they have *animum revertendi*, which is only to be known by their usual custom of returning. (*f*) A qualified property may also subsist in animals *feræ naturæ propter impotentiam;* as in young pigeons, who though not tame, being in the dove-house, are not able to fly out; and they shall go to the executors or administrators. (*g*)

property *propter impotentiam* in them.

What animals are incident to the inheritance and shall not go to the executor:

The animals which a man has *ratione privilegii* are considered as incident to the freehold and inheritance, and do not pass to the executor or administrator. Thus deer in a park, (*h*) (*i. e.* as it should seem, in a park properly so called which must be either by grant or prescription), (*i*) conies in * a warren, doves in a dove-house, (*i*[1]) will not

sonal. "And why not?" says the author of the Office of Executor (supposed to be Mr. Justice Doddridge), "for although hounds, greyhounds, and spaniels be for the most part but things of pleasure, that hindereth not but they may be valuable, as well as instruments of music, both tending to delight and exhilarate the spirits; a cry of hounds hath, to my sense, more spirit and vivacity than any other." Wentw. Off. Ex. 143, 14th ed.

(*c*) 2 Bl. Com. 390, 391.

(*d*) 2 Bl. Com. 390.

(*e*) Wentw. Off. Ex. 143, 14th ed.

(*f*) 2 Bl. Com. 392; [Commonwealth *v.* Chace, 9 Pick. 15.]

(*g*) Wentw. Off. Ex. 143, 14th ed.

(*h*) Co. Lit. 8 *a;* Liford's case, 11 Co. 50 *b;* Com. Dig. Biens, B.; Wentw. Off. Ex. 127, 14th ed.

(*i*) Davis *v.* Powell, Willes, 46, in which case it was held, that deer in an inclosed ground, in which deer had been usually kept, and which was therefore called a park, might be restrained for rent. And it has been lately held that deer in an ancient and *legal* park *may* be so tame and reclaimed from their natural wild state as to pass to executors as personal property. Morgan *v.* Earl of Abergavenny, 8 C. B. 768; Ford *v.* Tynte, 2 John. & H. 150.

(*i*[1]) [Commonwealth *v.* Chace, 9 Pick. 15.]

go to the executor or administrator. (*k*) And the reason assigned by Lord Coke is, because, without them, the inheritance would be incomplete. Another and more obvious reason mentioned by Lord Coke in the same case is, that the deceased had not any property in them. (*l*)

deer in a park: conies in a warren: doves in a dove-house:

So, if a man buys fish, as carps, bream, tenches, &c. and puts them into his pond, and dies, in this case the heir who has the water shall have them, and not the executors; but they shall go with the inheritance; because they were at liberty and could not be gotten without industry, as by nets, and other engines, (*m*) otherwise (as it has already been said), (*n*) if they are in a trunk or in a net, or the like; for then they are severed from the soil. (*o*)

fish:

But if the deceased has only a term for years in the lands in which the park, warren, dove-house, or pond is situate, *the deer, conies, doves, and fish will go to the executor or administrator as accessary chattels, following the estate of their principal, viz, the park, warren, dove-house, or pond. (*p*) It must, however, be understood that the

but if the deceased was termor for years, the deer, fish, &c. go to the executor:

(*k*) Com. Dig. Biens, B.; Wentw. Off. Ex. 127, 14th ed.

(*l*) The case of swans, 7 Co. 17 *b*. But though animals *ferœ naturæ* are not, while living, the personal chattels of the owner of the soil, yet if they are found and killed on the land by a trespasser, the qualified property in them *ratione soli* becomes absolute in the owner of the soil. Blades *v.* Higgs, 12 C. B. N. S. 501; 13 C. B. N. S. 844; affirmed in Dom. Proc. 11 Jur. N. S. 701; [11 H. L. Cas. 621. See Pierson *v.* Post, 3 Caines, 175; Buster *v.* Newkirk, 20 John. 75; 2 Kent, 349, 350; 1 Chitty Pl. (16th Am. ed.) 188.] As to bees, see 2 Bl. Com. 393. In Hannam *v.* Mockett, 2 B. & C. 944, Bayley J. says that bees are property, and are the subject of larceny. [Ferguson *v.* Miller, 1 Cowen, 243; Idol *v.* Jones, 2 Dev. 162. Merely finding a tree on the land of another, containing a swarm of bees, and marking it, does not vest the property of the bees in the finder. Gillet *v.* Mason, 7 John. 16. Bees which swarm upon a tree do not become private property until actually hived; Wallis *v.* Mease, 3 Binn. 546; while keeping their abode in the tree, they belong to the owner of the soil if unreclaimed, but, if reclaimed and identified, they belong to their former possessor. Goff *v.* Kilts, 15 Wend. 550.] The reader is also referred, on these matters generally, to the treatise on the Law of Fixtures, &c. p. 167 *et seq.*, by Messrs. Amos & Ferard, from which excellent work the author has derived great assistance in compiling this and the following part of the present book.

(*m*) Co. Lit. 8 *a*. See, also, Liford's case, 11 Co. 50 *b*; Parlet *v.* Cray, Cro. Eliz. 372; Anon. 4 Leon. 240; Grey's case, Owen, 20; S. C. Gouldsb. 129; Com. Dig. Biens, B.

(*n*) *Ante*, 704.

(*o*) Bac. Abr. tit. Executors, H. 3, vol. iii. 64. [As to oysters artificially planted in a bed clearly separated and marked out for the purpose of retaining them, see Fleet *v.* Hegeman, 14 Wend. 42; Decker *v.* Fisher, 4 Barb. 592; Lowndes *v.* Dickerson, 34 Barb. 586; Brinckerhoff *v.* Starkins, 11 Barb. 248.]

(*p*) Wentw. Off. Ex. 127, 14th ed.; Godolph. pt. 2, c. 13, s. 4; [*ante*, 705, note (*o*).]

executor or administrator can have no further interest than the deceased had in them, *i. e.* a right to take to his own use as many as he pleases, during his term, provided he leaves enough for the stores; for if a lessee for years of a park, vivary, warren, or dove-house, kills so many of the deer, fish, game, or doves, that there is not sufficient left for the stores, it is waste, (*q*) and will be equally waste in his executor or administrator.

qualified property in the persons of human beings:

Before quitting the subject of an executor's estate in chattels animate, it is proper to mention the sort of qualified property which a man may have in human beings, and which is transmissible to his personal representatives.

prisoner in execution:

The interest which a testator has in the person of his debtor, who has been taken in execution or, more properly, in his liberty, is a personal chattel, and the prisoner cannot be discharged without the concurrence of the executor. (*r*) So a

prisoner of war:

man may acquire a sort of personal property in the body of an enemy by taking him prisoner in war; at least till his ransom be paid; which interest will pass to the executor. (*s*) And this doctrine seems to have extended to

negro slaves.

negro servants who are purchased, when captives, of the nations with whom they are at war, and are therefore supposed to continue in some degree the property of their masters who buy them; though, accurately speaking, that property (if it indeed continues) consists rather in the *perpetual service than in the body or person of the captive. (*t*)

(*q*) Co. Lit. 53 *a*.

(*r*) Wentw. Off. Ex. 139, 140, 14th ed.; 3 Bac. Abr. 57, Executors, H. 1.

(*s*) Wentw. Off. Ex. 140, 14th ed. A writ of trespass appears in the Register for taking away a prisoner, viz, *quare quendam Scotum prisonarium suum cepit*, &c. And in the time of King Henry 8, the king himself, upon the winning of Boulogne, bought divers prisoners of his subjects. Ib.

(*t*) 2 Bl. Com. 402. See stat. 5 Geo. 4, c. 113, which amends and consolidates the laws relating to the abolition of the slave trade; and stat. 3 & 4 W. 4, c. 73, by which slavery throughout the British Colonies was abolished.

SECTION II.

Of the Estate of an Executor or Administrator in Chattels Vegetable.

What growing things shall go to the heir:

Personal effects of a vegetable nature are the fruit or other parts of a plant or tree, when severed from the body of it, or the old plant or tree itself, when severed from the ground. (*u*) But unless they have been severed, trees, and the fruit and produce of them, from their intimate connection with the soil, follow the nature of their principal, and therefore, when the owner of the land dies, they descend to his heir, and do not pass to his executor or administrator. (*x*) Hence, apples, pears, and other fruits, if hanging on the trees at the time of the death of the ancestor, shall go to his heir, and not to his executor or administrator. (*y*) So it is of hedges, bushes, &c.; for all these are the natural or permanent profit of the earth, and are reputed parcel of the ground whereon they grow.

trees and fruit not severed:

certain cases where growing trees go to the executor, &c.:

Some cases, however, exist, where even growing timber trees are, owing to special circumstances, considered as chattels, and as such will pass to the executor or administrator. Thus, if tenant in fee simple grants away the trees they are absolutely passed from the grantor and his heirs, and vested in the grantee; and if the latter should die before they are felled, they will go to his executor or administrator; for in consideration of law they are divided as * chattels from the freehold. (*z*) So where tenant in fee simple sells the land and reserves the trees from the sale, the trees are in property divided from the land, although, in fact, they remain annexed to it, and will pass to the executors or administrators of the vendor. (*a*) But if the person so entitled to the trees distinct from

(*u*) 2 Bl. Com. 389.

(*x*) Com. Dig. Biens, H.; Liford's case, 11 Co. 48 *a*; Swinb. pt. 7, s. 10, pl. 8.

(*y*) Swinb. pt. 7, s. 10, pl. 8; Wentw. Off. Ex. 146, 147, 14th ed.; Rodwell *v.* Phillips, 9 M. & W. 501; [Mitchell *v.* Billingsley, 17 Ala. 391; Price *v.* Brayton, 19 Iowa, 309; Maples *v.* Milton, 31 Conn. 598.]

(*z*) Stukeley *v.* Butler, Hob. 173; Wentw. Off. Ex. 148, 14th ed.; Com. Dig. Biens, H.; [Warren *v.* Leland, 2 Barb. 613; 1 Sugden V. & P. (8th Am. ed.) 126, note (*n*).]

(*a*) Herlakenden's case, 4 Co. 63 *b*; Wentw. *ubi supra*.

the land, afterwards purchases the inheritance, the trees will be reunited to the freehold in property, as they are *de facto*, and descend to the heir. (*b*) Yet if the tenant in fee simple lease the land for years, excepting the trees, and afterwards grants the trees to the lessee, they are not by this means reannexed to the inheritance, but the lessee has an absolute property in them, which will go to his executors or administrators. (*c*)

So if tenant in tail sells the trees to another, they are a chattel in the vendee, and his executors or administrators shall have them; and in such case also, *fictione juris*, they are severed from the land; but if the tenant in tail dies *before actual severance*, as to the issue in tail, they are part of his inheritance, and shall go with it, and the vendee or his executor cannot take them. (*d*) The law, it may be presumed, is the same with respect to the vendee of a tenant in tail after possibility of issue extinct, or a tenant for life without impeachment of waste. (*e*) And it seems that equity would not afford relief. (*f*)

when trees, &c. that are severed go to the executor.

With respect to the property in trees and bushes when severed, there seems to be a material difference between such trees as, by the general law of the land, or by the custom of the country where they grow, are timber, and * such as are not. For if tenant in dower, or by the curtesy, or tenant for life or years, unless he be so without impeachment of waste, cuts down timber trees, or a stranger does so, or the wind blows them down, the trees so severed shall not go to the tenant, or to his executor, but to the owner of the first estate of inheritance in the land. (*g*) On the other hand, if such a tenant cuts down hedges or trees, not timber, or they are severed

(*b*) 4 Co. 63 *b*; Anon. Owen, 49.

(*c*) 4 Co. 63 *b*.

(*d*) Liford's case, 11 Co. 50 *a*; for, it was said, timber trees cannot be felled with a goose quill.

(*e*) Pyne *v.* Dor, 1 T. R. 55; Bishop of London *v.* Webb, 1 P. Wms. 528.

(*f*) See Treat. on Equity, bk. 1, c. 4, s. 19, that no act of tenant in tail shall be carried into execution in a court of equity, any further than at law; for this would be to repeal the statute *de donis*.

(*g*) Herlakenden's case, 4 Co. 63 *a*; [Brackett *v.* Goddard, 54 Maine, 309; Kittredge *v.* Woods, 3 N. H. 503; Cook *v.* Whitney, 16 Ill. 481;] Bewick *v.* Whitfield, 3 P. Wms. 268; in which case Lord Chancellor Talbot said that this was so decreed upon the occasion of the great windfall of timber on the Cavendish estate. So if tenant for life without impeachment of waste commits equitable waste by cutting ornamental timber. Lushington *v.* Boldero, 15 Beav. 1; Ormonde *v.* Kyndersley, Ib. 10. But a tenant for life, though subject to impeachment for waste, is entitled to the interest of money produced by the sale of timber trees cut by order of the court of chancery, on account of their being in a de-

by the act of God, the tenant shall have them; (*h*) and, consequently, his executor or administrator. So if trees are blown down, which are in their nature timber, but are dotards without any timber in them, (*i*) or if such are wrongfully severed by the lessor, they belong to the tenant, and will pass to his executors. (*k*)

There are, however, certain vegetable products of the earth, which, although they are annexed to and growing upon the land at the time of the occupier's death, yet, as between the executor or administrator of the person seised of the inheritance, and the heir, in some cases, and between the executor or administrator of the tenant for life, and the remainder-man or reversioner, in others, are considered by the law as chattels, (*l*) and will pass as such. (*l*[1]) These are usually called emblements. Emblements:

* The vegetable chattels so named, are the corn and other growth of the earth, which are produced annually, not spontaneously, but by labor and industry, and thence are called *fructus industriales*. When the occupier of the land, whether he be the owner of the inheritance or of an estate determining with his own life, has sown or planted the soil with the intention of raising a crop of such a nature and dies before harvest time, the law gives to his executors or administrators the profits of the crop, *emblavence de bled*, or emblements, to compensate for the labor and

caying state, by reason of standing too thickly. Tooker *v.* Annesley, 5 Sim. 235; Consett *v.* Bell, 1 Y. & Coll. C. C. 569.

(*h*) Com. Dig. Biens, H.; Berryman *v.* Peacock, 9 Bing. 384; S. C. 2 M. & Scott, 524.

(*i*) Herlakenden's case, 4 Co. 63 *a*, *b*; Countess of Cumberland's case, Moore, 812.

(*k*) Channon *v.* Patch, 5 B. & C. 897; S. C. 8 D. & R. 651.

(*l*) They are in fact, not only in this respect, but in most others, looked upon as chattels; for the rule seems now to be established, that all those vegetables which go to the executor and not to the heir, are for most purposes considered mere chattels. They may consequently be seized and sold under a *fieri facias*; and the sale of them while growing is not a contract, or sale of any lands, tenements, or hereditaments, *or any interest in or concerning them*, within the 4th section of the statute of frauds; but a sale of goods, wares, and merchandise, within the 17th section. See the judgments of Bayley and Littledale JJ. in Evans *v.* Roberts, 5 B. & C. 829; and of Hullock B. in Scorell *v.* Boxall, 1 Y. & Jerv. 398. See, also, Jones *v.* Flint, 10 Ad. & El. 753; S. C. 2 Per. & Dav. 594.

(*l*[1]) [A devise of land, without more, includes a crop growing thereon at the death of the testator. Pratte *v.* Coffman, 27 Missou. 424; Budd *v.* Hiler, 27 N. J. (Law) 43; Grubb's Appeal, 4 Yeates, 23; Carnagy *v.* Woodcock, 2 Munf. 234; Fetrow *v.* Fetrow, 50 Penn. St. 253; Tayloe *v.* Bond, 1 Busb. (N. Car.) Eq. 5.]

expense of tilling, manuring, and sowing the land. (*m*) The rule is established as well for the encouragement of husbandry and the public benefit, (*n*) as on the consideration, in the case of tenant for life, that the estate is determined by act of God, and that the maxim of law is, *actus Dei nemini facit injuriam.* (*o*)

to what produce the doctrine of emblements extends:

The doctrine of emblements extends not only to corn and grain of all kinds, but to everything of an artificial and annual profit, that is produced by labor and manurance. (*p*)

corn, hemp, flax, saffron, &c.

As hemp, flax, saffron, and the like; (*q*)

melons; hops; potatoes:

and melons of all kinds; (*r*) and hops also, although they spring from old * roots, because they are annually manured, and require cultivation; (*s*) and so of potatoes. (*t*)

But the rule does not apply (as it has already ap-

(*m*) Swinb. pt. 7, s. 10, pl. 8; [Penhallow *v.* Dwight, 7 Mass. 34; Wadsworth *v.* Allcott, 6 N. Y. 64; Waring *v.* Purcell, 1 Hill Ch. 193; Gwin *v.* Hicks, 1 Bay (S. Car.), 503; Laurin *v.* McColl, 3 Strobh. 21; Singleton *v.* Singleton, 5 Dana, 92; Thornton *v.* Burch, 20 Geo. 791; Evans *v.* Inglehart, 6 Gill & J. 173. In Ohio, crops in the ground belong to the administrator, if the intestate die after the first of March and they are gathered before the first of December. All other crops go to the heir. Green *v.* Cutright, Wright (Ohio), 738. See Thompson *v.* Thompson, 6 Munf. 514. The statute of New York declares that "the crops growing on the land of the deceased at the time of his death," and every kind of produce raised annually by labor and cultivation, except grass growing and fruit not gathered, shall be regarded as assets, and of course go to the executor or administrator. 2 R. S. 83, § 6, subds. 5 and 6. Substantially, this is merely declaratory of the common law. See Bank of Lansingburg *v.* Crary, 1 Barb. 544; Kain *v.* Fisher, 6 N. Y. 597. A purchaser of land, at a sale for the payment of debts, in New York, takes the growing crops, although sown by a tenant of the heir or devisee. Jewett *v.* Keenholts, 16 Barb. 193.]

(*n*) 2 Bl. Com. 122.

(*o*) By Lord Hardwicke, in Lawton *v.* Lawton, 3 Atk. 16.

(*p*) Co. Lit. 55 *b*.

(*q*) Ib.; Wentw. Off. Ex. 147, 14th ed.

(*r*) Wentw. Off. Ex. 153, 14th ed. The author of that book expresses his opinion, that artichokes go to the heir, as they have not that yearly setting or manurance as should sever them in interest from the soil. Ib. *sed quære.*

(*s*) Co. Lit. 55 *b*, note (1) from Hal. MSS.; Latham *v.* Atwood, Cro. Car. 515; Wentw. Off. Ex. 147, 14th ed.; Gilb. Ev. 216; Anon. 2 Freem. 210; Fisher *v.* Forbes, 9 Vin. Abr. 373, tit. Emblements, pl. 82. These authorities, however, do not prove that the person who *planted* the young hops, or his personal representatives, will be entitled to the first crop, whenever produced. 5 B. & Ad. 120; *post*, 712. As to teazles, see Kingsbury *v.* Collins, 4 Bing. 202; 5 B. & Ad. 120.

(*t*) Evans *v.* Roberts, 5 B. & C. 832, by Bayley J. It is said in Godolphin, pt. 2, c. 14, s. 1, that things under ground, whether in gardens or elsewhere, as carrots, parsnips, turnips, or skerrets, shall go to the heir; and the same is said in Wentw. Off. Ex. 152, 14th ed., on the principle that the executors could not reach them without digging and breaking the soil. But Lord Coke says that if the tenant plant *roots*, his executors shall have that year's crop; Co. Lit. 55 *b*; and probably at this day it would be so holden. See 2 Bl. Com. 123.

peared) to fruit growing on trees; (*u*) nor to the plantation of trees; for the general rule is, *quidquid plantatur solo, solo cedit;* and when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to himself in future, and to future successions of tenants. (*x*) Therefore, if a man sow the land with acorns, or plant young fruit trees, or oak, elm, ash, or other trees, these cannot be comprehended under emblements. (*y*) The case of trees, shrubs, and other produce of their grounds planted by gardeners and nursery-men, with an express view to sale, may be mentioned as an exception; for they are removable by them or their executors as emblements are. (*z*)

not to fruits growing: or young trees planted: nursery grounds, &c.:

* The growing crop of grass, even if sown from seed, and though ready to be cut for hay, cannot be taken as emblements; because, as it is said, the improvement is not distinguishable from what is natural product, although it may be increased by cultivation. (*a*) It seems, however, that the artificial grasses, such as clover, saint-foin, and the like, by reason of the greater care and labor necessary for their production, are within the rule of emblements. (*b*)

grass: artificial grasses:

But the doctrine of emblements extends to a crop of that spe-

(*n*) *Ante*, 707.

(*x*) Gilb. Ev. 210; 2 Bl. Com. 123.

(*y*) Co. Lit. 55 *b;* Com. Dig. Biens, G. 1.

(*z*) Penton *v.* Robart, 2 East, 90, in Lord Kenyon's judgment; Lee *v.* Risdon, 7 Taunt. 191, in the judgment of Gibbs C. J.; and see the remark of Lawrence J. in 3 East, 44, note (*c*). But where a tenant, not being a nursery-man by trade, makes a nursery for fruit trees, for the purpose of transplanting to the orchards, he has no right to sell them. By Heath J. in Wyndham *v.* Way, 4 Taunt. 316. Lord Ellenborough held at nisi prius, that it was waste for an outgoing tenant of garden ground to plough up strawberry beds in full bearing, although when he came in he paid for them at a valuation. Wetherell *v.* Howells, 1 Campb. 227. And it was held in Empson *v.* Sodon, 4 B. & Ad. 655; S. C. 1 Nev. & M. 720, that a tenant (not a gardener by trade) cannot remove a border of box planted by himself on the demised premises. And in this case Littledale J. denied that the tenant could remove flowers which he had planted.

(*a*) Gilb. Ev. 215, 216; Com. Dig. Biens, G. 1. See, also, Evans *v.* Roberts, 5 B. & C. 832, in the judgment of Bayley J.; and Co. Lit. 56 *a*. [Growing clover and hay are not emblements; they go to the heir or devisee, and not to the executor or administrator. See Evans *v.* Inglehart, 6 Gill & J. 171, 188; Kittredge *v.* Woods, 3 N. H. 503, 504; Parham *v.* Tompson, 2 J. J. Marsh. 159; Kain *v.* Fisher, 6 N. Y. 597; Craddock *v.* Riddlesbarger, 2 Dana, 206.]

(*b*) 4 Burn E. L. 299. No case seems to have occurred where these matters have come in question. The general right seems to have been admitted in Graves *v.* Weld, *ubi supra*.

second year's crops.

cies only which ordinarily repays the labor, by which it is produced, within the year in which that labor is bestowed, though the crop may in extraordinary seasons be delayed beyond that period. (*c*) In Graves *v.* Weld, (*d*) the tenant for a term determinable upon a life sowed the land in spring, first with barley and soon after with clover. The life expired in the following summer. In the autumn the tenant mowed the barley, together with a little of the clover plant which had sprung up. The clover so taken made the barley-straw more valuable, by being mixed with it; but the increase of the value did not compensate for the expense of cultivating the clover, and a farmer would not be repaid such expense in the autumn of the year in which it was sown. The reversioner came into possession in the winter, and took two crops of the same clover, after more * than a year had elapsed from the sowing. It was held that the tenant was not entitled to emblements of either of these two crops; first, because emblements can be claimed only in a crop of a species which ordinarily repays the labor by which it is produced within the year in which that labor is bestowed; and, secondly, because, even if the plaintiff were entitled to one crop of the vegetable growing at the time of the *cesser* of his interest, this had been already taken by him at the time of cutting the barley.

In what cases the executor is entitled to emblements:

as against the heir:

It remains to consider in what cases the executor or administrator is entitled to emblements. Where the deceased was seised in fee simple of the land, his personal representatives are entitled to emblements as against the heir; (*e*) though not as against a dowress. (*f*) So if the deceased was seised in fee tail, his executor or administrator is entitled to the privilege as against the heir in tail. (*g*) But where a man is seised of the soil as joint tenant, and dies, the corn, &c. sown, goes to the survivor, and the moiety shall not go to the executors or administrators of the deceased. (*h*) Yet if a

(*c*) 5 B. & Ad. 118. [See Shofner *v.* Shofner, 5 Sneed, 94; Evans *v.* Inglehart, 6 Gill & J. 171, 190; Penhallow *v.* Dwight, 7 Mass. 34.]

(*d*) 5 B. & Ad. 105; S. C. 2 Nev. & M. 725.

(*e*) Co. Lit. 55 *b*, note (2); Lawton *v.* Lawton, 3 Atk. 16; Com. Dig. Biens, G. 2; Gilb. Ev. 214, 215; [Dennett *v.* Hopkinson, 63 Maine, 350.]

(*f*) See *post*, 717, 718.

(*g*) Com. Dig. Biens, G. 2; Wentw. Off. Ex. 145, 14th ed.

(*h*) Per Popham J. in James *v.* Portman, Owen, 102; Rowney's case, 2 Vern. 323; Com. Dig. Biens, G. 2; for joint

joint tenant agree that his companion shall occupy and sow all the land, who sows and dies before severance, his executors shall have the emblements. (*i*)

It must be observed, however, that if a man seised in fee sows the land and then conveys it away, and dies before severance, the crops will not go to the executor of him who has conveyed away the land, but will pass with the soil as appertaining to it. (*k*)

In like manner, the executor of a tenant in fee does not * enjoy the right to emblements as against a devisee; for if the land itself is devised, the growing crops pass to the devisee, and the executor is excluded. (*l*) And though the devise was made before sowing, and the devisor afterwards sows, and dies before severance, the devisee shall have them, and not the executor. (*m*) So, if the testator, being seised in fee, sows the land, and devises it to A. for life (without any remainders over), and the testator and A. both die before severance, the executors of A. shall have the crop, though A. did not sow. (*n*) This rule is founded upon a presumption that it is the will of the testator, that he who takes the land should take the crops which belong to it; because every man's donation shall be taken most strongly against himself. (*o*)

as against a devisee:

However, this distinction between the heir and devisee, though fully established, is mentioned by Lord Ellenborough, in West *v.* Moore, (*p*) as capricious enough. And the presumption may be rebutted by words in the will, that show an intent that the executor shall have the emblements. (*q*) Thus, where the testator devised certain estates to A. in fee, and to his executors all his money, &c. stock upon his farm, with the implements of husbandry, and all other his personal estate of what nature or kind

tenants are supposed to carry on the cultivation of the soil by a joint stock, and in all joint stock, except merchants', there is a survivorship. Gilb. Ev. 212, 213; but see *ante*, 651.

(*i*) James *v.* Portman, Owen, 102.

(*k*) Gilb. Ev. 214.

(*l*) Spencer's case, Winch. 51; Gilb. Ev. 215; Cooper *v.* Woolfitt, 2 H. & N. 122; [Dennett *v.* Hopkinson, 63 Maine, 350.]

(*m*) Com. Dig. Biens, G. 2.

(*n*) Winch. 51; Co. Lit. 55 *b*, note (2) from Hal. MSS.

(*o*) Gilb. Ev. 214. On the same ground, if a man seised in fee sows copyhold lands, and surrenders them to the use of his wife, and dies before the severance, the wife shall have the corn, and not the executors of the husband; for this is a disposition of the corn, being appurtenant to the land. 1 Roll. Abr. 727, pl. 18; Gilb. Ev. 214.

(*p*) 8 East, 343. See, also, a note of Hargrave to the same effect, Co. Lit. 55 *b*.

(*q*) 8 East, 343, by Lord Ellenborough.

soever, in trust, to pay debts and legacies, &c. it was held that the devise of the *stock upon his farm* carried the standing crops of corn growing there at the time of his death from the devisee of the land to the executors; although there were assets sufficient to * pay all the debts and legacies without that aid. (*r*) So where there is expressly a legatee of the growing crops, or any specific bequest in the will which can apply to emblements, they will vest in the executor, and after his assent, in the specific legatee. (*s*)

The privilege of taking the emblements is by no means confined to the case of the representatives of a person seised of the inheritance, as against the heir; but the rule is general, that every one who has an uncertain estate or interest, if his estate determines by the act of God before severance of the crop, shall have the emblements, or they shall go to his executor or administrator. (*t*) Therefore, the executor or administrator of a tenant for life is entitled to emblements to the exclusion of the remainder-man or reversioner; because in this case the estate of the tenant is determined by act of God. (*u*) So if tenant for years, *si * tamdiu vixerit*, sows, and

Right of executor of tenant for life to emblishments.

(*r*) West *v.* Moore, 8 East, 339; Cox *v.* Godsalve, 6 East, 604, note. See, also, Godolphin, pt. 3, c. 21, s. 13, that by a bequest of "movables," the industrial fruits of the ground will pass. But in Vaisey *v.* Reynolds, 5 Russ. 12, Sir John Leach M. R. held that a gift of "all farming stock" will not pass crops on the ground, as between a particular and residuary legatee; and his honor observed, that in Cox *v.* Godsalve, and West *v.* Moore, the devisee was excluded, rather because the executor was plainly meant to take the whole personal estate, than from the mere force of the words "stock on my farm." See, however, Blake *v.* Gibbs, 5 Russ. 13, *in notis*, where Lord Gifford held that emblements will pass as against a residuary legatee, under the description of *stock* on a farm, of which the testator was tenant for life. See, also, Rudge *v.* Winnall, 12 Beav. 357.

(*s*) Swinb. pt. 7, s. 10, pl. 8, p. 933 *et seq.*, 7th ed.; Cox *v.* Godsalve, 6 East, 604, note to Crosby *v.* Wadsworth.

(*t*) Com. Dig. Biens, G. 2; [Debow *v.* Colfax, 5 Halst. 128; Gee *v.* Gee, 2 Dev. & Bat. Eq. 103; Bevans *v.* Briscoe, 4 Harr. & J. 139.]

(*u*) Co. Lit. 55 *b*. Where the *landlord* is tenant for life, and by his death the estate of his tenant at rack-rent is determined, it is enacted by stat. 14 & 15 Vict. c. 25, s. 1, that instead of claims to emblements, the tenant shall continue to hold till the end of the then current year, and the new owner of the land shall be entitled to a proportion of the rent. Where H. held, as tenant from year to year, of A., tenant for life, a cottage with about an acre of land, which was partly cultivated as a garden, and partly sown with corn and planted with potatoes, and A. died in the middle of a year of H.'s tenancy, and M. thereupon became entitled to the reversion; and at the expiration of the then current year of H.'s tenancy, distrained for the proportion of the rent due since the death of A., it was held that the act applied to all tenancies in respect of which there might be a claim to emblements; that, but for the act, there might

dies before severance, his executor shall have the corn for the uncertainty of the determination of his estate. (*x*)

But there may be a case where the executor of the tenant for life has no right to emblements, on account of the deceased not having been the actual party who sowed the land, and the consequent failure of the reason upon which the right is founded. Thus, if A., seised of land, sows it and then conveys it or devises it to B. for life, remainder to C. for life, and B. dies before the corn is reaped, in this case B.'s executors shall not have the emblements, but they shall go with the land to C. (*y*) And if A. seised in fee, sows land and conveys it to B. for life, remainder to C. for life, and both B. and C. die before severance, the crop shall not go to the executors of either B. or C., but revert to A. (*z*)

*If a disseisor sow the land of tenant for life, and the tenant for life die, the executors of the tenant for life shall have the corn, and not the disseisor, nor he in reversion. (*a*)

Right of executors of clergy to emblements of the glebe.

The executors or administrators of the incumbent of a benefice would probably at common law be entitled to the emblements of the glebe lands; for the deceased had an uncertain interest in the land, which was determined by the act of God. The right, however, is fully established by the statute 28 Hen. 8, c. 11, which provides and enacts, that in case any incumbent happens to die, and before his death hath caused any of his glebe lands to be manured and sown at his own proper costs and charges with any corn grain, that then

have been a substantial claim to emblements here, and that the premises were, therefore, "a farm or lands" within section 1; and it was also held that that section gave a right to distrain for the rent, as well as to recover it by action. Haines *v.* Welch, L. R. 4 C. P. 91.

(*x*) 1 Roll. Abr. Emblements, A. pl. 12, p. 727.

(*y*) Grantham *v.* Hawley, Hob. 135; Anon. Cro. Eliz. 61, recognized, Ib. 464; Spencer's case, Winch. 51; Co. Lit. 55 *b*, note, from Hal. MSS.; 1 Roll. Abr. 727, pl. 21; Gilb. Ev. 214. So if a man sows land and lets it for life, and the lessee for life dies before the corn is severed, his executor shall not have it, but he in reversion. So if tenant for life sows the land, and grants over his estate, and the grantee dies before the corn is severed, *his* executor shall not have it. By Popham and Gawdy JJ. in Knevett *v.* Pool, Cro. Eliz. 464. But if the devise be to B. for life, without remainders over, and B. dies before severance, the executor of B. shall have the corn, though B. did not sow. Winch. 51; Co. Lit. 55 *b*, note (2) from Hal. MSS.; *ante*, 714.

(*z*) Hobart, 132, *in margine;* Gilb. Ev. 215; but see the preceding note. [If the tenant for life dies before the crops are sowed, emblements will go to the remainder-man. Gee *v.* Young, 1 Hayw. 17.]

(*a*) Knevit *v.* Poole, Gouldsb. 146, by Popham and Fenner.

in that case every such incumbent may make his testament of all the profits of the corn growing upon the said glebe so manured and sown. (*b*)

If the successor be inducted before the severance of the emblements from the ground, the successor shall have the tithe thereof; for although the executor represents the person of the testator, yet he cannot represent him as parson, inasmuch as another is inducted. (*c*) Otherwise, if the parson dies after severance from the ground, and before the corn is carried off. (*d*)

Dowress and her executors, when entitled to emblements.

If the husband sows the ground, and dies, and the heir assigns the land sown to his wife for her dower, she shall have the crop, and not the executors of the husband; for she shall be in *de optimâ possessione viri*, above the title of the executor. (*e*) It was with reference to this especial *privilege of a dowress, that at common law she could not, according to the more general opinion, devise corn which she herself had sown, nor did it go to her executors or administrators; (*f*) but now, by the statute of Merton, 20 Hen. 3, c. 2, the representatives of a tenant in dower, like those of any other tenant for life, will be entitled to emblements. (*g*)

Executor of a husband of dowress.

If tenant in dower sows the land, and takes husband, who dies before severance of the corn, the dowress shall have the crops, and not the executor of the husband. But if the husband of a dowress sows the land, and dies before severance, then the executor of the husband shall have them. (*h*)

And, generally, with respect to the executor of a man seised in

(*b*) But a person who resigns his living is not entitled to emblements. Bulwer *v.* Bulwer, 2 B. & Ald. 470. The general rule of law is, that the tenant shall not have emblements when the tenancy is determined by his own act; as where the lessee surrenders, or a woman who is tenant *durante viduitate* marries, or the estate determines by forfeitures, condition broken, &c. Com. Dig. Biens, G. 2; Davis *v.* Eyton, 7 Bing. 154.

(*c*) 1 Roll. Abr. 655; Dismes, K. pl. 3; Wats. C. L. 513, 4th ed.

(*d*) Wats. C. L. 513, 4th ed.; 3 Burn E. L. 415, 8th ed.

(*e*) 2 Inst. 81; Anon. Dyer, 316 *a*.

(*f*) Bract. lib. 2, fol. 96; 2 Inst. 81.

(*g*) See Com. Dig. Biens, G. 2, that the statute was only in affirmance of the common law. See, also, S. P. Perk. s. 522, and Gilb. Ev. 212. If two be tenants in common of land in fee, and one of them takes a wife, and dies, and the wife is endowed, &c. and she and the other tenant in common sow the land, &c. and afterwards she makes her executors, and dies, the corn not being severed, now her executors shall have the corn in common with him who held in common with the tenant in dower. Perk. s. 523.

(*h*) Bro. Abr. tit. Emblements, pl. 26; [Haslett *v.* Glenn, 7 Harr. & J. 17; Hall *v.* Browder, 4 How. (Miss.) 224.]

right of his wife, the rule is, that if he sow and die before severance, his executors shall have the emblements. (*i*) But it seems, that if the land was sown before marriage, the wife shall have them. (*k*) And if husband and wife are joint tenants for life, and the husband sows, and the land survives to the wife, it is also said that she shall have the corn. (*l*)

Executor of a man seised in right of his wife.

Executor of husband when husband and wife are joint tenants.

* The executor or administrator of a jointress, like a tenant in dower, is entitled to emblements of the estate settled in jointure; but she is not entitled to them at her husband's death to the exclusion of her husband's executors, as a dowress is. (*m*)

Right of executor of a jointress to emblements.

Upon the death of a tenant by the curtesy, like any other tenant for life, the emblements of the estate held by the curtesy will go to his executors or administrators. (*n*)

Right of executors of tenant by the curtesy.

A tenancy at will (in the strict sense of the expression) is determined by the death of the lessee, and his executor or administrator will be entitled to emblements. (*o*)

Right of executor of tenant at will to emblements.

When there is a right to emblements, the law gives a free entry, egress, and regress, as much as is necessary, in order to cut and carry them away. (*p*) But the emble-

Entry, egress, and regress to

(*i*) Co. Lit. 55 *b*; Swinb. pt. 3, s. 6, pl. 11, 253, 7th ed.; In Wentw. Off. Ex. p. 148, 14th ed., a case is put of the husband's sowing the land which his wife has for a term of years as executrix of another, and the author gives his opinion that the husband's executor would be entitled to the crop, at least so much as is more than the year's value of the land.

(*k*) 1 Roll. Abr. Emblements, A. pl. 17, p. 727; Gilb. Ev. 213.

(*l*) Co. Lit. 55 *b*, and the note to that passage from the Hal. MSS.; Anon. Cro. Eliz. 61, by Wray C. J.; Wentw. Off. Ex. 148, 14th ed. See, also, Godb. 189, pl. 270, by Coke C. J. But see Dyer, 316 *a*; S. C. *nomine* Arnold *v.* Skeale, Noy, 149; 1 Roll. Abr. 728, pl. 16; Rowney's case, 2 Vern. 322, 323; and Gilb. Ev. 213, *contra*, in which last book it is said that the land is not in such a case cultivated by a joint stock (as in the ordinary case of joint tenancy), but it is wholly the corn of the husband, which property seems not to be entirely lost by committing it to their joint possession, no more than if it had been sown in the land of the wife only. It is said in Brooke, that if baron and feme tenants in tail sow the land, and the baron die before severance, the feme shall have the emblements and not the executor of the baron; *contra*, if the baron had sold or devised them in his life; for then the executor shall have them. Bro. Abr. Emblements, pl. 15. But Brooke adds, *quære, car videtur mihi que l'executor eux avera.*

(*m*) Fisher *v.* Forbes, 9 Vin. Abr. tit. Emblements, pl. 82, p. 373.

(*n*) 1 Roper Husband & Wife, 35, 2d ed.

(*o*) Co. Lit. 55 *b*.

(*p*) Co. Lit. 56 *a*. See Hayling *v.* Okey, 8 Ex. 531, 545.

take the emblements.

ments do not give a title to exclusive occupation; and it is doubted in Plowden's Queries, (*q*) whether the executors of a lessee for life shall not pay rent for the land till the corn is ripe; though, perhaps, says that author, the executors of tenant in fee simple shall have the corn without paying for it.

*SECTION III.

Of the Estate of an Executor or Administrator in Chattels Personal Inanimate.

As to chattels personal inanimate. These are evident, viz, all household stuff, implements, and utensils, money, plate, jewels, corn, pulse, hay, wood felled and severed from the ground, wares, merchandise, carts, ploughs, coaches, saddles, and such like movable things. (*r*) All these pass to the executor and administrator; and although any one of them should be specifically bequeathed to a legatee, it will not vest in him till the executor has assented.

What chattels personal inanimate do not pass to the executor.

It is necessary to attend to three instances in which the right of the executor or administrator to the chattels personal inanimate of the deceased is barred, to some extent, in favor of certain special claimants: 1. Heir-looms, and things in the nature thereof, in respect of the heir or successor. 2. Fixtures, in respect of the heir or devisee, or in respect of the remainder-man or reversioner. 3. Paraphernalia and the like, in respect of the widow.

1. *Heir-looms and Things in the Nature thereof.*

1. Heir-looms:

It is proposed to consider, I. Heir-looms and things of the same nature, from which the executor or administrator is excluded in favor of the heir or successor. Heir-looms are such goods and personal chattels as shall go *by special custom* to the heir along with the inheritance, and not to the executor or administrator of the last proprietor. The termination "loom" is of Saxon origin, in which language it signifies a limb or member; so that heir-loom is nothing else but a limb or member of the

(*q*) 239th query.

(*r*) Wentw. Off. Ex. 141, 142, 14th ed.

inheritance. (*s*) An heir-loom *is also called "principalium," a chief or principal, and "hæreditarium." (*t*)

Brooke says (*u*) that heir-looms are those things which have continually gone with the capital messuage, by *custom*, which is the best thing of every sort, as of beds, tables, pots, pans, and such like of dead chattels movable. And Lord Coke says (*x*) that heir-looms are due by *custom*, and not by the common law, and that the heir may have an action for them at common law, and shall not sue for them in the ecclesiastical court. Also in Spelman's Glossary, (*y*) an heir-loom is defined to be "omne utensile robustius quod ab ædibus non facile revellitur, ideoque ex *more quorundam locorum* ad hæredem transit tanquam membrum hæreditatis." And in Les Termes de la Ley (*z*) (a book of great antiquity and accuracy), (*a*) an heir-loom is described to be "any piece of household stuff (ascun parcel des utensils d'un mease), which, *by the custom* of some countries, having belonged to a house for certain descents, goes with the house (after the death of the owner) unto the heir and not to the executors." Hence, it seems to follow that an heir-loom, in the strict sense of the word, can only go to the heir by force of a custom, and that in its nature it is a chattel distinct from the freehold. Yet Blackstone (*b*) says, that heir-looms are "generally such things as cannot be taken away without damaging or dismembering the freehold;" and Lord Holt is reported to have said at nisi prius, that goods in gross cannot be an heir-loom, but they must be things fixed to the freehold, as old tables, benches, &c.; (*c*) which proposition *is not only adverse to the authorities above cited, with regard to an heir-loom being a detached chattel, but is also liable to the objection that the heir would not then take it by custom, but as a thing annexed to the freehold at common law. Moreover, in the report of Lord Petre *v.* Heneage, by Lord

what they are strictly:

must go to the heir by custom:

(*s*) 2 Bl. Com. 457. But in Byng *v.* Byng, 10 H. L. Cas. 183, Lord Cranworth, on the authority of Johnson and Webster, said he believed the more correct explanation of the word is, that it is an old Anglo-Saxon word, signifying goods or chattels. According to either derivation, it must mean something which, though not by its own nature heritable, is to have a heritable character impressed on it; an interpretation hardly to be reconciled with an absolute gift to several persons as joint tenants. 10 H. L. Cas. 183.

(*t*) Bro. Discent. pl. 43; Co. Lit. 18 *b*.

(*u*) Discent. pl. 43.

(*x*) Co. Lit. 18 *b*.

(*y*) *Voce*, Heir-loom.

(*z*) See Treat. on Fixtures, 162.

(*a*) 5 B. & C. 229.

(*b*) 2 Com. 427.

(*c*) Lord Petre *v.* Heneage, 12 Mod. 520.

Raymond, (*d*) Lord Holt merely says, "a jewel cannot be an heir-loom, but only things ponderous, as carts, tables, &c." (*e*) which agrees with the above definition by Spelman, "omne utensile *robustius*."

semble, must be of a ponderous nature.

The custom which entitles the heir must be strictly proved. (*f*)

Crown jewels.

The ancient jewels of the crown are heir-looms, and shall descend to the next successor. (*g*)

Heir-looms are not devisable:

If a man, says Lord Coke, (*h*) be seised of a house, and possessed of divers heir-looms that, by custom, have gone with the house from heir to heir, and by his will deviseth away the heir-looms, this devise is void; for Littleton says, "the will takes effect after his death, and by his death the heir-looms, by ancient custom, are vested in the heir, and the law prefers the custom before the devise." And Lord Coke, in another place, observes, that the ancient jewels of the crown, being heir-looms, are not devisable by testament. (*i*) So Lord Macclesfield, in Tipping *v.* Tipping, (*k*) said, "I take it, *bona paraphernalia* are not devisable by the husband from the wife, any more than heir-looms from the heir." (*l*) Yet, during his life, the owner may sell or dispose of them, as he may of the timber of the estate. (*m*)

but are alienable by the ancestor in his lifetime.

* Besides heir-looms, properly so called, there are other instances of inanimate personal chattels, which the law gives to the heir, as part of his inheritance, and which may be considered as chattels in *the nature* of heir-looms. Thus, monuments, coat-armor, the sword, pennons, and other ensigns of honor, set up in memory of the deceased, shall go to the heir of the deceased, as heir-looms in the manner of an inheritance; (*n*) and it matters not that they are annexed to the freehold, albeit that is in the

Chattels in the nature of heir-looms:

monuments, coat-armor, &c. &c. set up in honor of deceased:

(*d*) Vol. i. p. 728.

(*e*) And Blackstone, in an earlier part of his Commentaries, vol. ii. p. 17, says, "an heir-loom or implement of furniture, which by custom descends to the heir together with a house, is neither land nor tenement, but a mere movable."

(*f*) 2 Bl. Com. 428.

(*g*) Co. Lit. 18 *b*.

(*h*) Co. Lit. 185 *b*.

(*i*) Co. Lit. 18 *b*.

(*k*) 1 P. Wms. 730.

(*l*) See, also, to the same effect, 2 Bl. Com. 429; Com. Dig. Biens, B.

(*m*) 2 Bl. Com. 429. So the king may dispose of the ancient crown jewels by patent. Lord Hastings *v.* Sir Archibald Douglas, Cro. Car. 344, by Berkeley and Jones.

(*n*) Corven's case, 12 Co. 105; Co. Lit. 18 *b*; Frances *v.* Ley, Cro. Jac. 367; May *v.* Gilbert, 2 Bulstr. 151; 2 Bl. Com. 429; Co. Lit. 18 *b*. See Stubs *v.* Stubs, 1 H. & C. 257, as to the heir's right

parson. (*o*) But the property of the shroud and coffin remains in the executors or other person who was at the charge of the funeral; and it may be laid to be theirs, in an indictment for stealing them. (*p*) coffin and shroud:

So, though a testator devise all his jewels, &c. to his wife, yet his garter and collar of S. S. shall go to his heir, in the way of heir-looms. (*q*) So where land is held by the tenure of cornage, an ancient horn may go along with the inheritance, as an heir-loom. (*r*) collar of S. S. and garter: ancient horn:

In the case of Upton *v.* Lord Ferrers, (*s*) a question was raised, whether the executor, or the heir-at-law of a peer of parliament having succeeded to the peerage, was entitled to the Journals of the house of lords, which are delivered to peers. The master of the rolls (Sir R. P. Arden) did not determine the point; but intimated an opinion that the heir-at-law was entitled, observing, that a bishop gives a receipt * for the journals of his see; and upon the death of a peer, the subsequent volumes only are delivered to the next lord. Journals of the house of lords:

Charters or deeds relating to the inheritance, are considered so much to savor of the realty, that the law for some purposes does not account them to be chattels (*t*) but provides that they shall follow the land to which they relate, and shall vest in the heir, as incident to the estate, to the exclusion of the executor or administrator. (*u*) So far has the doctrine of charters and other written assurances concerning the realty not being chattels been carried, that larceny could not have been committed of them at common law, the taking of them being considered (as of other things which were part of the freehold) merely as a trespass and charters and deeds belonging to the inheritance, go to the heir, and not to the executor:

to a grant of arms from the Herald's College.

(*o*) Co. Lit. 18 *b*; 1 Gibs. Cod. 544; 2 Bl. Com. 429.

(*p*) 2 Russell on Crimes, 163. If the executor lays a gravestone on the testator in the church, and sets up coat-armor, and the vicar or parson removes them or carries them away, an action on the case lies for either the executor or the heir. Godb. 200, by Coke; *i. e.* (*semble*) if they were originally set up with a faculty. Seager *v.* Bowle, 1 Add. 541; and see Spooner *v.* Brewster, 3 Bing. 136.

(*q*) Earl of Northumberland's case, Owen, 124.

(*r*) Pusey *v.* Pusey, 1 Vern. 273.

(*s*) 5 Ves. 801.

(*t*) By a grant of *omnia bona et catalla*, charters concerning the land shall not pass. Perk. s. 115; Touchst. 97, 98.

(*u*) Godolph. pt. 2, c. 14, s. 1; Wentw. Off. Ex. 153, 14th ed.; Lit. 6 *a*, where Lord Coke calls them the *sinews* of the land.

not a felony. (*x*) The very box or chest which has usually been employed for keeping them partakes of their nature, and goes to the heir, and not to the executor; (*y*) and of that also, at common law, no larceny could have been committed. (*z*) Some writers have taken a difference, that the executors shall have the chest unless it be shut or sealed. (*a*) But the weight of authorities seems against any such distinction, and in favor of the heir's general right. (*b*)

so of the box in which the deeds are kept:

But this rule applies to those deeds and writings only which relate to the freehold and inheritance; for such as regard terms for years, goods, chattels, or debts, belong to the executor or administrator. (*c*)

* Personal property may also be devised or limited in strict settlement to one for life, with remainder to sons and daughters in tail, so as to be transmissible like heir-looms. (*d*) Thus a testator may devise or limit in strict settlement and estate and capital mansion, together with personal property, as the plate, pictures, library, furniture, &c. therein, such plate, &c. to be enjoyed, together with the house and estate, unalienable by the devisees in succession, so far as the law will allow. But the chattels, whether trustees be interposed or not, will be the absolute property of the first person seised in tail, and on his death devolve on his executors or administrators; and be conformable to all the other rules concerning executory devises, so that the property cannot be rendered unalienable longer than lives in being and twenty-one years afterwards. (*e*)

chattels settled or devised as heir-looms:

If the chattels, therefore, which are intended to go as heir-looms, are merely subject to the same limitations as the real estate limited in strict settlement, they will vest absolutely in the first tenant in tail, though he should die within an hour after his birth,

(*x*) 2 Russell on Crimes, 141. But this defect of the common law has been remedied by stat. 7 & 8 Geo. 4, c. 29, s. 23.

(*y*) Godolph. pt. 2, c. 14, s. 1; Wentw. Off. Ex. 156, 14th ed.; Com. Dig. Biens, B.

(*z*) 2 Russell on Crimes, 142.

(*a*) Swinb. pt. 6, s. 7, pl. 5; Touchst. 470; 1 Roll. Abr. 915, tit. Exors. U. pl. 7.

(*b*) Godolph. pt. 2, c. 14, s. 1; Wentw. Off. Ex. 156; Law Test. 381.

(*c*) Wentw. Off. Ex. 153, 14th ed.; Bac. Abr. tit. Exors. H. 3. If the writings of an estate are pawned or pledged for money, they are considered as chattels in the hands of the creditor, and in case of his decease, they will go to his personal representatives as the party entitled to the benefit accruing from the loan. Touchst. 469.

(*d*) Co. Lit. 18 *b*, note (109), by Hargrave.

(*e*) Ib.; Carr *v.* Lord Errol, 14 Ves. 478.

and will go to his personal representative. Hence, as the real estate in that event passes over to the next remainder-man, a separation between the two properties ensues. It has been a subject of much discussion whether this will be obviated by a mere direction that the chattels shall go together with the land, "for so long a time as the rules of law and equity will permit." But the point, it should seem, must now be considered as settled, that this must be treated as a direct and not as an executory gift, and that, consequently, the absolute interest in the chattels will nevertheless vest in the first tenant in tail. (*f*) And accordingly in the case of Rowland *v.* Morgan, (*g*) * it was ruled by Sir James Wigram V. C. and afterwards Lord Cottenham C. on appeal, that a direction annexed to a bequest of chattels, that they shall go as heir-looms, although accompanied by a direction to the executors to make an inventory of them, does not render such bequest executory, or give to a court of equity any power to modify the legal effect of the bequest. In order, therefore, to prevent the separation, it is usual, after subjecting the chattels to the same limitations as the freehold which they are to accompany as heir-looms, to add a declaration, that they shall not vest absolutely in the tenant in tail by purchase until twenty-one, or death under that age, leaving issue inheritable under the entail. (*h*)

Executors ought not

Lord Eldon, in Clarke *v.* Lord Ormonde, (*i*) said that heir-looms are a kind of property that are rather favorites of the court; and that, although no testator can in any

(*f*) Foley *v.* Burnell, 1 Bro. C. C. 274; Vaughan *v.* Burslem, 3 Bro. C. C. 101; Duke of Newcastle *v.* Lincoln, 12 Ves. 218 (overruling Lord Hardwicke's decisions in Gower *v.* Grosvenor, Barn. Ch. Ca. 54; S. C. 5 Madd. 337, and in Trafford *v.* Trafford, 3 Atk. 347). See, further, Lord Scarsdale *v.* Curzon, 1 John. & H. 40; Doncaster *v.* Doncaster, 3 Kay & J. 26; Hogg *v.* Jones, 32 Beav. 45; Holmesdale *v.* West, L. R. 3 Eq. Ca. 474; Christie *v.* Gosling, L. R. 1 H. L. 279; Harrington *v.* Harrington, L. R. 3 Ch. App. 564; Holloway *v.* Webber, L. R. 6 Eq. Ca. 523; Shelley *v.* Shelley, L. R. 6 Eq. Ca. 540. In this case it was held by Wood V. C. that the objection, if any, to limiting personal estate as heir-looms, where there is no real estate to guide the limitations, does not apply to the case of family jewels.

(*g*) 6 Hare, 463; 2 Phill. Ch. Ca. 764. See, also, Holmesdale *v.* West, L. R. 3 Eq. Ca. 474.

(*h*) See Pow. Dev. by Jarman, vol. i. 716, 730, 732; vol. ii. 642; 2 Jarman on Wills, 548, 3d ed.; Boydell *v.* Golightly, 14 Sim. 346, per Shadwell V. C. See, also, Potts *v.* Potts, 1 H. L. Cas. 671, for an example of a limitation of chattels under which they do not vest in the tenant in tail on his birth. See, further, the observations of Wood V. C. on this case in his judgment in Lord Scarsdale *v.* Curzon (*ubi supra*), where all the previous cases are fully and most ably reviewed.

(*i*) 1 Jacob, 114, 115.

to apply them unnecessarily to the payment of debts.

way exempt any part of his personal estate from applicability to the payment of his debts, nor can he put into the hands of his executors the means of defending themselves at law; yet where a testator makes a will providing that certain * portions of his effects shall be treated as heir-looms, it is the duty of the executors, as far as possible, to preserve those parts of his property, and unless compelled they ought not to apply them to the payment of debts. (*k*)

Chattels which go to the successor of a corporation sole in the manner of heir-looms.

In the case of a corporation sole, as a bishop or parson, the general rule is, that chattels cannot go in succession; and there has already been occasion to point out a strong instance of this doctrine, viz, that though a lease for years be made to a bishop and *his successors*, yet it will go to his executors. (*l*) But there are some exceptions not only in cases of choses in action, which will hereafter be examined, but in cases of chattels personal, which shall go to the successor of a corporation sole in the manner of heir-looms. Thus it has been held that the ornaments of the chapel of a preceding bishop belong to the succeeding bishop, and are merely in succession. (*m*) So if an incumbent enter upon a parsonage-house in which are hangings, grates, iron backs to chimneys, and such like, not put up there by the last incumbent, but which have gone from successor to successor, the executor of the last incumbent shall not have them, but they shall continue in the nature of heir-looms; but if the last incumbent fixed them there only for his own convenience, it seems they shall be deemed as furniture, or household goods, and shall go to his executor. (*n*)

2. *Fixtures.*

Fixtures.

II. Fixtures, from which the executor or administrator is excluded in respect of the heir or devisee, or in respect of the remainder-man or reversioner. When personal inanimate chattels are affixed to the freehold, they are usually denominated fixtures; (*o*) and the questions concerning them, * which

(*k*) 1 Jacob, 108.

(*l*) *Ante*, 675.

(*m*) Corven's case, 12 Co. 105, 106.

(*n*) 4 Burn E. L. 304, 8th ed.

(*o*) The word "fixture" is here used to convey the idea simply of annexation to the freehold; which sense of the term is the most easy of adaptation to the present treatise. For general purposes, the definition given in the work of Messrs. Amos & Ferard is certainly the most convenient and scientific, viz, "fixtures are those

form the present subject of inquiry, have arisen in the nature of exception to the general rule of law with regard to chattels in their condition, viz, *quicquid plantatur solo, solo cedit*, *i. e.* whatever is affixed to the realty is thereby made parcel of it, and partakes of all its incidents and properties. (*p*)

General rule *quicquid plantatur solo, solo cedit.*

personal chattels which have been annexed to land and which may be afterwards severed and removed by the party who has annexed them against the will of the owner of the freehold." Treatise on the Law of Fixtures, p. 2. See, also, the judgments of Parke B. and Martin B. in Elliott *v.* Bishop, 10 Ex. 507, 518, and of Coleridge J. 11 Ex. 119; [State *v.* Bonhan, 18 Ind. 231; Pickerell *v.* Carson, 8 Iowa, 544; Prescott *v.* Wells, 3 Nev. 82; Teaff *v.* Hewitt, 1 Ohio St. 511.] The general question of the origin and extent of the doctrine of "fixtures" was fully discussed in the late case of Bishop *v.* Elliott, 10 Ex. 496; S. C. in Cam. Scacc. 11 Ex. 119. On a declaration in trover for goods, chattels, and fixtures (enumerating, among other merely movable articles, stoves, shelves, closets, cupboards, &c.), it was held, after verdict (general damages having been assessed on the whole declaration), that the word "fixtures" would not necessarily be taken to mean things affixed to the freehold, and therefore the judgment ought not to be arrested. Sheen *v.* Rickie, 5 M. & W. 175; [1 Chitty Contr. (11th Am. ed.) 489, 491, and note (*f*); 1 Sugden V. & P. (8th Am. ed.) 33, note (*x*) and cases cited; Ex parte Barclay, 5 De G., M. & G. 403; Haley *v.* Hammersley, 3 De G., F. & J. 587; Fifield *v.* Maine Central Railroad Co. 62 Maine, 77; Pierce *v.* George, 108 Mass. 78; Alvord Carriage Manuf. Co. *v.* Gleason, 36 Conn. 86.]

(*p*) See the judgment of Lord Hardwicke C. in Dudley *v.* Warde, Ambl. 113, and of Lord Ellenborough, in Elwes *v.* Maw, 3 East, 51; [English *v.* Foote, 8 Sm. & M. 444.] This rule is always open to variation by agreement of parties. Wood *v.* Hewett, 8 Q. B. 913. [See Bigelow J. in Wall *v.* Hinds, 4 Gray, 273; Brearley *v.* Cox, 4 Zabr. (N. J.) 287. *Primâ facie* all buildings, and especially dwelling-houses, belong to the owner of the land on which they stand, as part of the realty. It is only by virtue of some agreement with the owner of the land that buildings can be held by another party as personal property, with a right of removal. If erected wrongfully or voluntarily, without such agreement, they become the property of the owner of the soil. If built by a husband upon land of his wife, they become realty, because he could make no agreement with his wife, and therefore the law cannot imply an agreement for separate ownership. Wells J. in Howard *v.* Fessenden, 14 Allen, 128; Wells *v.* Bannister, 4 Mass. 514; Washburn *v.* Sproat, 16 Mass. 449; Pullen *v.* Bell, 40 Maine, 314; 1 Chitty Contr. (11th Am. ed.) 500, note (*p*); Kelly *v.* Austin, 46 Ill. 156; Gibbs *v.* Estey, 15 Gray, 587; Stillman *v.* Hamer, 7 How. Miss. 421; Fisher *v.* Saffer, 1 E. D. Smith, 611; Reid *v.* Kirk, 12 Rich. (S. Car.) 54; Dame *v.* Dame, 38 N. H. 429; White's Appeal, 10 Penn. St. 252; Preston *v.* Briggs, 16 Vt. 124; Van Ness *v.* Pacard, 2 Peters, 137; Bolling *v.* Whittle, 1 Ala. Sel. Cas. 268. But an agreement giving a right to remove a dwelling-house which is put upon the land of others may be implied from the circumstances. Howard *v.* Fessenden, 14 Allen, 124; Wilgus *v.* Gettings, 21 Iowa, 177; Brown *v.* Lillie, 6 Nev. 244; Fuller *v.* Taylor, 39 Maine, 519; O'Donnell *v.* Hitchcock, 118 Mass. 401. As a general proposition, however, as between heir and executor, vendor and vendee, and mortgagor and mortgagee, all buildings which enhance the value of the estate, and are designed to be occupied by the owner

What is an annexation of a chattel to the freehold:

It will perhaps be convenient to consider in the first place, what is such an annexation to the freehold as will bring a chattel within the general rule; and then to proceed to inquire, in what cases the rule is relaxed with respect to an executor or administrator. In order to constitute such an annexation it is necessary that the article should be let into or united to the land, or to substances previously connected therewith. It is not enough that it has been laid upon the land, and brought into contact with it. The rule requires something more than mere juxta-position; as, that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented, or otherwise fastened to some fabric previously attached to the ground. (*q*) As an illustration may be mentioned the case of Culling **v.* Tuffnall (*r*) before Treby C. J. at nisi prius, where it was holden that the tenant, who had erected a barn upon the premises, and put it upon pattens and blocks of timber lying upon the ground, but had not *fixed it in or to the groun* , might take it away at the end of his term. (*s*) On the other hand, where the tenant had erected a veranda, the lower part of which was attached to posts which were fixed in the ground, Abbot J. held that the tenant could not remove any part of it. (*t*)

thereof, agreeably to the principles of the common law, become a part of the realty, and pass with it by deed or descent. Leland *v.* Gassett, 17 Vt. 403; Schemmer *v.* North, 32 Misson. 206.]

(*q*) Treatise on Fixtures, p. 2; Wilde *v.* Waters, 16 C. B. 637; [1 Chitty Contr. (11th Am. ed.) 490; Bigelow J. in Wall *v.* Hinds, 4 Gray, 271. But actual attachment or fastening to the land is not necessary to make a chattel a fixture. Snedeker *v.* Warring, 12 N. Y. 170; Bainway *v.* Cobb, 99 Mass. 457. A cistern which was made of wood, lined with lead, and rested on the floor of the attic; and was filled with water by means of a supply pipe, which passed from the city aqueduct into the cellar of the building, and up through the floors to the cistern, was held to be a fixture. Wall *v.* Hinds, 4 Gray, 256. It is the permanent and settled annexation, and not the manner of fastening, that determines when personal property becomes part of the realty. Laflin *v.* Griffiths, 35 Barb. 58; Cook *v.* Champlain Trans. Co. 1 Denio, 91; Walker *v.* Sherman, 20 Wend. 636; Brennan *v.* Whittaker, 15 Ohio St. 446; Swift *v.* Thompson, 9 Conn. 63; Gale *v.* Ward, 14 Mass. 352.]

(*r*) Bull. N. P. 34.

(*s*) In Buller, it is said to have been holden that he might do so by the custom of the country; but Lord Ellenborough, in adverting to the case (in Elwes *v.* Maw, 3 East, 55), observes that the tenant might have done so without any custom; for the terms of the statement exclude the things from being considered as fixtures.

(*t*) Penry *v.* Brown, 2 Stark. N. P. C. 403. In this case the tenant had covenanted to repair and keep in repair the premises, and all the erections, buildings, and improvements, which might be erected thereon during the terms and yield up the same in good and sufficient repair. [Kinsell *v.* Billings, 35 Iowa, 154, case of a

In the case of R. *v.* Londonthorpe, (*u*) where a tenant had built on part of the land a post windmill constructed upon cross traces, laid upon brick pillars, but not attached or affixed thereto; the court held that the windmill was a mere chattel, and not to be considered as connected with the land. (*x*) And generally, where the buildings are * not let into the soil, but merely rest upon blocks or pattens, they continue mere chattels. (*y*) It is obvious, that in similar cases, where it is a conclusion of fact that the connection with the soil does not amount to an actual annexation, the property continues in every respect a mere chattel, and will pass as such to the executors and administrators. (*y*[1])

Moreover, the object and purpose of the annexation must be regarded. (*y*[2]) For if a chattel be fixed to a building, merely for the more complete enjoyment and use of it *as a chattel*, it still, it should seem, remains a chattel, notwithstanding it is annexed to the freehold; and is never a part of it, any more than a carpet which is attached to the floor by nails for the purpose of keeping it stretched out. And on this principle it was held that cotton

saw-mill, built in a permanent manner and attached to the soil; held part of the realty.]

(*u*) 6 T. R. 377.

(*x*) So in R. *v.* Otley, Suffolk, 1 B. & Ad. 161, a pauper rented a windmill, and a brick-built cottage and garden, at the rent of £30 per annum for six years, and during that time held and occupied the same, and actually paid that rent, and was rated to and paid the rates for the relief of the poor. The cottage and garden, with the mill, were together of more than the annual value of £10, but exclusive of the mill they were not of that annual value. The mill was of wood, and had a foundation of brick; but the woodwork was not inserted in the brick foundation, but rested upon it by its own weight alone. No part of the machinery of the mill touched the ground or any part of the foundation. It was held that the windmill, not being affixed to the freehold, nor to anything connected with it, was not parcel of a tenement, and, consequently, that the pauper gained no settlement. Again in Wansbrough *v.* Maton, 4 Ad. & El. 884, it was held that a tenant was entitled, at the expiration of his term, to remove a barn which he had erected on a foundation of brick and stone, the foundation being let into the ground, but the barn resting upon it by its weight alone; and that he might maintain trover for such a barn. See, also, Wiltshear *v.* Cottrell, 1 El. & Bl. 674.

(*y*) Nayler *v.* Collinge, 1 Taunt. 21.

(*y*[1]) [See Park *v.* Baker, 7 Allen, 78; Woodman *v.* Pease, 17 N. H. 282.]

(*y*[2]) [See Bainway *v.* Cobb, 99 Mass. 458. Personal property attached to land will be regarded as fixtures, where such is the manifest intention of the parties. Potts *v.* New Jersey Arms &c. Co. 14 N. J. (Law) 395; Hill *v.* Wentworth, 28 Vt. 428; Ford *v.* Cobb, 20 N. Y. 344; Wall *v.* Hinds, 4 Gray, 256, 271; Bliss *v.* Whitney, 9 Allen, 114, 115; Perkins *v.* Swank, 43 Miss. 349, 362; Parsons *v.* Copeland, 38 Maine, 537, 546; Capen *v.* Peckham, 35 Conn. 88; Teaff *v.* Hewitt, 1 Ohio St. 511; Strickland *v.* Parker, 54 Maine, 266; Snedeker *v.* Warring, 2 Kernan, 170.]

spinning machines, screwed into and fixed firmly to the floor, were chattels and distrainable for rent. (*z*)

constructive annexation.

But there may be a sort of constructive annexation of a chattel not actually affixed to the freehold; as if a man has a mill, and the miller takes the stone out of the mill, to the intent to pick it, to grind the better; although it is actually severed from the mill, yet it remains parcel of the mill, and will go to the heir. The same law of keys, and (in some sort) of doors, windows, rings, &c. which, although they are distinct things, shall go with the inheritance of the house. (*a*) So the

(*z*) Hellawell *v.* Eastwood, 6 Ex. 295; 10 Ex. 508, 520; Longbottom *v.* Berry, L. R. 5 Q. B. 123; Turner *v.* Cameron, L. R. 5 Q. B. 306; [Cresson *v.* Stout, 17 John. 116; Tobias *v.* Francis, 3 Vt. 425; Swift *v.* Thompson, 9 Conn. 63; Gale *v.* Ward, 14 Mass. 352; Walker *v.* Sherman, 20 Wend. 636; Taffe *v.* Warwick, 3 Blackf. 113; Hill *v.* Wentworth, 28 Vt. 428; Fullam *v.* Stearns, 30 Vt. 443; Morgan *v.* Arthurs, 3 Watts, 140; Lemar *v.* Miles, 4 Watts, 330; Despatch Line of Packets *v.* Bellamy Manuf. Co. 12 N. H. 234; Murdock *v.* Gifford, 18 N. Y. 28; Bartlett *v.* Wood, 32 Vt. 372; Childress *v.* Wright, 2 Coldw. (Tenn.) 350; Voorhies *v.* McGinnis, 46 Barb. 372; Wade *v.* Johnson, 25 Geo. 331; Strickland *v.* Parker, 54 Maine, 263; McLaughlin *v.* Nash, 14 Allen, 136; Lacey *v.* Giboney, 36 Missou. 320; Sturgis *v.* Warren, 11 Vt. 433. In the United States, generally, permanent machinery, such as the main wheel and its gearing, an engine attached to a building, a cotton gin fixed to its place, will vest in the grantee or mortgagee of the real estate to which they belong. It is not necessary that the machinery shall at the time of sale be actually affixed to the realty in order to pass with it. This kind of machinery may pass with a sale of the realty although for a particular purpose, at the time, temporarily detached. Voorhis *v.* Freeman, 2 Watts & S. 116; Powell *v.* Monson & Brimfield Manuf. Co. 3 Mason, 459; Farrar *v.* Stackpole, 6 Greenl. 154; Baker *v.* Davis, 19 N. H. 325; Sparks *v.* State Bank, 7 Blackf. 469; Parsons *v.* Copeland, 38 Maine, 537; Bratton *v.* Clawson, 2 Strobh. 478; English *v.* Foote, 8 Sm. & M. 444; Rice *v.* Adams, 4 Harring. 332; Degraffenried *v.* Scruggs, 4 Humph. 431; Murdock *v.* Harris, 20 Barb. 407; Preston *v.* Briggs, 16 Vt. 124; Miller *v.* Plumb, 6 Cowen, 665; Trull *v.* Fuller, 28 Maine, 545; Corliss *v.* McLagin, 29 Maine, 115; Union Bank *v.* Emerson, 15 Mass. 159; Despatch Line of Packets *v.* Bellamy Manuf. Co. 12 N. H. 205; Richardson *v.* Copeland, 6 Gray, 536; Winslow *v.* Merchants Ins. Co. 4 Met. 306; Butler *v.* Page, 7 Met. 40. In Pennsylvania, all machinery necessary to constitute a manufactory passes with the land on which it stands. The criterion, whether fixture or not, is not the permanent fastening to the freehold. Harlan *v.* Harlan, 15 Penn. St. 513; Heaton *v.* Findlay, 12 Penn. St. 304; Pyle *v.* Pennock, 2 Watts & S. 390; Voorhis *v.* Freeman, 2 Watts & S. 116; Roberts *v.* Dauphin Deposit Bank, 19 Penn. St. 71. As to New York, &c. *ante*, 728, note (*q*).] But see the observations of Wood V. C. in Mather *v.* Frazer, 2 Kay & J. 549 *et seq.*; [Blackburn J. in Holland *v.* Hodgson, L. R. 7 C. P. 328.] See, also, Davis *v.* Jones, 2 B. & A. 165; Waterfall *v.* Penistone, 6 El. & Bl. 876; Walmsley *v.* Milne, 7 C. B. N. S. 115. See, also, Ex parte Asthury, L. R. 4 Ch. App. 630; Climie *v.* Wood, L. R. 4 Ex. 328.

(*a*) Liford's case, 11 Co. 50 *b*; Place *v.* Fagg, 4 Man. & Ryl. 277; Walmsley *v.* Milne, 7 C. B. N. S. 138, per Crowder J.

sails of a windmill are parcel of the freehold, and shall go to the heir, and not to the executor. (*b*)

*It has been laid down that dung in a heap is a chattel, and goes to the executors, (*b*[1]) but if it lies scattered upon the ground, so that it cannot well be gathered without gathering part of the soil with it, then it is parcel of the freehold. (*c*)

The second branch of the inquiry respecting fixtures remains to be investigated, viz, when chattels personal have been affixed to

(*b*) R. *v.* Crosse, 1 Sid. 207, by Clench and Fenner JJ. [A fence inclosing a field, of whatever construction and material, whether having posts inserted in the ground or not, is a part of the freehold. Smith *v.* Carroll, 4 Greene (Iowa), 146; Boon *v.* Orr, 4 Greene (Iowa), 304; Glidden *v.* Bennett, 43 N. H. 306; Wentz *v.* Fincher, 12 Ired. (Law) 297; Mitchell *v.* Billingsley, 17 Ala. 391. Fencing materials, which have been used as a part of the fence accidentally or temporarily detached from it, without any intent of the owner to divert them permanently from that use, do not cease to be a part of the freehold. Goodrich *v.* Jones, 2 Hill (N. Y.), 142. The same principle was applied to a case of hop-poles, which had been taken up and laid in heaps for preservation through the winter, in Bishop *v.* Bishop, 11 N. Y. 123, and see, also, Shaw C. J. in Winslow *v.* Merchants Ins. Co. 4 Met. 314; Wadleigh *v.* Janvrin, 41 N. H. 503; Quinby *v.* Manhattan Cloth & Paper Co. 9 C. E. Green, 260. But rails in stacks are personal property and the title to them vests in the executor or administrator. Clark *v.* Burnside, 15 Ill. 62; Robertson *v.* Phillips, 3 Iowa, 220. See Johnson *v.* Mehaffey, 43 Penn. St. 308. So hewed timber, posts, and sawed logs, lying loosely upon the land, though originally intended to be put into a building upon the land, are not fixtures. Cook *v.* Whiting, 16 Ill. 430.]

(*b*[1]) [But see Plumer *v.* Plumer, 30 N. H. 558, 568; Conner *v.* Coffin, 22 N. H. 538; Sawyer *v.* Twiss, 26 N. H. 345; Lassell *v.* Reed, 6 Greenl. 222.]

(*c*) Yearworth *v.* Pierce, Alcyn, 32; S. C. *nomine* Carver *v.* Pierce, Sty. 66. See Higgon *v.* Mortimer, 5 C. & P. 616. [Manure taken from the barn-yard of a homestead, and piled upon the land, though not broken up, nor rotten, nor in a fit state for incorporation with the soil, is part of the realty, and does not go to the administrator of the owner. Fay *v.* Muzzey, 13 Gray, 53; Plumer *v.* Plumer, 30 N. H. 558, 568; Conner *v.* Coffin, 22 N. H. 538; Sawyer *v.* Twiss, 29 N. H. 345. Manure scattered about the barn-yard, or spread upon the land, will pass by a conveyance of the land, unless there is a reservation of it in the deed. Parsons *v.* Camp, 11 Conn. 525; Goodrich *v.* Jones, 2 Hill (N. Y.) 142; Middlebrook *v.* Cowen, 15 Wend. 169; Kittredge *v.* Woods, 3 N. H. 503; Stone *v.* Proctor, 1 Chipman, 108; Strong *v.* Doyle, 110 Mass. 92. But the rule does not apply to manure made in a livery stable, or in any manner not connected with agriculture, or in a course of husbandry. Daniels *v.* Pond, 21 Pick. 367; Needham *v.* Allison, 24 N. H. 355; Plumer *v.* Plumer, 30 N. H. 569; Lassell *v.* Reed, 6 Greenl. 222; Smithwick *v.* Ellison, 2 Ired. 326; Hill *v.* De Rochemont, 48 N. H. 87, 90; Corey *v.* Bishop, 48 N. H. 148; Perry *v.* Carr, 44 N. H. 120. See 1 Chitty Contr. (11th Am. ed.) 509, note (*o*). And, therefore, manure from a hotel stable, which was included in the inventory of an administrator, and agreed to be personal estate, must be accounted for by the administrator; and it is no sufficient account for the administrator to say that he has expended this manure upon the real estate which was afterwards sold for the payment of debts; an administrator has no right thus to expend the personal property of his intestate. Fay *v.* Muzzey, 13 Gray, 53.]

the freehold, and have thus lost their chattel character, under what circumstances the executor or administrator of the person who affixed them is entitled to sever them, and to reduce them again to a state of personalty, so as to form part of the estate of the personal representative.

In what cases executors are entitled to sever fixtures:

1. The subject will first be considered as between the executor or administrator, and the heir of tenant in fee. In this case, the old rule of law above mentioned, "*quicquid plantatur solo, solo cedit*," still obtains with some rigor in favor of the inheritance, and against the right to disannex therefrom, and consider as a personal chattel, anything which has been affixed thereto, (c^1) whereas, in the case as between the executors of tenant for life or in tail, and the remainder-man or reversioner, the right to the fixtures is considered more favorably for the executors; and in the case as between landlord and tenant (which, although foreign to this treatise, it will be necessary in some measure to contemplate), still greater latitude and indulgence has been allowed in favor of the tenant. (d) It must, therefore, carefully be observed, that an instance of the right allowed to a tenant as against his landlord, is no authority for its allowance to an executor as against the heir, or the remainder-man or reversioner; nor does it follow, that because the executor of tenant for life or in tail is entitled * to certain fixtures, that the executor of tenant in fee will also be entitled.

1. Right of the executor of tenant in fee to fixtures as against the heir.

The rule as anciently established, between the executor and heir of tenant in fee seems to have had no exceptions; whatever was affixed to the freehold descended to the heir as parcel of the inheritance. "The law is the same," says Godolphin, (e) "*concerning all things fastened to the freehold*, or to the ground by mortar or stone, as tables, dormants, leads, mangers, millstones, anvils, doors, keys, glass windows, and the like; for none of these be chattels, but parcels of the freehold, and, therefore, belonging to the heir, not the executor." So it is said in the Touchstone, (f) "the inci-

Old rule between the executor and heir of tenant in fee.

(c^1) [2 Kent, 345; Tuttle *v.* Robinson, 33 N. H. 119, 120; Guthrie *v.* Jones, 108 Mass. 191, 196.]

(d) Elwes *v.* Maw, 3 East, 51, in Lord Ellenborough's judgment. See, also, Lord Kenyon's judgment in Penton *v.* Robart, 2 East, 90, 91.

(e) Pt. 2, c. 14, s. 1.

(f) P. 470.

dents of a house, as glass windows annexed with nails or otherwise to the windows, the wainscot fixed by nails, screws, or irons put through the posts or walls, tables, dormants, furnaces of lead and brass, and vats in a brew and dye-house standing and fastened to the walls, or standing in or fastened to the ground in the middle of the house (although fastened to no wall), a copper, or lead, fixed to the house, the doors within and without that are hanging and serving to any part of the house, shall not go to the executor or administrator to be divided and sold from the house." So it is laid down in Noy's Maxims, (*g*) "all chattels shall go to the executors as vats and furnaces fixed in a brew-house or dye-house by the lessee; but if they be fixed by *tenant in fee*, the heir shall have them." (*h*)

But in modern times some relaxations of the rule have obtained; which may be considered, 1st, with respect to fixtures put up by the tenant in fee for the purposes of trade; and 2dly, with respect to fixtures put up by him for ornament or domestic convenience. As to trade fixtures, the first instance of departure from the old rigor was in the * case of a cider-mill, before C. B. Comyns, at the assizes, at Worcester, where, upon an action of trover brought by the executor against the heir, the cider-mill, though deep in the ground, and certainly affixed to the freehold, was held to be personal estate, and the jury were directed to find for the executor. (*i*) This, in fact, is the only expressly decided case in favor of the right of the executor of tenant in fee to trade fixtures; although Lord Hardwicke, in Lawton *v.* Lawton, (*k*) alluding to fire-engines set up in a colliery, said, "I think, even between ancestor and heir, it would be very hard that such things should go in every instance to the heir;" and Lord Ellenborough, in his judgment in Elwes *v.* Maw, (*l*) recognizes the principle of C. B. Comyn's decision. Its authority, however, has lately been denied in the house of lords in Fisher *v.* Dixon; (*m*) unless on the sup-

Relaxations with respect to executor's right, as against the heir, to trade fixtures.

(*g*) P. 51.

(*h*) See, also, Swinb. pt 6, s. 7, pl. 5; Wentw. Off. Ex. 149, 150, 151, 14th ed.; Herlakenden's case, 4 Co. 64 *a*.

(*i*) *Ex relatione* Wilbraham, in 3 Atk. 14, Lawton *v.* Lawton. The decision was recognized by Lord Hardwicke in that case, and in Lord Dudley *v.* Lord Warde, Ambl. 114, and by Lord Ellenborough in Elwes *v.* Maw, 3 East, 54. [See Crenshaw *v.* Crenshaw, 2 Hen. & Munf. 22.]

(*k*) 3 Atk. 15.

(*l*) 3 East, 54.

(*m*) 12 Cl. & F. 312, [Am. ed. and cases in notes (1) and (2),] 325, 329, 331.

position that the cider-mill in question was not annexed to the freehold (which it has always been assumed to have been in all the previous judicial discussions of the case). The case of Fisher *v.* Dixon has also negatived the doubt suggested by the *dictum* of Lord Hardwicke above cited. For it was there held by the house of lords, that machinery affixed to the freehold by the owner in fee of certain land (purchased by himself), consisting of steam-engines, rails, and other fixtures, erected and used by him in the course of trade, for the purpose of working coal and iron mines in the land, went to his heir as part of his real estate. And several learned peers laid down that the principle on which a departure has been made from the old rule in favor of trade has no application to a case between the heir and the executor. (*n*)

* This decision is in accordance with that of Lawton *v.* Salmon, (*o*) where an action of trover was brought by an executor against the tenant of the heir-at-law of the testator, to recover certain vessels used in salt-works, called salt-pans. The testator, some years before his death, placed the salt-pans in the works; they were made of hammered iron and riveted together; they were brought in pieces, and might again be removed in pieces; they were not joined to the walls, but were fixed with mortar to a brick floor; there were furnaces under them; they might be removed without injuring the buildings, though the salt-works would be of no value without them. The question was, whether the executor or the heir-at-law was entitled to them. Lord Mansfield, in delivering the judgment of the court, after observing that the strict rule had been relaxed between landlord and tenant, and between tenant for life and remainder-man, thus proceeded: "But I cannot find that between heir and executor there has been any relaxation of this sort, except in the case of the cider-mill, which is not printed at large. The present case is very strong. The salt-spring is a valuable inheritance, but no profit arises from it, unless there is a salt-work, which consists of a building, &c. for the purpose of containing the pans, &c. which are fixed to the ground. The inheritance cannot be enjoyed without them. They are accessories necessary to the enjoyment and use of the principal. The owner erected them for the benefit

(*n*) See *post*, 743; Mather *v.* Frazer, 2 Kay & J. 536; Walmsley *v.* Milne, 7 C. B. N. S. 115.

(*o*) 1 H. Bl. 259, in a note to Fitzherbert *v.* Shaw.

of the inheritance; he could never mean to give them to the executor, and put him to the expense of taking them away, without any advantage to him, who could only have the old materials, or a contribution from the heir in lieu of them. But the heir gains 8*l.* per week by them. On the reason of the thing, therefore, and the intention of the testator, they must go to the heir." (*o*[1])

In Trappes *v.* Harter, (*p*) the question was, whether the * machinery, which was the subject of the action, passed to the mortgagee under a mortgage deed, or vested in the assignees under a commission of bankruptcy. The bankrupts had carried on the business of calico printers, in partnership, at Catterall, near Garstang, in the county of Lancaster. Many years ago, the lands and buildings in question were purchased, and the conveyance was taken to one of the partners; but it was clear that the estate was treated throughout as belonging to the partnership. The machinery was erected by the partners, for the purpose of carrying on the partnership trade. It consisted principally of articles which could be removed without the slightest injury to the freehold. They were fixed by bolts and screws, so that they could be drawn off without any damage to the building. All the rest of the machinery was so fixed that it was capable of being removed; and it was actually removed without any material injury either to itself or to the freehold. In taking the account of stock, the land and buildings were always placed under one head, and the machinery under another. In the part of the country where these premises were situated, it appeared that machinery of this description was constantly bought and sold distinctly from the freehold. It was held by the barons of the exchequer, that, looking at the particular terms of the mortgage deed (which it is unnecessary to state with reference to the present inquiry), the machinery in question did not pass by it; but that it formed part of the partnership estate, and passed to the assignees as such. And Lord Lyndhurst C. B. in delivering the judgment of the court, observed that it was clear, as between landlord and tenant, it might be removed by the tenant, if put there by him; as between heir and

(*o*[1]) [Fowler J. in Tuttle *v.* Robinson, 33 N. H. 104, 120; Parker C. J. in Despatch Line of Packets *v.* Bellamy Manuf. Co. 12 N. H. 232; Kittredge *v.* Woods, 3 N. H. 504.]

(*p*) 2 Cr. & M. 153; S. C. 3 Tyrwh. 603; [Cook *v.* Champlain T. Co. 1 Denio, 92.]

executor, it would have passed to the executor. His lordship proceeded to observe, that applying the authorities of Lawton *v.* Lawton and Lawton *v.* Salmon, to the present case, the court thought that this machinery, erected for the purposes of trade, in a neighborhood where machinery of such description was commonly removed, and which was capable * of removal without injury to the freehold, was not to be considered as belonging to the inheritance, but as part of the personal estate. (*q*)

It seems to have been held, that the custom of the country may extend the rights of the executor beyond the rules above stated. In Viner's Abridgment, (*r*) it is said, "A granary built on pillars in Hampshire is a chattel, and goes to the executors, and may be recovered in trover. This shall be understood according to the custom of the country. *Coram* Eyre C. B. summer assizes, 1724, *apud* Winchester."

Relaxation with respect to executor's right, as against the heir, to fixtures put up for ornament or convenience:

furnace:

hangings:

As to the right of the executor of tenant in fee to fixtures set up for ornament or domestic convenience, the first infringement of the strict rule in favor of the heir, with respect to fixtures of this sort, appears to be in Squire *v.* Mayer, Trin. term, 1701, where it was held by Lord Keeper Wright, that a furnace, (*r*[1]) though fixed to the freehold and purchased with the house, and also the hangings nailed to the walls, should go to the executor and not to the heir; and so determined, says the report, contrary to Herlakenden's case. (*s*)

(*q*) It should seem, however, that the above case was certainly not at all intended to interfere with the principle established by Baker *v.* Horn, 9 East, 215, viz, that fixtures affixed to the freehold are not "goods and chattels, in the order and disposition of the bankrupt," so as to pass to his assignees, under the bankrupt laws. The point decided in Baker *v.* Horn has been settled to be good law by numerous subsequent cases. See Clark *v.* Crownshaw, 3 B. & Ad. 804; Combs *v.* Beaumont, 5 B. & Ad. 72; Boydell *v.* M'Michael, 1 Cr., M. & R. 177; S. C. 3 Tyrwh. 974; Rufford *v.* Bishop, 5 Russ. 346; Hubbard *v.* Bagshaw, 4 Sim. 326; Ex parte Barclay, 5 De G., M. & G. 403. In Trappes *v.* Harter, the fixtures belong to the assignees, not under the order and disposition clause, but because they were the property of the bankrupts. 5 De G., M. & G. 412.

(*r*) Tit. Executors, U. 74. See, also, Davis *v.* Jones, 2 B. & A. 165.

(*r*[1]) [But see Main *v.* Schwarzwaelder, 4 E. D. Smith, 273, in which it was held that a furnace, so placed in a house that it cannot be removed without injury to the house, is a fixture. It has, however, been decided that stills set up in furnaces in the usual manner for making whiskey, are not fixtures, but personal property. Burk *v.* Baxter, 3 Missou. 207; Moore *v.* Smith, 24 Ill. 513; Terry *v.* Robbins, 5 Sm. & M. 291.]

(*s*) 2 Eq. Cas. Abr. 430; S. C. 2 Freem. 249; [Weston *v.* Weston, 102 Mass. 514. A personal chattel becomes a fixture so as

The next case on the subject was Cave *v.* Cave, (*t*) decided by the same judge, in Trin. term, 1705. The lord keeper * was there of opinion, that "although pictures and glasses, generally speaking, are part of the personal estate, yet, if put up instead of wainscot, or where otherwise wainscot would have been put, they shall go to the heir. The house ought not to come to the heir maimed and disfigured; Herlakenden's case; wainscot put up with screws shall remain with the freehold. (*u*)

pictures: pier-glasses:

But in Beck *v.* Rebow, (*v*) determined in the subsequent year, a bill was filed in chancery, upon a covenant made by a testator, to convey a house *and all things affixed to the freehold thereof.* The bill alleged that the defendant, the devisee in trust of the house, had taken away, among other things, the pier-glasses, hangings, and chimney-glasses, and it was urged for the plaintiff, that these hangings, pier-glasses, and chimney-glasses, were as wainscot, being fixed with nails and screws to the freehold; that there was no wainscot under them; and as they would have gone to the heir and not the executor, *à fortiori* they would go to the plaintiff who was as a purchaser of the house; and Cave *v.* Cave was cited. But Lord Keeper Cowper was of a different opinion; saying, that hangings and looking-glasses were only matters of ornament and furniture, and not to be taken as part of the house or freehold.

Perhaps a deduction may be made from these cases, which may reconcile their apparent discrepancies, viz, that, generally, pictures and looking-glasses shall go to the executor as personal estate, although, strictly speaking, they may be so fixed by nails and screws to the walls as to be attached to the freehold; but that if they are *let into the wainscot*, so as to take the place of panels of it, they shall * go to the heir; because they could not be removed by the executor without disfiguring the house. The true reason

to form a part of the real estate, when it is so affixed to the freehold as to be incapable of severance without injury thereto; and this whether the annexation be for use, for ornament, or from caprice. Providence Gas Co. *v.* Thurber, 2 R. I. 15; McClintock *v.* Graham, 3 McCord, 553; Baker *v.* Davis, 19 N. H. 325; Murdock *v.* Harris, 20 Barb. 407.]

(*t*) 2 Vern. 508.

(*u*) The decree was, "as to the pictures and glass fixed in the wainscot of the dwelling-house, and the coppers and furnaces there, the court is of opinion that they are not to be taken as part of the personal estate, but are to go along with the house, and be taken as part thereof, and to decree the same accordingly." Reg. Lib. 1704; A. fol. 535. See Mr. Raithby's note to 2 Vern. 508; [Guthrie *v.* Jones, 108 Mass. 191.]

(*v*) 1 P. Wms. 94.

why they have been held to be removable, probably is that, on the principle already stated (*ante*, 730), they were never part of the freehold.

ornamental chimney-pieces:

Lord Hardwicke, in Lord Dudley *v.* Lord Warde, (*x*) speaking of marble chimney-pieces, says, that as between landlord and tenant, they are removable by the latter, if erected by him, but this does not hold between the heir and the executor. They are removable, is should seem, not because they are marble, but because they are ornamental. (*y*)

tapestry: iron backs to chimneys:

The cases of relaxation were followed by Harvey *v.* Harvey, (*z*) in which it was held by C. J. Lee, at nisi prius, in trover by an executor against the heir, that hangings, tapestry, and iron backs to chimneys, belonged to the executor, who recovered accordingly against the heir.

tables, ovens, jacks, clock-cases.

The inference drawn from these decisions, by a writer of considerable accuracy, (*a*) is this: The law seems now to be held not so strict as formerly, and if these things can be taken away without prejudice to the fabric of the house, it seemeth that the executor shall have them (*a*[1]) as tables, although fastened to the floor; furnaces, if not made part of the wall; grates, iron ovens, jacks, clock-cases, and such like, although fixed to the freehold by nails or otherwise.

Contrary *dicta* of judges in recent cases:

On the other hand, the common law judges have, in several modern instances, incidentally stated the old rule as existing with scarcely any relaxation, between the executor and the heir. Thus, in Winn *v.* Ingilby, (*b*) the question was, whether the sheriff had a right to take in execution, under a *fieri facias*, some fixtures, in a house which was the plaintiff's freehold, consisting of set pots, ovens, and ranges. The court decided that the sheriff had no right. For these were fixtures which would go to the heir, and not * the executor, and they were not liable to be taken as goods and chattels under an execution. (*c*) So in Colegrave *v.* Dias Santos, (*d*) which was trover for articles of three classes; the first, admitted to be clearly annexed to the inheritance; the second, consisting of

set pots, ovens, ranges:

(*x*) Ambl. 113.
(*y*) Bishop *v.* Elliott, 11 M. & W. 113.
(*z*) 2 Stra. 1141.
(*a*) 4 Burn E. L. 301, 8th ed.
(*a*[1]) [Morton J. in Weston *v.* Weston, 102 Mass. 514, 518.]
(*b*) 5 B. & A. 625.
(*c*) See Mather *v.* Frazer, 2 Kay & J. 550, per Wood V. C.
(*d*) 2 B. & C. 76.

stoves, cooling coppers, and blinds; and the third, not fixtures at all; Bayley J. said, "The general rule relating to the right of fixtures, is that between the heir and the executor; and as between them, the second class of articles would belong to the heir." (d^1) In the same case, Abbot C. J. said, "The rule of law is most strict between the heir and the executor. (d^2) According to that rule, the articles in the two first classes would be considered as a parcel of the freehold." And in The King *v.* St. Dunstan, (e) where in a settlement case, the question was whether certain fixtures, consisting of a stove, cupboards, and grates, (the stove and grates fixed with brick-work in the chimney-places, and the cupboards standing on the ground, and supported by holdfasts, and all removable without doing any injury to the freehold, except leaving a few marks of nails) were parcel of a demised tenement; the court held that they were, and Bayley J. said, "Although these fixtures, if they belonged to the tenant, might have been removed by him during the term, yet, as they actually belonged to the landlord, they were parcel of the freehold, and would have gone to his heir, and not to his executor." (e^1)

stoves, cooling coppers, blinds:

stoves, grates, cupboards:

From these cases, it should seem that the law is by no means clearly settled respecting the right of the executor of

(d^1) [As between the administrator and the heir, a heavy stove, placed by the ancestor in the chimney having no fire-place, without legs, set on brick-work, with a short funnel bricked around in the chimney, so as to render it doubtful whether it could be removed without disturbing the brick, is to be regarded as real estate. Tuttle *v.* Robinson, 33 N. H. 104.]

(d^2) [Parker C. J. in Despatch Line of Packets *v.* Bellamy Manuf. Co. 12 N. H. 232; 2 Kent, 345; Tuttle *v.* Robinson, 33 N. H. 119, 120; Bigelow J. in Wall *v.* Hinds, 4 Gray, 270, 271.]

(e) 4 B. & C. 686; S. C. 7 D. & R. 178.

(e^1) [See Goddard *v.* Chase, 7 Mass. 432; Green *v.* Malden, 10 Pick. 504; Smith J. in Gray *v.* Holdship, 17 Serg. & R. 415; Williams *v.* Bailey, 3 Dana, 152; Gaffield *v.* Hapgood, 17 Pick. 192; Main *v.* Schwarzwaelder, 4 E. D. Smith, 273; Tuttle *v.* Robinson, 33 N. H. 104. Stoves not standing in their places at the time of a levy, but put away for the summer in a garret, are not fixtures. Otherwise, if standing in their places where used. Blethen *v.* Towle, 40 Maine, 310. Chandeliers attached to a house, gas-fixtures, such as a gasometer and an apparatus for generating gas, will pass to a grantee, or to an heir-at-law, as fixtures. Johnson *v.* Wiseman, 4 Mete. (Ky.) 357; Hays *v.* Doane, 11 N. J. Eq. 84; Lawrence *v.* Kemp, 1 Duer, 363. But chandeliers and side brackets, attached to gas-pipes by the owner of the house, have been held not to be such fixtures as pass by a sheriff's sale of the house. Vaughen *v.* Haldeman, 33 Penn. St. 522; Montague *v.* Dent, 10 Rich. (S. Car.) 135.]

tenant in fee to fixtures set up for ornament or domestic convenience. (*f*)

2. To what fixtures an executor is entitled as against a devisee of tenant in fee.

2. It is now proper to view the subject of fixtures as between the executor and the devisee of a tenant in fee. The general rule is, that a devisee shall take the land in the *same condition as it would have descended to the heir; and, consequently, he will be entitled to all articles that are affixed to the land, whether the annexation takes place before, or subsequent to the date of the devise; and as to those fixtures which the executor may claim against the heir, he would be equally entitled against a devisee. (*g*) However, it will be recollected that in the analogous case of emblements, while the heir is excluded in favor of the executor, the devisee has been held to be entitled to them upon the presumed intention of the testator. (*h*)

There seems no doubt but that if, from the nature or condition of the property devised, it is apparent that the intention was that the fixtures should go along with the freehold to the devisee, they will pass to him, although they are of such a sort that the executor might have been entitled to them as against the heir. Thus, where the devise was of the testator's copyhold estates, which consisted, *inter alia*, of a brew-house and malt-house, let on lease, together with the plant and utensils, it was held that the plant passed with the brew-house, on the ground that the testator intended to devise the plant as well as the shell of the brew-house; that without the plant, the walls would be of no use; and that it was material that the whole was, at the time of making the will, in lease together. (*i*)

(*f*) See, further, D'Eyncourt *v.* Gregory, L. R. 3 Eq. Cas. 382.

(*g*) Treatise on Fixtures, 198.

(*h*) See *ante*, 714.

(*i*) Wood *v.* Gaynon, 1 Ambl. 395. See Lushington *v.* Sewell, 1 Sim. 435. See, also, as to whether fixtures shall pass by a grant or mortgage of the freehold to which they are affixed, Place *v.* Fagg, 4 Man. & Ryl. 277; Hare *v.* Horton, 5 B. & Ad. 715; Trappes *v.* Harter, 2 Cr. & M. 153; S. C. 3 Tyrwh. 603; Longstaff *v.* Meagoe, 2 Ad. & El. 167; Hitchman *v.* Walton, 4 M. & W. 409; Wiltshear *v.* Cottrell, 1 El. & Bl. 674; Mather *v.* Fraser, 2 Kay & J. 536; Walmsley *v.* Milne, 7 C. B. N. S. 115; Cullwick *v.* Swindell, L. R. 3 Eq. Ca. 249; Boyd *v.* Shorrock, L. R. 5 Eq. Ca. 72; [Snedeker *v.* Warring, 2 Kernan, 170; 2 Kent, 345, 346, and note (*a*); Winslow *v.* Merchants' Ins. Co. 4 Met. 306; Butler *v.* Page, 7 Met. 42; Union Bank *v.* Emerson, 15 Mass. 159; Despatch Line of Packets *v.* Bellamy Manuf. Co. 12 N. H. 233; Gale *v.* Ward, 14 Mass. 352; Voorhis *v.* Freeman, 2 Watts & S.

3. The subject now proceeds to the right to fixtures of *the executor of tenant for life or in tail, as against the reversioner or remainder-man; and the division employed in considering the right of the executor of tenant in fee will here be resorted to, viz, 1. The claim to fixtures set up by the particular tenant for purposes of trade. 2. The claim to fixtures set up by him for ornament or domestic convenience.

Rights to fixtures of the executor of tenant for life or in tail as against remainder-man:

Since the law is more indulgent in this respect to the executor of the particular tenant, than to the executor of the tenant in fee, it is clear that the authorities already mentioned, which are in favor of the executor's right, as against the heir are equally so in favor of it, as against the remainder-man or reversioner. In addition to these, there are cases, with respect to trade fixtures, in which the rights of the personal representatives of the tenant for life or in tail have been expressly considered. In Lawton *v.* Lawton, (*j*) it was held that a fire-engine, set up for the benefit of a colliery, by the tenant for life, should be considered part of his personal estate, and go to his executor for the increase of assets in favor of creditors. And Lord Hardwicke, in giving his judgment, said, "It appears in evidence that, in its own nature, the fire-engine is a personal movable chattel, taken either in part, or in gross, before it is put up; but then it has been insisted, that fixing it, in order to make it work, is properly an annexation to the freehold.

as to trade fixtures:

"To be sure, in the old cases, they go a great way upon the annexation to the freehold; and so long ago as Henry the Seventh's time, the courts of law construed even a copper and furnaces to be part of the freehold. Since that time the general ground the courts have gone upon, of relaxing this strict construction of law, is, that it is for the *benefit of the public* to encourage tenants for life to do what is advantageous to the estate during their term."

116; Pyle *v.* Pennock, 2 Watts & S. 390; Day *v.* Perkins, 2 Sandf. 359; Hill *v.* Wentworth, 28 Vt. 428; Pierce *v.* George, 108 Mass. 78; Quinby *v.* Manhattan Cloth & Paper Co. 9 C. E. Green, 260; Burnside *v.* Twitchell, 43 N. H. 390.] As to a bequest of "fixtures and fixed furniture," see Birch *v.* Dawson, 2 Ad. & El. 37. [A cotton gin in its place, that is, connected with the running works in the gin house, is a fixture that passes to the purchaser of the house, and, of course, to the heir. Bratton *v.* Clawson, 2 Strobh. (S. Car.) 478; McKenna *v.* Hammond, 3 Hill (S. Car.), 331; De Graffenried *v.* Scruggs, 4 Humph. 431.]

(*j*) 3 Atk. 13.

In another part of his judgment, his lordship observed, "It is true the old rules of law have indeed been relaxed, chiefly between landlord and tenant, and not so frequently between an ancestor and heir-at-law, or tenant for life and remainder-man. But even in these cases it does admit the consideration of *public conveniency* for determining the question.

"One reason that weighs with me is, its being a mixed case, between enjoying the profits of the land and carrying on a species of trade; and, considering it in this light, it comes very near the instances in brew-houses, &c. of furnaces and coppers."

The judgment concludes with these observations: "It is very well known that little profit can be made of coal mines without this engine; and tenants for lives would be discouraged in erecting them, if they must go from their representatives to a remote remainder-man, when the tenant for life might possibly die the next day after the engine is set up. These reasons of public benefit and convenience weigh greatly with me, and are a principal ingredient in my present opinion."

This decision was followed by the case of Lord Dudley *v.* Lord Warde, (*k*) which came before Lord Hardwicke a few years after Lawton *v.* Lawton, and was very similar in its circumstances. A bill was brought by the executor of tenant for life (or tenant in tail, for it did not appear which the testator was) against the remainder-man of the estate, to have a fire-engine, which had been erected by the testator for a colliery, delivered up as part of the personal estate; and it was adjudged in favor of the executor. And his lordship, in reference to the point decided in Lawton *v.* Lawton, says, "If it is so in the case of a tenant for life, *query*, how would it be in cases of tenant in tail? Tenant in tail has but a particular estate, though somewhat higher than tenant for life. In the reason of the thing there is no material difference. The determinations have been from a * consideration of the benefit of trade. A colliery is not only the enjoyment of the estate, but in part carrying on a trade. The reason of emblements going to the executor of a particular tenant holds here, to encourage agriculture. Suppose a man of indifferent health, he would not erect such an engine, at a vast expense, unless it would go to his family."

There appears to be no other express case in the books upon this part of the subject; but these decisions of Lord Hardwicke

(*k*) 1 Ambl. 113.

have been frequently recognized in the common law courts, viz, by Lord Mansfield, in Lawton *v.* Salmon, (*l*) by Lord Kenyon, in Penton *v.* Robart, (*m*) and by Lord Ellenborough, in Elwes *v.* Maw. (*n*)

It will be observed, that none of the arguments employed by Lord Hardwicke respecting the benefit of the public, and the encouragement of trade, appear to have any application to the question as between heir and executor, where the owner of the fee, being the absolute owner of the land as well as the personal property which has been affixed to the freehold for the purposes of his trade, may dispose of the one as well as the other as he shall think fit for the benefit of his family, and where, consequently, it is not at all necessary, in order to encourage the erection of such works, to make any departure, in his favor, from the old rule of law. (*o*)

Right of executor of tenant for life, &c. to ornamental fixtures, &c.

With respect to the right of the executor of tenant for life, as against the remainder-man or reversioner, to fixtures set up for ornament, or domestic convenience; it is somewhat singular, that not a single case is to be found in the books relating expressly to this subject. Nevertheless, upon the ground that the law is more favorable in this respect *to the executor of tenant for life than to the executor of tenant in fee, it is clear, *à fortiori*, that all the cases which support the right of the latter to hangings, pier-glasses, tapestry, pictures, iron backs to chimneys, furnaces, grates, &c. are express authorities in favor of the right of the former; and further, that the strong expressions of judges in favor of the heir, which, in the recent cases heretofore mentioned, somewhat weaken the effect of the determinations in favor of the claims of the executor of tenant in fee, do not affect them with relation to those of the executor of tenant for life or in tail. (*o*[1])

4. With respect to the decisions between landlord and tenant, it has been so repeatedly laid down by the highest authorities

(*l*) 1 H. Bl. 260, *in notis*.

(*m*) 2 East, 91.

(*n*) 3 East, 54.

(*o*) See the observations of Lord Cottenham in Fisher *v.* Dixon, 12 Cl. & Fin. 328, of Lord Campbell, Ib. 330, 331, and of Lord Brougham, Ib. 332. See, also, the able and elaborate judgment of Wood V. C. in Mather *v.* Fraser, 2 Kay & J. 536; and Walmsley *v.* Milne, 7 C. B. N. S. 115.

(*o*[1]) [Gray J. in Bainway *v.* Cobb, 99 Mass. 459.]

4. Cases of fixtures between landlord] and tenant.

that the right to fixtures is considered more favorably to the tenant, as against his landlord, than to the executors of tenant for life, or in tail, (*p*) as against the remainder-man or reversioner, that it would be wrong to conclude that a fixture set up for an ornament or domestic convenience, by a tenant for life, &c. may be claimed as personalty by his executor, from the fact that it has been decided to be a removable fixture, as between landlord and tenant. (*p*[1]) However, it is asserted in a work, in which this subject has been fully and ably treated, (*q*) that it cannot, upon authority, be affirmed of any specific article, that it is removable as between landlord and tenant, but that it is *not* removable as between the tenant for life and the remainder-man. And Lord Hardwicke seems to treat the two classes much in the same light, considering their claims to be founded on similar reasons. And although he says, that the case of a tenant for life is not quite so strong as that of a common tenant, yet many of his arguments are drawn from a close analogy between them. (*r*)

But this is perfectly clear with regard to the decisions, as * to fixtures, between landlord and tenant, that wherever it has been decided that fixtures are not removable by a common tenant, *à fortiori*, they are not removable by the executor of tenant for life or in tail, or the executor of tenant in fee. It will, therefore, be useful to point out some cases where the decisions have been against the right of removal by a common tenant.

Executors are in no case entitled to fixtures set up for agriculture:

It was decided in a celebrated case, after much deliberation, that the privilege established in favor of tenants in trade, does not extend to agricultural tenants, so as to entitle them to remove things which they have erected for the purposes of husbandry. (*s*) In that case it was held that a tenant could not remove a beast-house, carpenter's

(*p*) Penton *v.* Robart, 2 East, 91; Elwes *v.* Maw, 3 East, 51; Grymes *v.* Boweren, 6 Bing. 439, 440.

(*p*[1]) [See Hill *v.* Sewald, 53 Penn. St. 271; Northern C. R. Co. *v.* Canton Co. 30 Md. 347, 354; Miller *v.* Plumb, 6 Cowen, 665. In Bainway *v.* Cobb, 99 Mass. 459, Gray J. said: "The law is more favorable to the heir as against the executor, both claiming under the same absolute owner of the estate, than to the landlord as against his tenant, who has paid for the occupation of the premises and himself put in the fixtures in question." See Wall *v.* Hinds, 4 Gray, 256; Bliss *v.* Whitney, 9 Allen, 114; Kutter *v.* Smith, 2 Wall. 491; Blethen *v.* Towle, 40 Maine, 310; Hays *v.* Doane, 3 Stockt. 84.]

(*q*) Treatise on Fixtures, by Amos & Ferard, p. 116.

(*r*) Ib.

(*s*) Elwes *v.* Maw, 3 East, 28. See the

shop, fuel-house, cart-house, pump-house, nor fold-yard wall, erected for the use of his farm, *even though he left the premises exactly in the same state as he found them on his entry.* Hence it follows, that the executors of tenants for life or in tail, or in fee, are not entitled to remove, as trade fixtures, things erected for the purposes of agriculture.

Executors not entitled to remove a conservatory, &c.

In Buckland *v.* Butterfield, (*t*) a question arose whether a tenant for years had a right to remove a conservatory and pinery. The conservatory, which had been purchased by the tenant and brought from a distance, was by him erected on a brick foundation, fifteen inches deep; upon that was bedded a sill, over which was frame-work, covered with slate; the frame-work was eight or nine feet high at the * end, and about two in front. This conservatory was attached to the dwelling house by eight cantilivers let nine inches into the wall, which cantilivers supported the rafters of the conservatory. Resting on the cantilivers, was a balcony with iron rails. The conservatory was constructed with sliding glasses, paved with Portland stone, and connected with the parlor chimney by a flue. Two windows were opened from the dwelling-house into the conservatory, one out of the dining-room, another out of the library. A folding door was also opened into the balcony; so that when the conservatory was pulled down, that side of the house to which it had been attached became exposed to the weather. Surveyors who were called, stated that the house was worth 50*l.* a year less after the conservatory and pinery had been removed. Dallas C. J., in delivering the judgment of the court of common pleas, said, "Allowing that matters of ornament may or may not be removable, and that whether they are so or not, must depend on the particular case, we are of opinion that no case has extended the right to remove nearly so far as it would be extended, if such right were to be established in the present instance; and we agree

cases of Dean *v.* Allalley, 3 Esp. N. P. C. 11; Fitzherbert *v.* Shaw, 1 H. Bl. 258, as qualified by the remarks of Lord Ellenborough, in Elwes *v.* Maw. By stat. 14 & 15 Vict. c. 25, s. 3, if any tenant shall, with the consent in writing of the landlord, erect any farm building, or put up any other building, engine, or machinery, either for agricultural purposes, or for the purposes of trade and agriculture, they shall be the property of the tenant, and removable by him, after giving the landlord a month's notice in writing, unless the landlord elects to purchase them, in which case the value shall be ascertained by arbitration, as prescribed by the act.

(*t*) 2 B. & B. 54; S. C. 4 B. Moore, 440.

with the learned judge who tried the cause (Mr. Baron Graham), in thinking that the building in question must be considered as annexed to the freehold, and the removal of it consequently waste." (*u*) This case, therefore, is an authority that the executors of tenant for life, or in tail, or in *fee, are not entitled to remove a conservatory such as described above. (*x*)

Pumps.

In a modern case on the subject, (*y*) the question was respecting a tenant's right to remove a pump which he had erected on the demised premises at his own expense. It was attached to a stout perpendicular plank; this plank rested on the ground at one end, and at the other was fastened by an iron bolt or pin to an adjacent wall, from which it was distant about four inches. The pin, which had a head at one end, and a screw at the other, passed entirely through the wall. The tube of the pump passed through a brick flooring into a well beneath. This well had originally been open, but the tenant had arched it over, when he erected the pump. And in withdrawing the tube, four or five of the floor bricks were displaced, but the iron pin which attached the perpendicular plank to the wall was left in the wall when the plank was removed. Under these circumstances the court of common pleas was of opinion that the pump was removable as a tenant's fixture.

The fixtures must be removed before the tenancy expires:

It may be observed, that it has been decided that a tenant must use his privilege in removing fixtures, *during the continuance of his term;* for if he forbears to do so within this period the law presumes that he voluntarily relinquishes his claim in favor of his landlord. (*z*) Hence it follows, that *if a tenant from year to year of a house dies, and

(*u*) See, also, accord. Jenkins *v.* Gething, 2 J. & H. 520; in which case Wood V. C. held that though greenhouses could not be removed, nor the boiler put into the masonry, the pipes connected with screws were removable. It is expressly said by Lord Kenyon, in Penton *v.* Robart, 2 East, 90, that where hothouses and greenhouses, and the like, have been put up by nursery-men and gardeners at their own expense, such things might be taken away at the end of the term; but Lord Ellenborough, in Elwes *v.* Maw, speaking of that *dictum*, said, that there certainly existed no decided case, and, he believed, no recognized opinion or practice on either side of Westminster Hall, to warrant such an extension. And Dallas C. J. in the above case of Buckland *v.* Butterfield, seems to approve Lord Ellenborough's observation.

(*x*) See, also, West *v.* Blakeway, 2 M. & Gr. 729.

(*y*) Grymes *v.* Bowcren, 6 Bing. 437; [M'Cracken *v.* Hall, 7 Ind. 30; Bigelow J. in Wall *v.* Hinds, 4 Gray, 272, 273.]

(*z*) Lyde *v.* Russell, 1 B. & Ad. 394; Treatise on Fixtures, p. 87; Minshall *v.* Lloyd, 2 M. & W. 450. In this last case, Parke B. said, "The right of the tenant

his executor or administrator gives a notice to quit, he should take care to remove the fixtures, or dispose of the right of the deceased to them, before such notice expires. In the case of a tenant for life, or in tail, his executor must, it should seem, remove the fixtures to which he is entitled within a reasonable time after the death of the testator.

within a reasonable time, in the case of tenant for life.

In conclusion of the subject of the right of executors to fixtures generally, it may be observed, that after all, the question whether fixtures be removable or not in a great measure depends on the individual circumstances of each particular case, with reference to the nature of the article, and the mode in which it is fixed. (*a*)

General conclusion as to the right to fixtures.

3. *Separate Property, Paraphernalia, and other Rights of the Widow.*

3. Personal chattels inanimate in possession, from which the executor or administrator is excluded in favor of the widow.

Marriage is an absolute gift to the husband, as well of all the chattels of which the wife was actually and beneficially possessed at the time he married her, (*b*) as also of such as come to her during marriage, whether she survives him or not. (*c*) And consequently, though his wife outlives him, *they will go to his ex-

is only to remove during his term the fixtures he may have put up, and so to make them cease to be any longer fixtures." The tenant's right has been lately defined to continue during his original term, and such further period of possession by him, as he holds the premises under a right still to consider himself a tenant. Mackintosh *v.* Trotter, 3 M. & W. 186; Weeton *v.* Woodcock, 7 M. & W. 14. See, also, Heap *v.* Barton, 12 C. B. 274; Leader *v.* Homewood, 5 C. B. N. S. 546; London & Westminster Loan Company *v.* Drake, 6 C. B. N. S. 798; Sumner *v.* Bromilow, 11 Jur. N. S. 481; Pugh *v.* Arton, L. R. 8 Eq. Ca. 626; [Gray J. in Bainway *v.* Cobb, 99 Mass. 458, 459; Talbot *v.* Whipple, 14 Allen, 181, 182; 1 Chitty Contr. (11th Am. ed.) 495, and note (*p*); White *v.* Arndt, 1 Whart. 91; Stall *v.* Elliott, 11 N. H. 540; Shepard *v.* Spaulding, 4 Met. 416; Guthrie *v.* Jones, 108 Mass. 191; M'Cracken *v.* Hall, 7 Ind. 30.]

(*a*) By Tindal C. J. 6 Bing. 439. See, also, Avery *v.* Cheslyn, 3 Ad. & El. 75; Walmsley *v.* Milne, 7 C. B. N. S. 115.

(*b*) Co. Lit. 351 *b*. And there is no distinction in this respect between property to which the wife is entitled at equity, and property to which she is entitled at law. Osborn *v.* Morgan, 9 Hare, 432. [In New Hampshire, the personal chattels owned by a woman before her marriage do not become the absolute property of the husband after marriage, unless he reduce it to his possession. Caswell *v.* Hill, 47 N. H. 407; *post*, 846, note (*u*[1]).]

(*c*) [Morgan *v.* Thames Bank, 14 Conn. 99; Jamison *v.* May, 13 Ark. 600.] These rules of law, however, have been considerably modified by the married woman's property act (33 & 34 Vict. c. 93), which

ecutor, if he makes a will, or to his administrator if he dies intestate. (c^1)

Separate property.

But by conveying her property to trustees before marriage, the wife may preserve it, in cases clear of fraud, separate from her husband, and those claiming from or through him, both at law and in equity; (d) for wherever the trust can be supported in equity, the trustee will be entitled at law. (e) And it is now fully established, that if personal property be bequeathed to or settled upon a married woman for her separate use, even without the precaution of the intervention of trustees, the wife's

came into operation on the 9th day of August, 1870. By that act any married woman becomes absolutely entitled, independent of her husband, to —

a. Her earnings, and investments thereof (s. 1).

b. Government annuities and deposits in savings banks in her own name, whether before or after marriage (s. 2).

c. Sums invested in certain securities, companies, or societies (ss. 3, 4, 5).

d. Policies of insurance, and all benefits thereof, effected by her on her own life or her husband's for her separate use, if so expressed on the face of the policy (s. 10).

e. Any property hers before marriage, which her husband shall, by writing under his hand, have agreed with her shall be her separate property after marriage (s. 11). And if married on or after the 9th of August, 1870, to —

f. The rents and profits of real property descending on her as heiress of an intestate. Personal property accruing to her during her marriage from an intestate, or any sum not exceeding 200*l*., to which she shall, after her marriage, become entitled by deed or will (ss. 7, 8).

(c^1) [Harper *v*. McWhorter, 18 Ala. 229; Nelson *v*. Gorce, 34 Ala. 565; Maloney *v*. Bland, 14 Ind. 176; Jordan *v*. Jordan, 52 Maine, 320; Carleton *v*. Lovejoy, 54 Maine, 445. Recent legislation in many of the American States, followed by a series of corresponding judicial decisions, has materially modified the ancient rules of the common law upon this subject. See Houston *v*. Clark, 50 N. H. 480; Hall *v*. Young, 37 N. H. 134; Caswell *v*. Hill, 47 N. H. 407; George *v*. Cutting, 46 N. H. 130; Clough *v*. Russell, 55 N. H. 279; Albin *v*. Lord, 39 N. H. 196; Rice J. in Colby *v*. Samson, 39 Maine, 120; Lee *v*. Lanahan, 59 Maine, 478; Motley *v*. Sawyer, 34 Maine, 540; Stone *v*. Gazzam, 46 Ala. 275; Uhrig *v*. Horstman, 8 Bush (Ky.), 172; Rice *v*. Hoffman, 35 Md. 344; De Fries *v*. Conklin, 22 Mich. 255; Foster *v*. Conger, 61 Barb. 145; Allen *v*. Eldridge, 1 Col. T. 287; Holliday *v*. Dailey, 1 Col. T. 460; Jenkins *v*. Flinn, 37 Ind. 349; Knaggs *v*. Mastin, 9 Kansas, 532; Harding *v*. Cobb, 47 Miss. 599; Voorhees *v*. Bonesteel, 16 Wallace, 16; S. C. 7 Blatchf. 495; Quigley *v*. Graham, 18 Ohio St. 42; Huff *v*. Wright, 39 Geo. 41; Cheever *v*. Wilson, 9 Wallace, 108; Marsh *v*. Marsh, 43 Ala. 677; Hanford *v*. Bockee, 20 N. J. Eq. 101; Sweeney *v*. Damron, 47 Ill. 450; Clark *v*. Bank of Missouri, 47 Missou. 17; Young's Estate, 65 Penn. St. 101; Wilkinson *v*. Cheatham, 45 Ala. 337; Walker *v*. Coover, 65 Penn. St. 430. The common law disability of married women, to enter into contracts, still exists in New York, as to contracts which are not made valid by statute. Robinson *v*. Rivers, 9 Abb. Pr. N. S. 144. So in Mississippi, see Whitworth *v*. Carter, 43 Miss. 61; Dunbar *v*. Meyer, 43 Miss. 679.]

(*d*) Jarman *v*. Woolloton, 3 T. R. 618; Haselinton *v*. Gill, Ib. 620, note (*a*).

(*e*) By Lord Mansfield, in Haselinton *v*. Gill, *ubi supra*.

separate interest will be protected in equity by the conversion of her husband into a trustee for her; (*f*) and, consequently, upon his death, the property will not form a part of the beneficial estate of his executors or administrators. (*g*)

What words will give a separate estate:

* A material question here arises as to what words in a will or settlement are to be regarded as sufficient to give the wife an interest separate from her husband. This inquiry appears to belong more properly to the general law of husband and wife, than to a work on the law of executors and administrators; and it is not, therefore, deemed requisite to pursue it at any length in this treatise. It may be sufficient here to state, that the principle is now thoroughly established, that courts of equity will not deprive the husband of his rights at law, unless there appears to be a clear intention of the donor so to do, manifested by his introduction of expressions which exclude the marital right in express terms; as by directly giving the property to the wife's separate use, or (what has been held to amount virtually to the same thing) by annexing some direction or condition to the gift, in a manner incompatible with the existence of the husband's right. (*g*[1]) Of this nature are the phrases,

(*f*) Parker *v.* Brooke, 9 Ves. 583; Rich *v.* Cockell, Ib. 375, in Lord Eldon's judgment; [Gover *v.* Owings, 16 Md. 91; Schafroth *v.* Ambs, 46 Missou. 114; Walker *v.* Walker, 9 Wallace, 743, 753; Baldwin *v.* Carter, 17 Conn. 201.] But see Izod *v.* Lamb, 1 Cr. & Jerv. 35. Where there is sufficient evidence to show an intention on the part of the wife that the husband shall employ the money for his own use, or for the family expenditure, as he might think proper, the assent of the wife to such application of the money puts an end to the trust for her separate use. Gardner *v.* Gardner, 1 Giff. 126.

(*g*) But it has been lately held that if the husband survives and the wife dies in actual possession of her separate property without having exercised her right of disposing of it by deed or will, the quality of separate property ceases at her death, and the fund belongs to the husband in his marital right, so that he need not become her administrator, in order to entitle himself to it. Molony *v.* Kennedy, 10 Sim. 254. See, also, Carne *v.* Brice, 7 M. & W. 183; Messenger *v.* Clarke, 5 Ex. 388; Bird *v.* Peagrum, 13 C. B. 639; Bourne *v.* Fosbrook, 18 C. B. N. S. 515. [See Stewart *v.* Stewart, 7 John. Ch. 229; McCosker *v.* Golden, 1 Bradf. Sur. 64; Farie's Appeal, 23 Penn. St. 29; McKennan *v.* Phillips, 6 Whart. 576; Brown *v.* Brown, 6 Humph. 127; Cox *v.* Coleman, 13 B. Mon. 453; Brown *v.* Alden, 14 B. Mon. 141; Rogers *v.* White, 1 Sneed. 60.]

(*g*[1]) [Williams *v.* Clairborne, 7 Sm. & M. 488; Carroll *v.* Lee, 3 Gill & J. 505; Fears *v.* Brooks, 12 Geo. 197; Hale *v.* Stone, 14 Ala. 803; Cook *v.* Kennedy, 12 Ala. 42; Moss *v.* McCall, 12 Ala. 630; Mitchell *v.* Gates, 23 Ala. 428; Welch *v.* Welch, 14 Ala. 76; Pollard *v.* Merrill, 15 Ala. 170; Rudisell *v.* Watson, 2 Dev. Eq. 430; Ashcroft *v.* Little, 4 Ired. Eq. 236; Hunt *v.* Booth, 1 Freem. 215; Hoyt *v.* Parks, 39 Conn. 357. No particular form of words is necessary to create a trust for the separate use of a married woman; but the intention to exclude the husband must

"to be at the wife's own disposal," or "to be enjoyed independently of her husband," or "her receipt to be a good discharge," or "absolutely," or "a trust for the wife only." (g^2) But a gift to a wife "for her own use and benefit," does not clearly express such intention so as to give a separate estate. (g^3) The principal modern cases by which this doctrine has been established will be found collected in the note below. (h)

a gift to the separate use of an unmarried woman excludes the executors of a future husband.

Connected with this subject, a point of great importance * arises, with respect to which not a little doubt and controversy have existed, viz, whether gifts can legally be made to the sole and separate use of an unmarried woman, so as to preserve the property from becoming part of the estate of any *future husband*. This question, after a great variety of decisions, (i) appears to be finally settled by the case of Tullett *v.* Armstrong. (j) There the question raised

be unequivocal; Nightingale *v.* Hidden, 7 R. I. 115; and when the intention is clear, the court will carry it into effect. West *v.* West, 3 Rand. 373; Stewart *v.* Kissam, 2 Barb. 294; Perry *v.* Boileau, 10 Serg. & R. 208; Ballard *v.* Taylor, 4 Desaus. 550; Beaufort *v.* Collier, 6 Humph. 487; Nixon *v.* Rose, 12 Grattan, 485; Lewis *v.* Adam, 6 Leigh, 320; Clark *v.* Maguire, 16 Missou. 362; Baal *v.* Morgner, 46 Missou. 48; Duvall *v.* Graves, 7 Bush, 461; Davis *v.* Cain, 1 Ired. Eq. 305; Heathman *v.* Hall, 3 Ired. Eq. 414; Hamilton *v.* Bishop, 8 Yerger, 33; Porter *v.* Bank of Rutland, 19 Vt. 410; Charles *v.* Coker, 2 S. C. 122; Prout *v.* Roby, 15 Wallace, 171; Cuthbert *v.* Wolfe, 19 Ala. 373; Williams *v.* Avery, 38 Ala. 115; Lewis *v.* Elrod, 38 Ala. 17; Brown *v.* Jordan, 17 Ala. 232.]

(g^2) [See a collection of the phrases, by which, and cases, in which, the husband has been held to be excluded, in 2 Perry Trusts (2d ed.), § 648.]

(g^3) [See 2 Perry Trusts (2d ed.), § 649, and phrases and cases referred to.]

(h) Stanton *v.* Hall, 2 Russ. & M. 175; Tyler *v.* Lake, 2 Russ. & M. 183; Massey *v.* Parker, 2 My. & K. 174; Kensington *v.* Dollond, 2 My. & K. 184. See, also, Doe *v.* Stewart, 1 Ad. & El. 300; Margetts *v.* Barringer, 7 Sim. 482; Ashton *v.* McDougall, 5 Beav. 56; Wardle *v.* Claxton, 9 Sim. 524; Newlands *v.* Paynter, 10 Sim. 377; 4 M. & Cr. 408; Blacklow *v.* Laws, 2 Hare, 49; Beales *v.* Spencer, 2 Y. & Coll. C. C. 651; Shewell *v.* Dwarris, John. 172; Goulder *v.* Camm, 1 De G., F. & J. 146; Gilbert *v.* Lewis, 1 De G., J. & S. 38; Moore *v.* Morris, 4 Drew. 33; Spirett *v.* Willows, 34 L. J. Ch. 365; [S. C. 3 De G., J. & S. 293.] As to the meaning of the word "sole" in a will, see Massy *v.* Rowen, L. R. 4 H. L. 288.

(i) See Massey *v.* Parker, 2 My. & K. 174; Woodmeston *v.* Walker, 2 Russ. & M. 197; Brown *v.* Pocock, 2 Russ. & M. 210; Benson *v.* Benson, 6 Sim. 126; Bradley *v.* Hughes, 8 Sim. 149; Davies *v.* Thornycroft, 6 Sim. 420; Tullett *v.* Armstrong, 1 Beav. 1; Scarborough *v.* Borman, Ib. 34; Clark *v.* Jacques, Ib. 36; Dixon *v.* Dixon, Ib. 40; Maber *v.* Hobbs, 2 Y. & Coll. 317; Baggett *v.* Meux, 1 Phill. C. C. 627; Russell *v.* Dixon, 2 Drury & W. 133; Wright *v.* Wright, 2 John. & H. 647; [Parker *v.* Converse, 5 Gray, 336.]

(j) 4 My. & Cr. 377; [S. C. 1 Beav. 1. The strong current of American cases sustains the law as established in Tullett *v.* Armstrong, *supra*. Fears *v.* Brooks, 12 Geo. 197; Robert *v.* West, 15 Geo. 123;

was twofold; viz, first, whether property could be validly given to the separate use of a woman who was single when the gift took effect; and, if that could be done, then secondly, whether she could be restrained from anticipation during the coverture, by force of a prohibition to that effect inserted in the instrument of gift. And Lord Cottenham C., after a most elaborate review of all the authorities, decided both questions in the affirmative, expressing his opinion that they were identical as to the principle which must regulate the decision upon them. His lordship, in giving his judgment, stated, that after the most anxious consideration, he had come to the conclusion that the jurisdiction which the court of chancery has assumed in similar cases justifies it in extending it to the protection of the separate estate with its qualities and restrictions attached to it, throughout a subsequent coverture; though it was, no doubt, doing violence to the rules of property to say that property which, being given with qualifications and restrictions which are held to be void, belonged absolutely to the woman up to the moment of her marriage, should not be subject to the ordinary rules of law as to the interest which the husband is to take in it. (*k*)

Antenuptial settlement of money, jewels, &c. by the husband.

Again, an antenuptial settlement of money or jewels, *furniture, or other movables, made by the husband himself of his own property upon the wife, will be valid, as well against the husband himself and volunteer claimants from him, as also against his creditors. (*k*[1]) Nor will it differ the case that the husband was indebted at the time of mak-

Fellows *v.* Tann, 9 Ala. 1003; Shirley *v.* Shirley, 9 Paige, 363; Waters *v.* Tazewell, 9 Md. 291; Nix *v.* Bradley, 6 Rich. Eq. 43; Bridges *v.* Wilkins, 3 Jones Eq. 342; Beaufort *v.* Collier, 6 Humph. 487; In re Gaffee, 1 McN. & G. (Am. ed.) 541, and note (2); Vinnedye *v.* Shaffer, 35 Ind. 341; Schafroth *v.* Ambs, 46 Missou. 114. But a different view of the law has been maintained in Pennsylvania, and some other of the American States. See Hamersley *v.* Smith, 4 Whart. 126; McBride *v.* Smyth, 24 Penn. St. 250; Yarnall's Appeal, 70 Penn. St. 501; Dodson *v.* Ball, 60 Penn. St. 492; Hepburn's Appeal, 65 Penn. St. 472; McGargee *v.* Naglee, 64 Penn. St. 216; Wells *v.* McCall, 64 Penn. St. 207; Springer *v.* Arundell, 64 Penn. St. 218; Hemphill *v.* Harford, 3 Watts & S. 217; Craig *v.* Watts, 8 Watts, 499; Quigley *v.* The Commonwealth, 16 Penn. St. 356; Snyder *v.* Snyder, 10 Penn. St. 423; Lindsay *v.* Harrison, 3 Eng. 311; Dick *v.* Pitchford, 1 Dev. & Bat. Eq. 480; Apple *v.* Allen, 3 Jones Eq. 342; Miller *v.* Bingham, 1 Ired. 423; Gully *v.* Hall, 31 Miss. 20.]

(*k*) See, also, In re Gaffee, 1 Mac. & G. 541; [(Am. ed.), 550, note (1).]

(*k*[1]) [2 Sugden V. & P. (8th Am. ed.) 715, and note (*k*); De Barante *v.* Gott, 6 Barb. 492; Roberts *v.* Roberts, 22 Wend. 140; Vogel *v.* Vogel, 22 Missou. 161. If the settlement is made in good faith, and

ing the settlement, and that his future wife knew it; nor that the husband had the joint-possession, as long as he lived, of the furniture, &c.; (*l*) nor that the wife brought him no portion. (*m*)

Antenuptial agreement in writing.

The same principle of equity which secures the interest of the wife in the case of a settlement or bequest, will protect it when the husband *agrees* before marriage, by writing, that his wife shall be entitled to specific parts of her personal estate to her separate use, although the legal title becomes vested in him by the subsequent marriage. (*m*[1]) In such a case the husband will be a trustee for the wife's separate use, and the trust will bind his executors and administrators. (*n*)

without notice of any contemplated fraud, it cannot be impeached by creditors. In order to render the settlement void on account of fraud, both parties must concur in or have knowledge of the intended fraud. If the settlor alone intends to commit a fraud, and the other party does not participate in that intent, the settlement will be valid and binding. See Andrews *v.* Jones, 10 Ala. 400; Coutts *v.* Greenhow, 2 Munf. 363; Bunnel *v.* Witherow, 29 Ind. 123; Frank's Appeal, 59 Penn. St. 190; Jones's Appeal, 63 Penn. St. 324; Tunno *v.* Trevesant, 2 Desaus. 264; Croft *v.* Arthur, 3 Desaus. 223; Eppes *v.* Randolph, 2 Call, 103; Jones's Appeal, 62 Penn. St. 324; Miller *v.* Goodwin, 8 Gray, 542; Sullings *v.* Richmond, 5 Allen, 187; Tisdale *v.* Jones, 38 Barb. 523; Magniac *v.* Thompson, 7 Peters, 348.]

(*l*) Campion *v.* Cotton, 17 Ves. 264; Cadogan *v.* Kennett, Cowp. 432. But where the husband, with the knowledge of the wife, had committed an act of bankruptcy before the execution of the settlement, and an adjudication of bankruptcy followed within twelve months, the settlement, though antenuptial, was held invalid; for, by relation, the property had ceased to be the property of the bankrupt before the settlement was executed. Fraser *v.* Thompson, 4 De G. & J. 659. See Bulmer *v.* Hunter, L. R. 8 Eq. Ca. 46, as to where the settlement was held fraudulent as against the wife as well as the husband.

(*m*) Brown *v.* Jones, 1 Atk. 190, by Lord Hardwicke. A settlement made between the time of a runaway marriage in Scotland, and its re-celebration in England, cannot be considered antenuptial; Ex parte Hall, 1 Ves. & B. 112.

(*m*[1]) [See Southerland *v.* Southerland, 5 Bush, 591. But in Abbott *v.* Winchester, 105 Mass. 115, it was held that a promissory note given by a husband to his wife before their marriage becomes a nullity on the marriage, and is not revived by the death of the husband. To the same effect, see Chapman *v.* Kellogg, 102 Mass. 246; Patterson *v.* Patterson, 45 N. H. 164; Pike *v.* Baker, 53 Ill. 163; Smiley *v.* Smiley, 18 Ohio St. 543. See, however, for the law of other states, Webster *v.* Webster, 58 Maine, 139; Wright *v.* Wright, 59 Barb. 505; Logan *v.* Hall, 19 Iowa, 491; Child *v.* Pearl, 43 Vt. 224; Stone *v.* Gazzam, 46 Ala. 269; Hinney *v.* Phillips, 50 Penn. St. 382; Steadman *v.* Wilbur, 7 R. I. 481; Simmons *v.* Thomas, 43 Miss. 31; Petre *v.* State, 6 Vroom, 64, 69, 70.]

(*n*) 2 Roper Husband & Wife, 156. But the agreement must be in writing, by reason of the 4th section of the statute of frauds enacting that no action shall be brought whereby to charge any person upon any *agreement made in consideration of marriage*, unless some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or by some other person by him lawfully authorized. Randall *v.* Morgan, 12 Ves. 74; Warden *v.* Jones, 23 Beav. 487; S. C. 2 De G. & J. 76; Goldicutt *v.* Townshend, 28 Beav. 445; [2 Sugden V. & P. (8th

* Likewise a *post*-nuptial settlement of property by the husband on the wife is obligatory upon himself and all persons claiming as volunteers from or through him. (*o*) And such a settlement will protect the property even against creditors, unless it can be considered, from the circumstances under which it was made, fraudulent as against them. (*p*) With respect to

Postnuptial settlement.

Am. ed.) 718; Riley *v.* Riley, 25 Conn. 154; Albert *v.* Winn, 5 Md. 66; Borst *v.* Corey, 16 Barb. 136; Reade *v.* Livingston, 3 John. Ch. 481; Kirksey *v.* Kirksey, 30 Geo. 156; Lassence *v.* Tierney, 1 Mac. & G. 551, and cases in note (2), 571; Hammersley *v.* Baron De Biel, 12 Cl. & Fin. 45; Surcome *v.* Pinniger, 3 De G., M. & G. 571, note (1), and cases.] These and other authorities have overruled Dundas *v.* Duters, 1 Ves. jr. 199. But if a man, on his marriage with a lady, enters into a mere parol agreement with her, that a sum of money shall be transferred to trustees upon trust for himself, his intended wife, and the children of the marriage, and the money is, before the marriage, actually transferred to the trustees, who hold it solely upon the trusts agreed upon, the fact that the instrument declaring the trusts is executed by them subsequently to the marriage, does not make it a voluntary instrument, and enable creditors to set it aside. Cooper *v.* Wormald, 27 Beav. 270. Indeed, if the non-reduction into writing be owing to the fraudulent conduct of the husband, equity will relieve. Lady Montacute *v.* Maxwell, 1 P. Wms. 620; S. C. 1 Stra. 236; 1 Eq. Cas. Abr. 19.

(*o*) See Curtis *v.* Price, 12 Ves. 89; [Riley *v.* Riley, 25 Conn. 154; Paschall *v.* Hall, 5 Jones Eq. 108; Teasdale *v.* Teasdale, 2 Bay (S. Car.), 546; Bertrand *v.* Elder, 23 Ark. 494; Gardner *v.* Baker, 25 Iowa, 343; Kuhn *v.* Stansfield, 28 Md. 210; Jones *v.* Morgan, 6 La. Ann. 631.]

(*p*) [Picquet *v.* Swan, 4 Mason, 443; Riley *v.* Riley, 25 Conn. 154; Rogers *v.* Ludlow, 3 Sandf. Ch. 104; William & Mary College *v.* Powell, 12 Grattan, 372; Butler *v.* Rickets, 11 Iowa, 107; Wright *v.* Wright, 11 Iowa, 107; Williams *v.* Avery, 38 Ala. 115; Wiley *v.* Gray, 36 Miss. 510; Albert *v.* Winn, 5 Md. 66; Leavitt *v.* Leavitt, 47 N. H. 329; Larkin *v.* McMullin, 49 Penn. St. 29; Woolston's Appeal, 51 Penn. St. 452; Barker *v.* Koneman, 13 Cal. 9; Scogin *v.* Stacy, 20 Ark. 265; Clayton *v.* Brown, 30 Geo. 490; Reynolds *v.* Lansford, 16 Texas, 286.] The statute 27 Eliz. c. 4, makes all voluntary settlements null and void against *purchasers*, but does not relate to creditors, and extends only to lands, tenements, and hereditaments. The statute 13 Eliz. c. 5, which relates to creditors, directs that no act whatever done to defraud a creditor or creditors shall be of any effect against such creditor or creditors. Therefore the statute does not militate against any transaction *bonâ fide*, and where there is no imagination of fraud; and so is the common law. Cadogan *v.* Kennett, Cowp. 434, by Lord Mansfield. See, also, Walker *v.* Burrows, 1 Atk. 93; 1 Smith's Leading Cas. 9 *et seq.*; Turnley *v.* Hooper, 3 Sm. & G. 349. The principle now established is this: The language of the act being, that any conveyance of property is void against creditors, if it is made with intent to defeat, hinder, or delay creditors, the court is to decide in each particular case whether, on all the circumstances, it can come to the conclusion that the *intention* of the settlor in making the settlement was to defeat, hinder, or delay his creditors. Thompson *v.* Webster, 4 Drew. 628, by Kindersley V. C. But it is not necessary to show from anything actually said or done by the party, that he had the express design by the deed to defeat creditors. If he includes in it property to such an amount that the court is satisfied, having regard to the state of his property, and to the amount of his liabilities, its effect might probably be to delay or defeat

what is so regarded, if the debts * of the husband, at the time of making the settlement, were considerable, and the effect of the settlement is substantiated, would be to defeat the creditors of their demands, then such settlement is void as fraudulent. (*q*) And if the husband, though not indebted at the very time, becomes so shortly afterwards, so that it may be presumed that he made the settlement with a view to being indebted at a future time, it is equally to be considered as fraudulent. (*r*) But, gen-

creditors, the deed is within the statute. Jenkyn *v.* Vaughan, 3 Drew. 424; Freeman *v.* Pope, L. R. 5 Ch. App. 538. [But any presumption of fraud arising from the mere fact that the settlor was indebted at the time of making a voluntary settlement may be rebutted. Thacher *v.* Phinney, 7 Allen, 146; Lerow *v.* Wilmarth, 9 Allen, 382; Woolston's Appeal, 51 Penn. St. 542; Babcock *v.* Eckler, 24 N. Y. 623; Case *v.* Phelps, 39 N. Y. 164; Kent *v.* Riley, L. R. 14 Eq. 190.]

(*q*) Beaumont *v.* Thorp, 1 Ves. sen. 27; 1 Rop. Husband & Wife, 309. See, also, Holmes *v.* Penney, 3 Kay & J. 90; Barrack *v.* M'Cullock, Ib. 110; Acraman *v.* Corbett, 1 John. & H. 411; French *v.* French, 6 De G., M. & G. 95; Christy *v.* Courtenay, 26 Beav. 140; [Belford *v.* Craoe, 16 N. J. Eq. 265. The doctrine is thus expressed by Lord Westbury L. C. in Spirett *v.* Willows, 3 De G., J. & S. 293, 302: "If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement." See the remarks of Lord Hatherly L. C. and Gifford L. J. in Freeman *v.* Pope, L. R. 5 Ch. Ap. 543, 544, upon, and in limitation of the doctrine thus expressed. See, also, Bellows J. in Pomeroy *v.* Bailey, 43 N. H. 122; Potter *v.* McDowell, 31 Misson. 62; Norton *v.* Norton, 5 Cush. 524; Brackett *v.* Waite, 4 Vt. 389; Van Wyck *v.* Seward, 18 Wend. 375; S. C. 6 Paige, 62; Babcock *v.* Eckler, 24 N. Y. 623; Reade *v.* Livingston, 3 John. Ch. 481; Tilley *v.* Register, 4 Minn. 391; Coolidge *v.* Melvin, 42 N. H. 531; Freeman *v.* Burnham, 36 Conn. 469; Gridley *v.* Watson, 53 Ill. 186; Stewart *v.* Rogers, 25 Iowa, 395; Hunters *v.* Waite, 3 Grattan, 26; Church *v.* Chapin, 36 Vt. 223; Ellinger *v.* Crowl, 17 Md. 361; Kuhn *v.* Stansfield, 28 Md. 210; Chambers *v.* Spencer, 5 Watts, 406; 2 Sugden V. & P. (8th Am. ed.) 714, note (*t*), where this subject is fully discussed and the cases cited; Mackay *v.* Douglass, L. R. 14 Eq. 106; Bridgford *v.* Riddell, 55 Ill. 261; Sims *v.* Rickets, 35 Ind. 181; Bancroft *v.* Curtis, 108 Mass. 49, and cases cited; Annin *v.* Annin, 24 N. J. Eq. 185; Phelps *v.* Morrison, 24 N. J. Eq. 195. In the above case of Spirett *v.* Willows, 3 De G., J. & S. 293, 303, Lord Westbury said: "It is obvious that the fact of a voluntary settlor retaining money enough to pay the debts which he owes at the time of making the settlement, but not actually paying them, cannot give a different character to the settlement or take it out of the statute. It still remains a voluntary alienation or deed of gift, whereby in the event the remedies of creditors are delayed, hindered, or defranded." But it is said in Babcock *v.* Eckler, 24 N. Y. 623, that when the settlor retains a large amount, more than enough to pay his existing debts, the presumption of fraud is sufficiently rebutted. See Kipp *v.* Hanna, 2 Bland, 26; Taylor *v.* Enhanks, 3 A. K. Marsh. 239; Hopkirk *v.* Randolph, 2 Brock. 132; Brookbank *v.* Kennard, 41 Ind. 339; Moritz *v.* Hoffman, 35 Ill. 553; Miller *v.* Johnson, 27 Md. 6; Townsend *v.* Maynard, 45 Penn. St. 198; Tripner *v.* Abrahams, 47 Penn. St. 220.]

(*r*) Stileman *v.* Ashdown, 2 Atk. 481,

erally speaking, debts subsequently incurred will not defeat a post-nuptial settlement; (*s*) nor will any presumption of fraud against creditors arise from the debts of the husband owning at the time, if they were of inconsiderable amount; (*t*) or if, though considerable, the payment of them is secured, as upon mortgages or by other means; (*u*) or if the settlement itself provides for their payment. (*x*)

Besides the presumptive evidence of fraud arising from the situation of the husband, with respect to his debts, at the date of a postnuptial settlement, it has also been considered as a badge of fraud towards creditors, that the husband reserves to himself by the provisions of it, a power of revoking the limitations of the property in favor of the * wife. (*y*) So fraud *may* be presumed

by Lord Hardwicke; Barling *v.* Bishop, 29 Beav. 417.

(*s*) Townshend *v.* Wyndham, 2 Ves. sen. 10, by Lord Hardwicke; Kidney *v.* Couss. maker, 12 Ves. 136; Battersbee *v.* Farrington, 1 Swanst. 106; Holloway *v.* Millard, 1 Madd. 414. See Spirett *v.* Willows, 34 L. J. Ch. 365; [3 De G., J. & S. (Am. ed.) 293, note (2) and cases cited;] Freeman *v.* Pope, L. R. 5 Ch. App. 538; Hare *v.* Gardner, L. R. 7 Eq. Cas. 317. [In Spirett *v.* Willows, 2 De G., J. & S. 293, 302, 303, Lord Westbury L. C. said: "If a voluntary settlement or deed of gift be impeached by subsequent creditors whose debts had not been contracted at the date of the settlement, then it is necessary to show either that the settlor made the settlement with express intent" to delay, hinder, or defraud creditors, "or that after the settlement the settlor had no sufficient means or reasonable expectation of being able to pay his then existing debts, that is to say, was reduced to a state of insolvency; in which case the law infers that the settlement was made with intent to delay, hinder, or defraud creditors, and is therefore fraudulent and void." See S. C. 3 De G., J. & S. (Am. ed.) 293, note (2) and cases cited; 2 Sugden V. & P. (8th Am. ed.) 714, note (*t*) and cases cited; Kindersley V. C. in Jenkyn *v.* Vaughan, 3 Drew. 419; James V. C. in Freeman *v.* Pope, L. R. 9 Eq. 206; Thompson *v.* Webster 4 Drew. 628; Phillips *v.* Wooster, 36 N. Y. 412; Holmes *v.* Clark, 48 Barb. 237; Thatcher *v.* Phinney, 7 Allen, 146; Case *v.* Phelps, 39 N. Y. 164; Crossley *v.* Elworthy, L. R. 12 Eq. 158; Carter *v.* Grimshaw, 49 N. H. 100, 105, 106; McLane *v.* Johnson, 43 Vt. 48; Bridgford *v.* Riddell, 55 Ill. 261.]

(*t*) Lush *v.* Wilkinson, 5 Ves. 384, in which case Lord Alvanley intimated that the validity of the settlement will depend on the fact whether the husband was solvent at the time of making it. But it has been since held that it is not necessary to prove insolvency, though the mere existence of *some* debt is not sufficient. Townsend *v.* Westacott, 2 Beav. 340; Skarf *v.* Soulby, 1 Mae. & G. 364; [Malins V. C. in Smith *v.* Cherrill, L. R. 4 Eq. 389, 395; Norton *v.* Norton, 5 Cush. 524; Smith *v.* Yell, 3 Eng. 470; Potter *v.* McDowell, 31 Misson. 62; Dewey J. in Parkman *v.* Welch, 19 Pick. 231, 235; Wilson *v.* Howser, 12 Penn. St. 109; Wilson *v.* Buchanan, 7 Grattan, 334; Worthington *v.* Bullett, 6 Md. 172; S. C. 2 Md. Ch. 99; Parish *v.* Murphree, 13 How. 92; Hudnal *v.* Wilder, 4 McCord, 294; M'Elwee *v.* Sutton, 2 Bailey, 128; Robinson *v.* Stewart, 10 N. Y. 189; Bridgford *v.* Riddell, 55 Ill. 261.]

(*u*) Stephens *v.* Olive, 2 Bro. C. C. 90.

(*x*) George *v.* Milbanke, 9 Ves. 194.

(*y*) 1 Roper Husband & Wife, 318, Jacob's ed.

from the fact, that notwithstanding the postnuptial settlement purports to be an absolute transfer of personal property, the husband continues in possession of it, (*z*) unless, indeed, his possession be *bonâ fide* consistent with the nature of the settlement. (*a*)

Where the settlement after marriage by the husband upon the wife is made for a valuable consideration, the presumption of fraud fails, though the husband be indebted at the time. (*a*[1]) Thus, if the settlement be made in consideration of her father, or some other person, advancing a sum of money, (*b*) or on occasion of an increase of fortune falling to her, (*c*) or in consideration of her relinquishing any valuable interest, as her jointure, (*d*) or dower, (*e*) or property secured to her for her separate use; (*f*) in all these cases the settlement will be valid against creditors, unless the property settled so much exceeds the consideration in value, that from its inadequacy it appears that a fraud was intended on the creditors. (*g*)

(*z*) That the continuance in possession is a badge of fraud, see Twyne's case, 3 Co. 81 *a*; Edwards *v.* Harben, 2 T. R. 587; Bamford *v.* Baron, Ib. 594, in note (*a*); [Benj. on Sales (1st Am. ed.), § 484 *et seq.*; Bellows C. J. in Putnam *v.* Osgood, 52 N. H. 148, 153 *et seq.*; Coolidge *v.* Melvin, 42 N. H. 510; Rothchild *v.* Rowe, 44 Vt. 389.]

(*a*) Kidd *v.* Rawlinson, 4 Bos. & Pull. 59; Lady Arundell *v.* Phipps, 10 Ves. 139; Colvile *v.* Parker, Cro. Jac. 158. See Eastwood *v.* Brown, Ryan & M. 312; Martindale *v.* Booth, 3 B. & Ad. 498; 1 Smith's Leading Cases, p. 9 *et seq.*; Alton *v.* Harrison, L. R. 4 Ch. App. 622; [Bellows C. J. in Putnam *v.* Osgood, 52 N. H. 154; Morse *v.* Powers, 17 N. H. 296; Colt J. in Ingalls *v.* Herrick, 108 Mass. 353, 354; Brooks *v.* Powers, 15 Mass. 244; Benj. on Sales (1st Am. ed.), §§ 486, 502.]

(*a*[1]) [See Hunt *v.* Johnson, 44 N. Y. 27; Barnum *v.* Farthing, 40 How. (N. Y.) Pr. 25; Duffy *v.* Ins. Co. 8 Watts & S. 413.]

(*b*) Colvile *v.* Parker, Cro. Jac. 158; Ramsden *v.* Hylton, 2 Ves. sen. 308, in Lord Hardwicke's judgment; Brown *v.* Jones, 1 Atk. 190; Wheeler *v.* Caryl, 1 Ambl. 121.

(*c*) 1 Roper Husband & Wife, 323, 2d ed. The court of chancery will order an additional settlement to be made on the wife on an increase of fortune falling to her, which will bind both the creditors and purchasers of the husband. Ib.

(*d*) Cottle *v.* Fripp, 2 Vern. 220; Scot *v.* Bell, 2 Lev. 70.

(*e*) *Per curiam* in Lavender *v.* Blackstone, 2 Lev. 147. See, also, Hewison *v.* Negus, 16 Beav. 598, by Lord Langdale.

(*f*) Lady Arundell *v.* Phipps, 10 Ves. 139. [When a husband owes his wife money he may make a *bonâ fide* conveyance of land to her. Peiffer *v.* Lytle, 58 Penn. St. 286.]

(*g*) Ward *v.* Shallet, 2 Ves. sen. 16; Dewey *v.* Bayntum, 6 East, 257. What is a reasonable proportion or value between the thing given or paid, and that settled in consideration of it by the husband, is a calculation and result dependent upon each case in connection with collateral circumstances. The question is incapable of a general definite answer; and when the court is unable to draw the conclusion, the fact must be ascertained by a jury. 1 Roper Husband & Wife, 327, 2d ed.

On the same ground, when a postnuptial settlement * is made in pursuance of a written agreement before marriage, it is valid against creditors; for the contract of marriage is a valuable consideration, and establishes the settlement against every one; (*h*) but if the agreement before marriage is verbal only, though the settlement after marriage is in pursuance of it, such agreement will not support the settlement against creditors. (*i*)

When a settlement is made after marriage, and there being creditors at the time, it is on that account declared fraudulent, the property so settled becomes part of the assets, and all subsequent creditors are let in to partake of it. (*j*) And it should seem that the subsequent creditors may assert their rights as plaintiffs; (*k*) at all events, if any debt, which was due at the time of the execution of the deed still remains unsatisfied. (*l*)

Separate property acquired by wife's separate trading.

Besides the means already described of the acquirement of separate property, by a wife, she may also do so by carrying on trade apart from her husband, on her separate account, either in consequence of an express agreement between her and her hushand before marriage, or from his permission after marriage. (*m*) There is an important distinc-

(*h*) 1 Roper, 306, 2d ed.; [Belford *v.* Crane, 16 N. J. Eq. 265; 2 Sugden V. & P. (8th Am. ed.) 718; Saunders *v.* Terrill, 1 Ired. (Law) 97; Caines *v.* Marley, 2 Yergcr, 582; Rogers *v.* Hull, 4 Watts, 359. In Smith *v.* Allen, 5 Allen, 454, it was held that a legal contract and promise of marriage made in good faith by a woman to one who has executed to her a deed of land, for the purpose of inducing her to marry him, furnishes a good consideration for the deed; and she will be entitled to hold the land against his creditors, although the marriage is prevented by his death. See Sterry *v.* Arden, 1 John. Ch. 261; 4 Kent, 463; Huston *v.* Cantril, 11 Leigh, 176.]

(*i*) *Ante*, 752, note (*n*); [2 Sugden V. & P. (8th Am. ed.) 718; Izard *v.* Izard, 1 Bailey (S. Car.) Ch. 228; Wood *v.* Savage, 2 Doug. (Mich.) 316; Borst *v.* Corey, 16 Barb. 136; Davidson *v.* Graves, Riley (S. Car.) Ch. 219; Simpson *v.* Graves, Riley (S. Car.) Ch. 232.]

(*j*) Walker *v.* Furrowes, 1 Atk. 94, by Lord Hardwicke. Taylor *v.* Jones, 2 Atk. 600; Montague *v.* Sandwich, 12 Ves. 156, 2d edition, note (52) to Kidney *v.* Coussmaker; [*post*, 1679, and notes.]

(*k*) Jenkyn *v.* Vaughan, 3 Drew. 419. See Reese River Silver Mining Company *v.* Atwell, L. R. 7 Eq. Ca. 347. In Lush *v.* Wilkinson, 5 Ves. 387, Lord Alvanley said it was very extraordinary for a subsequent creditor to come with a fishing bill, in order to prove antecedent debts. But see Richardson *v.* Smallwood, 1 Rop. 313, note (*c*), Jacob's edition, and the rest of the note, and Atherley's note to the Touchstone, p. 66.

(*l*) Jenkyn *v.* Vaughan, H. T. 1856, by Kindersley V. C. 3 Drew. 419.

(*m*) See Haddon *v.* Fladgate, 1 Sw. & Tr. 48; *ante*, 61, note (*b*). Any agreement with, or permission from her husband, is not now necessary, by the married woman's property act (33 & 34 Vict. c. 93, s. 1). See *ante*, 748, note (*c*).

tion, * with respect to the estate of the executor of the husband, between the wife's right to property acquired in the two cases. When the agreement is made previously to marriage, since the consideration is valuable, the transaction will not only be obligatory upon the husband and his executors, but also binding upon his creditors; when the agreement originates during the marriage, it will be void against his creditors, but good against himself. (*n*)

In the case of the wife's being a sole trader within the city of London, according to the custom there, the husband can do no act to prevent the creditors of the wife being satisfied out of her property in trade; but when these demands are satisfied, he may, at law, possess himself of the surplus of her property; for the custom does not extend to prevent him. (*o*) But there may be a question whether a court of equity would not consider this surplus as the wife's separate property. (*p*)

Savings, &c. from wife's separate property:

The savings arising from the separate property of the wife will not form a part of the estate of her husband's executor; for "the sprout is to savor of the root and go the same way." (*q*) And so jewels, or other things, bought by the wife, with money arising out of her separate property, will not be assets liable to the husband's debts. (*r*) But as she * is entitled to deal with her separate estate as she pleases, if

(*n*) 2 Rop. 165, 2d ed.; [Rogers *v.* Fales, 5 Penn. St. 157.]

(*o*) Lavie *v.* Phillips, 3 Burr. 1785, by Yates J.

(*p*) 2 Rop. Husband & Wife, 125, 2d ed.

(*q*) Gore *v.* Knight, 2 Vern. 535. Sir Paul Neal's case, cited in Herbert *v.* Herbert, Prec. Chanc. 44; [Barron *v.* Barron, 24 Vt. 375; Richardson *v.* Estate of Merrill, 32 Vt. 27; Miller *v.* Williams, 5 Md. 226, 236; Rush *v.* Vought, 55 Penn. St. 437; Towers *v.* Hagner, 3 Whart. 57; Yardly *v.* Raub, 5 Whart. 123; Rogers *v.* Fales, 5 Penn. St. 104; Young *v.* Jones, 9 Humph. 551; Gentry *v.* McReynolds, 12 Missou. 533; Hoot *v.* Sorrell, 11 Ala. 386; Kee *v.* Vasser, 2 Ired. Eq. 553; Merritt *v.* Lyon, 3 Barb. 110.] So as to her savings out of her alimony. Moore *v.* Barber, 34 L. J. N. S. Ch. 482.

(*r*) Willson *v.* Pack, Prec. Chan. 297, per Lord Cowper C.; Sir Paul Neal's case, Prec. Chan. 44; but see Lady Tyrrell's case, 1 Freem. 304; *post*, 761, note (*j*). See, also, Carne *v.* Brice, 7 M. & W. 183, where it was held that clothes bought by the wife out of money settled to her separate use might be taken in execution for her husband's debts. See, likewise, Messenger *v.* Clarke, 5 Ex. 388; Bird *v.* Peagrum, 13 C. B. 639. But these decisions at law do not conclude the question as to the rights of the wife in equity. Accordingly in Brooke *v.* Brooke, 25 Beav. 342, husband and wife had for many years lived, and were still living separate. He remitted money for her maintenance and support. She saved a considerable portion. And it was held by Romilly M. R. that the husband could not recover back these savings; for that the remittances must, as against the husband, be treated as her separate estate.

she directly authorizes any moneys which for a part of it, or the savings arising from it, to be paid to her husband, he is entitled to receive them, and she can never recall them. (*s*)

The general rule of law, derived from the unity of person, is, that gifts from the husband to the wife are void. (*s*[1]) "But in courts of equity," Lord Hardwicke says in Lucas *v.* Lucas, (*t*) "gifts between husband and wife have often been supported, though the law does not allow the property to pass. It was so determined in the case of Mrs. Hungerford, and in Lady Cowper's case, before Sir Joseph Jekyll, where gifts from Lord Cowper, in his lifetime, were supported, and reckoned by this court as a part of the personal estate of Lady Cowper." (*u*)

gifts from the husband to the wife:

And his lordship proceeded to decree that the defendant in the cause, a widow, was entitled to 1,000*l.* South Sea annuities, transferred by her husband, in his lifetime, into the name of his wife, as a valid gift against the husband and his representatives. (*v*)

(*s*) Caton *v.* Rideout, 1 Mac. & G. 599. But see, also, Darkin *v.* Darkin, 17 Beav. 578.

(*s*[1]) [See Manny *v.* Rixford, 44 Ill. 129; Woodson *v.* Pool, 19 Missou. 340. This common law rule is abrogated in New York, by N. Y. Laws, 1862, c. 343. Rawson *v.* Pennsylvania R. R. Co. 2 Abb. Pr. N. S. 220.]

(*t*) 1 Atk. 271. See, also, 3 Atk. 393.

(*u*) See, also, Sir Thomas Plumer's judgment in Walter *v.* Hodge, 2 Swanst. 104; S. C. 1 Wils. Ch. Cas. 445. Though the property does not pass at law, yet, in equity, a husband, being the owner at law, may become a trustee for his wife; and if by clear and irrevocable acts he has made himself such trustee, the gift to his wife will be conclusive. Mews *v.* Mews, 15 Beav. 533, by Romilly M. R.; Grant *v.* Grant, Rolls, July 10, 1865, 11 Jur. N. S. 787; S. C. 34 L. J. Ch. 641; [George *v.* Spencer, 2 Md. Ch. 353; Eddins *v.* Buck, 23 Ark. 507; Peck *v.* Brummagin, 31 Cal. 440; Jennings *v.* Davis, 31 Conn. 134; Underhill *v.* Morgan, 33 Conn. 105; Churchill *v.* Corker, 25 Geo. 479; Clawson *v.* Clawson, 25 Ind. 229; Skillman *v.* Skillman, 13 N. J. Eq. 403; Wells *v.* Treadwell, 28 Miss. 717; Herr's Appeal, 5 Watts & S. 494; Paschall *v.* Hall, 5 Jones (N. Car.), 108; Dale *v.* Lincoln, 62 Ill. 22; *ante*, 752, note (*m*[1]); Coates *v.* Gerlach, 44 Penn. St. 43; Chapman *v.* Kellogg, 102 Mass. 246, 248, and cases cited; Lord *v.* Parker, 3 Allen, 129; Ingham *v.* White, 4 Allen, 412, 415; Vance *v.* Nagle, 70 Penn. St. 176; Sims *v.* Rickets, 35 Ind. 181; Beard *v.* Dedolph, 29 Wis. 136; Simmons *v.* Thomas, 43 Miss. 31. It is well settled in Mississippi, that husband and wife may have direct pecuniary dealings with each other and that the latter may become the creditor of the former. Butterfield *v.* Stanton, 44 Miss. 15; Thoms *v.* Thoms, 45 Miss. 263. See Mayfield *v.* Kilgour, 31 Md. 240; Savage *v.* O'Neil, 44 N. Y. 298; Simmons *v.* Thomas, 43 Miss. 31.]

(*v*) See, also, Lord Hardwicke's notice of this case, in Graham *v.* Londonderry, 3 Atk. 393. But see, likewise, 2 Sm. & G. 197; [Scott *v.* Simes, 10 Bosw. 314; Williams *v.* Maull, 20 Ala. 721; Booker *v.* Booker, 32 Ala. 473; Barron *v.* Barron, 24 Vt. 375; Pinney *v.* Fellows, 15 Vt. 525; Wood *v.* Warden, 20 Ohio, 518; Hutton *v.* Duey, 3 Penn. St. 100; Resor *v.* Resor, 9 Ind. 347.]

stock, &c. purchased by husband in the names of himself and wife or in her name:

So stock purchased by a man in the name of himself and his wife, was, on his death, held by the vice chancellor * (Sir John Leach) to go to her as the survivor. (*x*) And in a similar case, Lord Eldon C. said it was *primâ facie* a gift to herself in the event of her surviving, unless evidence of contemporaneous acts, showing a contrary intention, were produced. (*y*) So where the husband lends out money upon securities taken in the names of himself and wife, and dies, the wife is entitled by survivorship, if there are sufficient assets without this money to pay debts. (*z*) And, generally, where a husband purchases personal property in the name of his wife, or in their joint names, it will be presumed, in a case clear of fraud, to have been intended as an advancement and provision for the wife, and on surviving her husband she will be entitled, unless he has aliened the property in his lifetime. (*a*)

(*x*) Lorimer *v.* Lorimer, MSS. Mr. Beames, note (46) to Rider *v.* Kidder, 10 Ves. 367, 2d ed. [In Draper *v.* Jackson, 16 Mass. 480, Jackson J., in a very elaborate opinion, sustained the doctrine that the husband might by his act authorize a contract in the joint names of himself and wife, and that such a contract would inure to the benefit of the wife, if she survived her husband. Dewey J. in Phelps *v.* Phelps, 20 Pick. 559, 560; Sanford *v.* Sanford, 5 Lansing, 486; S. C. 61 Barb. 293. In Michigan, securities taken by a husband in his own name for money of his wife, belong after her death to her administrator. Leland *v.* Whitaker, 23 Mich. 324. See Dayton *v.* Fisher, 34 Ind. 356.]

(*y*) Wilde *v.* Wilde, MS. 1 Rop. Husband & Wife, by Jacob, 54. See, also, accord. Dummer *v.* Pitcher, 5 Sim. 35; 2 My. & K. 262; Coates *v.* Stevens, 1 Y. & Coll. 66; Low *v.* Carter, 1 Beav. 426; Vance *v.* Vance, 1 Beav. 605; Williams *v.* Davies, 33 L. J., P. M. & A. 127.

(*z*) Christ's Hospital *v.* Budgin, 2 Vern. 683. [A husband subscribed for shares in the stock of a bank, and on paying the instalments he stated that the shares belonged to his wife, and that she would have something to support her if he should spend all his property. He took receipts as for payments made by her, which payments were entered in the book of the bank, as made by the wife, and a certificate was issued to her as owner of the shares. The husband afterwards purchased shares in the same bank, in his own name, and sometimes pledged the same to the bank as security for loans made to him, but never so pledged, nor proposed so to pledge, the shares that stood in his wife's name. He received dividends as long as he lived, on the shares that stood in his own name and on those that stood in the name of his wife, and always requested the cashier of the bank to give him the money in two distinct and separate sums, and he sometimes asked for particular kinds of money for his wife in payment of the dividends on the shares that stood in her name. It was held that the wife, upon her husband's death, was entitled, as against his heirs-at-law, to hold the shares that stood in her name, as her own property, these having been a gift thereof to her by her husband, valid as against all persons except his creditors, who might resort to the shares for payment of these debts if he did not leave other property sufficient to pay them. Adams *v.* Brackett, 5 Met. 280.]

(*a*) Kingdon *v.* Bridges, 2 Vern. 67; Glaister *v.* Hewer, 8 Ves. 199. So where

what is sufficient evidence of a gift by husband to wife.

But where the widow seeks to establish a gift from her husband in his lifetime, she must adduce evidence beyond suspicion; (*b*) and nothing less will do than a clear irrevocable gift, either to some person as trustee, or by some clear and distinct act of his, by which he divested himself of the property, and engaged to hold it as trustee for the separate use of his wife. (*c*)

a man from time to time gave his wife sums of money, part of which accumulated as stock in his name, and he received the dividends and paid them to her, and in every way treated the stock as her separate property, it was held by Sir Cresswell Cresswell that the wife had acquired a separate estate, of which the husband had considered himself trustee for her, and to which the *jus disponendi* attached. In the Goods of Smith, 1 Sw. & Tr. 125. [See notes (*z*), above, and (*c*), below; Rynders *v.* Crane, 3 Daly, 339.]

(*b*) Walter *v.* Hodge, 2 Swanst. 92; S. C. 1 Wils. Ch. Rep. 445; [Paschall *v.* Hall, 5 Jones Eq. 108.]

(*c*) M'Lean *v.* Longlands, 5 Ves. 79, by Lord Alvanley. See, also, 2 Swanst. 104; Mews *v.* Mews, 15 Beav. 329; Hoyes *v.* Kindersley, 2 Sm. & G. 195. [See Crissman *v.* Crissman, 23 Mich. 217; Woodford *v.* Stephens, 51 Misson. 443; Sims *v.* Rickets, 35 Ind. 181; Thompson *v.* Mills, 39 Ind. 528; Trowbridge *v.* Holden, 58 Maine, 117. In Stanwood *v.* Stanwood, 17 Mass. 57, it appeared that the wife at the time of her marriage held in her own right nine shares in a bank, the charter of which having subsequently expired, her husband subscribed in her name for five shares in a new bank, to which the holders of shares in the old bank were permitted to subscribe to a limited extent, leaving four hundred dollars due to the wife for the remainder of her shares. This amount thus due was entered in the books of the bank to the credit of the husband as a deposit by him, and a book stating the deposit was delivered to him; and thus it remained at the time of his death. This money, the wife claimed, had never vested in her husband. To rebut the inference of reduction to possession by the husband, arising from the facts above stated, it was shown that at the time when the money was placed to the credit of the husband in the books of the bank, he stated that it was not his money but his wife's; that he did not want the money, but would leave it in the bank for her. The court held that there was no reduction of the property to the possession of the husband, inasmuch as he disaffirmed at the time any such purpose. So in Phelps *v.* Phelps, 20 Pick. 556, it appeared that a married woman lent the interest accruing after her marriage upon a note held by her before her marriage, and the borrower gave her therefor his promissory note, which was made payable to her, in accordance with the wishes of her husband, in order that she might be the exclusive owner thereof; and the husband frequently declared that the money, as well as the interest thereon, was her separate property, and that he did not intend to claim or receive any part thereof to his own use; but he also stated to a third person that no agreement had been made with the wife in relation to the money, either before or after the marriage. After the death of the husband, the maker of the note paid to the wife the amount due thereon, she having retained the note in her custody; and it was held that she was entitled to retain the amount so paid, for her own use, as against the executor of her husband. See the facts of Adams *v.* Brackett, stated *supra*, note (*z*). In Vermont a husband may surrender to his wife the right to her personal property which the law gives him as her husband, by an antenuptial contract to that effect; by allowing her to claim and control for a long time property given to her during the

*In a case, however, where a husband gave directions to his bankers to invest a sum of money in the funds, in the joint names of himself and wife, and their brokers accordingly made the purchase; Lord Langdale M. R. held that the wife was entitled to the stock by survivorship, although the husband died after the contract, but before the transfer had been completed. (*d*)

Pin-money:

Those gifts of money by the husband to the wife for clothes, or to purchase ornaments, or for her separate expenditure, which are usually called pin-money, (*e*) will be good in equity as against the husband, and all volunteer claimants through him. (*f*)

and similar allowances from husband to wife:

Similar allowances have been supported in equity; as where the husband voluntarily allowed the wife to dispose and make profit of all such butter, eggs, poultry, pigs, fruit, and other trivial matters arising from a farm (over and besides what was used by the family) for her own separate use, calling it her pin-money; out of which the wife saved 100*l.*; which the husband borrowed, and died; Lord Chancellor Talbot decreed, that *there being no deficiency of assets to pay debts*, the widow should come in as a creditor for the 100*l.*; and the court mentioned the case of Calmady *v.* Calmady, where there was a like agreement made betwixt husband and wife, that, upon every renewal of a lease by a husband, two guineas should be paid by the tenant to the wife, and this was allowed to be her separate money. (*g*)

See also in Mangey *v.* Hungerford, (*h*) the wife had saved a considerable sum of money out of housekeeping, and in a suit instituted against her for a discovery of what she had saved, she insisted by answer that she was not bound to *make such a discovery; and upon exceptions to the answer, it was held sufficient by Lord King.

coverture as her separate property, and refraining to exercise the right which the law gives him to take from her such property and use it as his own; and by making gifts himself to his wife. Bent *v.* Bent, 44 Vt. 555. See Hoyt *v.* Parks, 39 Conn. 357; Teague *v.* Downs, 69 N. Car. 280; Fowler *v.* Rice, 31 Ind. 258; Bergey's Appeal, 60 Penn. St. 408; Child *v.* Pearl, 43 Vt. 224; Goree *v.* Walthall, 44 Ala. 161; Goodrich *v.* Goodrich, 44 Ala. 670.]

[760] [761]

(*d*) Vance *v.* Vance, 1 Beav. 605.

(*e*) As to the nature of pin-money, see the elaborate observations of Lord Brougham C. in Howard *v.* Digby, 8 Bligh, 224; S. C. 2 Cl. & Fin. 634.

(*f*) 2 Roper Husband & Wife, 132, 2d ed.

(*g*) Slanning *v.* Style, 3 P. Wms. 339; [Hubbard J. in Adams *v.* Brackett, 5 Met. 285.]

(*h*) 2 Eq. Cas. Abr. 136, *in margine*.

property acquired by wife after a protection order under divorce act:

There has already (*i*) been occasion to show that, under the divorce act, 1857, s. 25, property acquired by a wife, after obtaining a protection order, may be disposed of by her in all respects as a *feme sole*.

savings out of pin-money and other allowances, when liable to husband's debts:

It often happens that pin-money is settled on the wife by agreement previous to marriage; in which case it falls under a different consideration; and upon the principles already explained, the savings by the wife out of it will be protected as her separate property, not only against the husband and volunteer claimants through him, but also from his creditors. But if the wife, by good management, effect savings out of her pin-money or other allowance made by the husband, *not* in pursuance of an antenuptial contract, such savings, as well as jewels so purchased by the wife out of them, will not, it should seem, be exempt from the husband's debts, but will be assets for the purpose of satisfying them, in the hands of his executors, (*j*) although protected from voluntary claims.

arrears of pin-money, what recoverable.

If pin-money be in arrear, and the husband dies, the wife may claim the arrears against her husband's representatives; though such claim cannot, generally speaking, be carried farther back than one year's income; (*k*) which restriction appears to have been founded partly on a supposed satisfaction by acquiescence, on the notion of the consent of the wife, to make it a common fund for the expense of the family; (*l*) and partly on the consideration, that the money * is meant for the dress and ornament of the wife, in a mode suitable to the degree of the husband, so as to maintain his dignity, and not for the accumulation of the fund; so that if the wife does not choose to expend the money for the purpose to which it was appropriated, viz, to support his and her rank in society, she cannot justly claim the arrears of it. (*m*) Again, if pin-money be in arrear, and the wife

(*i*) *Ante*, 59.

(*j*) Willson *v.* Pack, Prec. Chan. 297; and see Lady Tyrrell's case, 1 Freem. 304, where Lord Keeper Finch held that jewels bought by the widow, out of the savings of a yearly sum allowed by her husband for her own expenses, were liable to his creditors. This decision has been considered by Mr. Hovenden, in his edition of 2 Freeman, to be effectually overruled by Herbert *v.* Herbert, and Wilson *v.* Peck, but these cases, it should seem, only apply to allowances settled before marriage.

(*k*) Peacock *v.* Monk, 2 Ves. sen. 190; Thrupp *v.* Harman, 3 My. & K. 513.

(*l*) Brodie *v.* Barry, 2 Ves. & B. 36.

(*m*) 2 Cl. & Fin. 657; S. C. 8 Bligh, 249.

dies, her representatives cannot sustain any claim for it whatever; the ground of which rule is, that the pin-money was not meant for the sustentation of the wife, but for her dress and ornament in a station suitable to the degree of her husband. The authorities connected with this subject, and the nature of pin-money in general, were fully discussed and commented on in the arguments of counsel and the judgment of Lord Brougham in a late case relating to the arrears of the pin-money of the Duchess of Norfolk. (*n*) Her grace was entitled, under the trusts of the settlement made in contemplation of her marriage with the duke in 1771, to two annuities of 700*l.* and 300*l.*, charged by way of pin-money, upon estates to which the duke was entitled for his life. The duke received all the rents and profits of the estates, and maintained the duchess according to her rank, up to the time of his death in 1815. In 1816, the duchess was found to have been a lunatic, without lucid intervals, from 1782, and she continued so until 1820, when she died intestate. Her personal representative claimed from the personal representative of the duke arrears of the pin-money, from 1782 to 1815. And it was held by the house of lords, reversing the decree of the vice chancellor, (*o*) that the personal representatives of the duke would have been entitled to set off any payments made by the duke in respect of the personal expenses of the duchess, against a claim for the arrears of her pin-money by her, if it had been *made on her behalf during her lifetime, and that the personal representative of the duchess was not entitled to *any* arrears whatever. (*o*[1])

Paraphernalia:

Another instance where the wife may acquire a property in her husband's personal chattels, by gift from him, so as to exclude his executors or administrators, is to be found in her paraphernalia. (*o*[2]) The term is borrowed from the civil

(*n*) Howard *v.* Digby, 2 Cl. & Fin. 234; S. C. 8 Bligh, 224. See, also, Jodrell *v.* Jodrell, 9 Beav. 45; [Miller *v.* Williamson, 5 Md. 219, 236.]

(*o*) Digby *v.* Howard, 4 Sim. 588.

(*o*[1]) [See Miller *v.* Williamson, 5 Md. 219, 236.]

(*o*[2]) [By statute, in Massachusetts, the widow and minor children of a deceased person are entitled to their articles of apparel and ornament. And the judge of the probate court may allow to the widow such parts of the personal estate of the deceased, as he, having regard to all the circumstances of the case, may deem necessary for herself and family under her care, not exceeding fifty dollars to any child; and the statute also declares, that "such provisions and other articles as are necessary for the reasonable sustenance of his family, and the use of his house and the furniture therein, for forty days after his

law, and is derived from the Greek, παρα φερνη, *i. e.* something which she is entitled to over and above dower. Our law uses it to signify the apparel and ornaments of the

what are so considered:

death, shall not be taken as assets for the payment of debts, legacies, or charges of administration." Genl. Sts. c. 96, §§ 4, 5. See Shaw C. J. in Washburn *v.* Hale, 10 Pick. 431–433; Adams *v.* Adams, 10 Met. 170; Fisk *v.* Cushman, 6 Cush. 20, 28 The authority of the probate court to make the allowance is not limited to intestate estates. It is given in all cases — whether there is a will or not, whether the widow waives the provisions of the will or not, whether there is a residuary clause or not — provided there is personal estate from which the allowance can be made. The allowance for necessaries for the widow, for the use of herself and the family under her care, and that of sustenance of the family of the deceased for forty days after his death, are put on the same ground. Thomas J. in Williams *v.* Williams, 5 Gray, 24, 25. She is entitled to receive the allowance, made her by the judge of probate, in priority to the payment of the debts, the expenses of the last sickness and funeral, and charges of settling the estate of the deceased. Kingsbury *v.* Wilmarth, 2 Allen, 310. The allowance can be paid to her only out of the personal estate. Paine *v.* Paulk, 39 Maine, 15. And a second allowance may be made at any time before the personal estate is exhausted. Hale *v.* Hale, 1 Gray, 518. But the judge of probate has no authority to revoke a decree once passed by himself, making an allowance to the widow, and to pass a new decree for a smaller allowance to her. Pettee *v.* Wilmarth, 5 Allen, 144. In Wright *v.* Wright, 13 Allen, 207, Gray J. said: "The allowance which a judge of probate is authorized to make to a widow out of the personal estate of her husband is principally intended for the present support of herself and her family, if any, while the estate is in process of settlement and is usually moderate in amount, and made by the judge of probate in a summary manner soon after her husband's death." Washburn *v.* Washburn, 10 Pick. 374; Drew *v.* Gordon, 13 Allen, 122; Adams *v.* Adams, 10 Met. 170; Barrows J. in Kersey *v.* Bailey, 52 Maine, 201; Foster *v.* Foster, 36 N. H. 437; Hubbard *v.* Wood, 15 N. H. 74; Mathes *v.* Bennett, 21 N. H. 188; Kingman *v.* Kingman, 31 N. H. 182. No notice of the application of a widow for an allowance is required by the statute, except upon a grant of special administration; and the practice of the probate courts in the different counties has not been uniform upon this subject; although the better practice no doubt is not to make an allowance of any unusual amount without notice to all parties interested. In many cases notice to the executor is sufficient to protect the interests of all concerned. Gray J. in Wright *v.* Wright, *supra*. In Adams *v.* Adams, 10 Met. 171, Shaw C. J. said: "We are of opinion that this provision [for allowance] is intended for the present relief of the widow, for the maintenance of herself and children, that it is temporary in its nature and personal in its character, and confers no absolute or contingent right of property, which can survive her, or go to her personal representative." In this case it was held that the death of the widow, while an appeal from the decree making the allowance was pending, put an end to the claim. See Drew *v.* Gordon, 13 Allen, 120; Schaffner *v.* Grutzmacher, 6 Iowa, 137; France's Estate, 75 Penn. St. 220, 226; Ex parte Dunn, 63 N. Car. 137; Cox *v.* Brown, 5 Ired. Law, 194. But see Dorah *v.* Dorah, 4 Ohio St. 292; Bane *v.* Wick, 14 Ohio St. 505. But her claim, being established by a decree of the judge of probate, may, after a demand and refusal, be enforced by an action brought by her against the executor. Drew *v.* Gordon, *supra*. For considerations, which should affect and guide the discretion of the probate court in making and even under circumstances in refusing the above allowance to

wife, suitable to her rank and degree. (*p*) What are to be so considered, are questions to be decided by the court, and will depend upon the rank and fortunes of the parties. (*q*)

the widow, see the observations of Shaw C. J. in Hollenbeck *v.* Pixley, 3 Gray, 524, 525; and of Barrows J. in Kersey *v.* Bailey, 52 Maine, 198, 200–202; Washburn *v.* Washburn, 10 Pick 374. In Washburn *v.* Hale, 10 Pick. 429, it was held that the administrator could not lawfully charge in his administration account, expenses paid in support of the intestate's widow. This case contains a series of wise and highly practical observations by Chief Justice Shaw, touching the duty of administrators in reference to the allowance and advances to the widow and family of the deceased. See Brewster *v.* Brewster, 8 Mass. 131. In Kersey *v.* Bailey, 52 Maine, 199, Barrows J. remarking upon the claim of a widow to an allowance out of her deceased husband's estate, said: "The judge is empowered by the statute to make her an allowance, in the case of an intestate estate, or of any testate estate which is insolvent, or in which no provision is made for the widow in the will of the husband, or where she duly waives the same, of so much of the personal estate as he deems necessary, according to the degree and estate of her husband and the state of the family under her care, and she shall be entitled to so much as he determines in the exercise of his judicial discretion she shall have. But any petition of this sort is addressed to the discretion of the judge of probate, and is to be considered in the light of all the circumstances of the particular case, and the judge may make an allowance larger or smaller as the case may seem to require, or dismiss the petition altogether, if it appears that, all things considered, no allowance ought to be made." An allowance was refused in this case; and so an allowance was refused in Hollenbeck *v.* Pixley, *supra*. This discretion is a legal discretion, to be judiciously exercised by the judge of probate, subject to appeal to the supreme court of probate. Wright *v.* Wright, *supra*; Piper *v.* Piper, 34 N. H. 563; Kersey *v.* Bailey, *supra*; Washburn *v.* Washburn, 10 Pick. 374. In Vermont it is held that the statute provision for the support of the widow and children of intestates is of universal application, and the discretion of the court extends only to the amount of the provision. Sawyer *v.* Sawyer, 28 Vt. 245. An administrator who has paid over to the widow the allowance decreed to her, is entitled to have the same allowed in his account. Richardson *v.* Merrill, 32 Vt. 27. In Georgia the widow and children of an intestate are entitled to one year's support out of his estate, without regard to its insolvency, and although it may be mortgaged beyond its value. Silcox *v.* Nelson, 1 Geo. Decis. 24; Cole *v.* Elfe, 23 Geo. 235; Elfe *v.* Cole, 26 Geo. 197. She is entitled to support out of the estate only for that period, whether she obtains it with or without application, or partly before and partly after application. Blassingame *v.* Rose, 34 Geo. 418; Wells *v.* Wilder, 36 Geo. 194. Under the statute of Mississippi allowing a year's provision to the widow of a deceased insolvent, the commissioners appointed by the probate judge to select and set them apart may allow her a sum of money in lieu thereof,

(*p*) 2 Bl. Com. 436. A bed is also in some authors enumerated among the paraphernalia. Com. Dig. Baron & Feme, F. 3. Noy enumerates "all her apparel, her bed, her copher, her chains, borders, and jewels." Max. c. 49. And Swinburne mentions the ancient and general custom, as to widows, of the province of York, as extending "not only to their apparel, and convenient bed, but a coffer with divers things therein necessary for their own persons." Pt. 6, s. 7, pl. 5.

(*q*) 2 Rop. Husband & Wife, 141, 2d ed. [See Sawyer *v.* Sawyer, 28 Vt. 249; Vass *v.* Southall, 4 Ired. (Law) 301.]

Pearls and jewels, whether usually worn by the wife, or only on birthdays, and other public occasions, are to be considered paraphernalia. (*r*) In the reign of Queen Elizabeth, the executors of Viscount Bindon brought detinue against the widow of the deceased viscount, and declared upon the detainer of certain jewels. The defendant justified the detainer of them as her paraphernalia. It was said by Manwood, chief baron, that paraphernalia ought to be allowed to a widow, having regard to her degree, and in

and, if confirmed by the probate judge, it will be legal. Nelson *v.* Smith, 12 Sm. & M. 662; McMulty *v.* Lewis, 8 Sm. & M. 520. The widow in this state is entitled to an allowance of one year's provision out of her husband's property, whether he died testate or intestate, or whatever the condition of his estate. The right is not, however, absolute; it is contingent on the event of no disposition being made for her by the will. If she desire to take it, she must renounce the will; abiding by the will she has no claim to it. Turner *v.* Turner, 30 Miss. 428. The fact that she has separate property of her own equal to her share of her late husband's estate, and no children by him, does not deprive her of the right to one year's support out of his property, and she has, besides, her share in the exempt portion thereof. Wally *v.* Wally, 41 Miss. 657. This allowance to the widow and children is made upon an *ex parte* petition, of which the administrator is not entitled to notice. Morgan *v.* Morgan, 36 Miss. 348. As to the allowance of a year's provision to the widow in North Carolina, see Ex parte Rogers, 63 N. Car. 110; Ex parte Dunn, 63 N. Car. 137; Cox *v.* Brown, 5 Ired. Law, 194. In Ohio, see Dorah *v.* Dorah, 4 Ohio St. 292; Bane *v.* Wick, 14 Ohio St. 505. In Tennessee, see Sanderlin *v.* Sanderlin, 1 Swan, 441. In Texas, see Sloan *v.* Webb, 20 Texas, 189; Giddings *v.* Crosby, 24 Texas, 295; Connell *v.* Chandler, 11 Texas, 249. By statute of Iowa, as soon as the executors are possessed of sufficient means over and above the expenses of administration, they shall pay off the charges of the last sickness and funeral of the deceased, and they shall in the next place pay any allowance which may be made by the court for the maintenance of the widow and minor children, previous to the time when a sufficient amount for such maintenance can be paid to them out of their shares of the estate, which amount so advanced shall afterwards be deducted from their several portions. Laws of Iowa (Rev. of 1860), p. 413, §§ 2402, 2403. In Mississippi the widow is in all cases entitled to all the property of her deceased husband which is exempt by law from sale on execution. Lowry *v.* Herbert, 25 Miss. 101; Coleman *v.* Brooke, 27 Miss. 71; Whitley *v.* Stevenson, 38 Miss. 113; Carpenter *v.* Brownlee, 38 Miss. 200. As to the law of Pennsylvania, with reference to allowing the widow to retain goods and chattels exempt from execution, see Estate of Wood, 1 Ashm. 314; of Tennessee, see Duncan *v.* Duncan, 2 Swan, 351; Bayliss *v.* Bayliss, 4 Coldw. 359. As to the law of Iowa, Laws of Iowa (Rev. of 1860), p. 410, § 2361; Meyer *v.* Meyer, 23 Iowa, 359. As to the law of New York, under which certain of the goods of the deceased are set apart for the use and benefit of his widow and minor children, see the cases cited and the statute, in which the articles are enumerated, in Redf. L. & P. of Sur. Cts. 209–212. As to the widow's right of quarantine in Alabama, see Slatter *v.* Meek, 35 Ala. 528; Glenn *v.* Glenn, 41 Ala. 571. In New York, Corey *v.* People, 45 Barb. 262; Johnson *v.* Corbett, 11 Paige, 265; Voelckner *v.* Hudson, 1 Sandf. 215; Jackson *v.* O'Donaghy, 7 John. 247; Siglar *v.* Van Piper, 10 Wend. 414.]

(*r*) Graham *v.* Londonderry, 3 Atk. 394, by Lord Hardwicke.

this case the husband of the defendant being a viscount, 500 marks was but a good allowance for such a matter. (*s*)

In the reign of Charles 1, a chain of diamonds and pearls worth 370*l.*, being usually worn by a lady, who was a *daughter of an earl of Ireland, and a baron of England, and the wife of a knight and a sergeant-at-law of the king, were considered *bona paraphernalia.* (*t*) In the year 1674, Lord Keeper Finch said he never knew any paraphernalia allowed, but where the party was noble either by birth or marriage; (*u*) but in the year 1721, Lord Macclesfield, in the case of Tipping *v.* Tipping, (*x*) decreed that the widow of a commoner should have jewels, &c. to the value of 200*l.* and upwards, as her *bona paraphernalia.* Lord Talbot afterwards allowed the widow of a private gentleman her gold watch, and several gold rings given at the burials of relations. (*y*) And in a case where a Mrs. Northey, in the lifetime of her husband, was possessed of jewels to the value of 3,000*l.* and upwards, which had been bought partly with her own money, and partly her husband's, and had been worn by her whenever she was dressed; Lord Hardwicke held that she was entitled to them as paraphernalia, and said that the value made no alteration in the court of chancery. (*z*)

The following case, as decided Mich. 5 Geo. 1, is reported in Viner's Abridgment. (*a*) Mr. Calmady having a crocheat of diamonds, which was his first wife's, in 1695 makes his will, and, amongst other things, devises this crocheat to his eldest son, and that it should go in succession to the heir of his family as an heirloom. Afterwards, in 1699, he marries a second wife (the defendant), and turns this crocheat into a necklace, and adds several new diamonds to it to the value of 200*l.*, which was more than the value of the crocheat. The plaintiff, as heir to Mr. Calmady (though not the eldest son to whom it was specifically devised), demands this crocheat *of the defendant, the widow of Mr. Calmady. Counsel for the defendant insisted that the defendant was entitled to it as part of her paraphernalia, which the husband cannot give away from his wife by will, though he may dispose of it

(*s*) Visconntess Bindon's case, 2 Leon. 166, pl. 201; S. C. Moore, 213.

(*t*) Lord Hastings *v.* Sir A. Douglas, Cro. Car. 343; S. C. 1 Roll. Abr. 911, pl. 9; W. Jones, 334.

(*u*) Lady Tyrrell's case, 1 Freem. 304.

(*x*) 1 P. Wms. 729.

(*y*) 2 Eq. Cas. Abr. 156, *in margine.*

(*z*) Northey *v.* Northey, 2 Atk. 79.

(*a*) Calmady *v.* Calmady, 11 Vin. Abr. 181, pl. 21.

in his lifetime, and the wife shall retain it against the devisee or executor of her husband, unless in the case of creditors, who cannot otherwise have a satisfaction of their debts. Counsel for the plaintiff said, that though formerly it was a doubt whether the husband could devise any part of the paraphernalia of the wife, yet of late it has been holden that the husband may devise specifically jewels of his own which he permitted his wife to wear, though they shall not go to his executor, or to a general residuary legatee, and that in this case, there being no direct proof of an express gift to the wife, only a permission to wear them, they are well devised to the heir as an heir-loom, and that the altering and turning the crocheat into a necklace, and permitting his wife to wear them, was no revocation of the devise. Parker C. seemed to doubt at first, that turning the crocheat into a necklace, adding new diamonds to it, and permitting his wife to wear it, was a revocation of the devise, but at last ordered the master to examine and separate the old diamonds from the new, and decreed the diamonds of the crocheat to the plaintiff as heir-at-law, and specifically devised to him as an heir-loom.

On the authority of this case it is ruled by Lord Langdale in Jervoise *v.* Jervoise, that family jewels, which have been handed down from father to son, do not constitute paraphernalia, notwithstanding they may have been worn by the wife at court and on other full-dress occasions; but that jewels presented to a wife during coverture by a third person, or by her husband for the purpose of ordinary use as befitting her station in life, are properly paraphernalia. (*b*)

If the husband delivered to the wife a piece of cloth to be * made into a garment, and dies, though it was not made into a garment in the life of the husband, yet the wife shall have it, and not the executors of the husband. (*c*) By the custom of London, a citizen's widow may retain some part of her jewels as paraphernalia, but not all. (*d*)

It will make no difference as to the widow's right, that the jewels, &c. were in the custody of the husband, if the wife occasionally wore them. (*e*)

(*b*) 17 Beav. 566. But as to those presented to her by a third person, see *post*, 769, *contra*.

(*c*) Harwell *v.* Harwell, 1 Roll. Abr. 911, pl. 8.

(*d*) 11 Vin. Abr. 180, pl. 17.

(*e*) Northey *v.* Northey, 2 Atk. 79.

the wife cannot dispose of them by gift or will during her husband's life:

There is an important distinction between gifts of the husband to the wife for her separate use, and gifts by him to her as paraphernalia; for she may dispose absolutely of the things given to her for her separate use; but where the husband gives them to her expressly for the ornament of her person, she cannot, according to our law, dispose of them by gift or will during his life; (*f*) although by the civil law, the wife has such an absolute property in them that she might alien them *in vitâ mariti, invito marito.* (*g*)

the husband may sell them or give them away:

but he cannot devise them:

But the husband may sell them or give them away in his lifetime, (*h*) although he cannot dispose of them by will during her life. (*i*)

By the civil law, *bona paraphernalia* in all cases go to the wife, to the exclusion of the executor, nor are they subject to the payment of the husband's debts. (*k*) But by our law * they are clearly liable to his creditors, and therefore, the widow will not be entitled to them (except as far as her necessary apparel), (*l*) in case of a deficiency of assets. (*m*) Nor are they to be allowed to her, where there are not assets at the time of her husband's death, though contingent assets afterwards fall in; for the same might not have happened until twenty or thirty years after the death of the testator, nor possibly until after the death of the widow, when the end and design of the widow's wearing her *bona paraphernalia*, in memory of her husband, could not have been answered, and, therefore, it was reasonable that this should be reduced to a certainty, viz, that if

they are subject to the debts of the husband:

(*f*) Graham *v.* Londonderry, 3 Atk. 394.

(*g*) Cro. Car. 344, by Berkeley and Jones JJ.; 3 Bac. Abr. 66; Executors, H. 4.

(*h*) 3 Atk. 394.

(*i*) Cary *v.* Appleton, 1 Cas. Chan. 240; Godolph. pt. 2, c. 15, s. 1; Tipping *v.* Tipping, 1 P. Wms. 730; Northey *v.* Northey, 2 Atk. 78, 79; Seymour *v.* Tresilian, 3 Atk. 358; 2 Bl. Com. 436. This was denied by Richardson C. J. and Cooke J. in Lord Hastings *v.* Douglas, Cro. Car. 345, though agreed to by Berkeley and Jones JJ.; and Harcourt C. reserved the consideration of the point in Wilcox *v.* Gore, 11 Vin. Abr. 180, 181. See, also, Calmady *v.* Calmady, Ib. 181; *ante*, 764, 765, and 3 Bac. Abr. 66, Executors, H. 4, where the husband's power to dispose of them by will is asserted.

(*k*) Swinb. pt. 6, s. 7, pl. 5; Godolph. pt. 2, c. 15, s. 1.

(*l*) Noy's Maxims, c. 49; 2 Bl. Com. 436.

(*m*) Willson *v.* Pack, Prac. Chan. 225; Lord Townsend *v.* Windham, 2 Ves. sen. 7; 2 Bl. Com. 436; Campion *v.* Cotton, 17 Ves. 264. "It is not fit," said Lord Keeper Finch, "that the widow should shine in jewels and the creditors starve." Lady Tyrrell's case, 1 Freem. 304.

there should not be assets real and personal at the testator's death, or, at least, at the time when the jewels were applied to debts, then the jewels should be liable. (*n*)

but not to his legacies:

But the widow's claim to her paraphernalia is preferred to that of a legatee of her husband, and, therefore, they will not be liable to satisfy the testator's legacies, or any of them, (*o*) either general or specific. (*p*)

the widow is entitled to marshal the assets against the heir:

Likewise, where a creditor has a double fund, the widow's claim to paraphernalia shall not be disappointed by the effect of his option of resorting to the personal estate. (*q*) Therefore, if the personal estate, including the paraphernalia, has been exhausted in payment of specialty creditors, the widow shall, in equity, stand in their place as to so much upon the real assets of the heir-at-law. (*r*) So where there * is a real trust estate, charged with the payment of the husband's debts, the wife may resort to the trust to be reimbursed to the value of her paraphernalia, if the personal estate has been exhausted by her husband's creditors. (*s*) So a real estate, charged with payment of debts, in aid of the personal estate, shall be applied before the widow's paraphernalia. (*t*)

and against a devisee in trust:

quære, whether against a devisee:

But whether the widow shall stand in the place of creditors for the amount of her paraphernalia against real assets *devised*, unless in trust for payment of debts, appears doubtful. (*u*) According to Lord Hardwicke's decisions in Ridout *v.* Plymouth, (*x*) and Probert *v.* Morgan, (*y*) she is not so entitled; but the case of Tynt *v.* Tynt, (*z*) is at variance with those decisions. It seems, however, that if the devised estate be subject to a mortgage, or other specific incumbrance, she would

(*n*) Burton *v.* Pierpont, 2 P. Wms. 79.

(*o*) Snelson *v.* Corbett, 3 Atk. 370.

(*p*) In Graham *v.* Lord Londonderry, 3 Atk. 395, Lord Hardwicke said that the right of the wife was superior to that of *any* legatee.

(*q*) Aldrich *v.* Cooper, 8 Ves. 397.

(*r*) Snelson *v.* Corbett, 3 Atk. 369. See, also, Tipping *v.* Tipping, 1 P. Wms. 729; Tynt *v.* Tynt, 2 P. Wms. 544.

(*s*) Incledon *v.* Northcote, 3 Atk. 438.

(*t*) Boyntun *v.* Boyntun, 1 Cox, 106; S. C. 1 Bro. C. C. 576.

(*u*) See Cox's note to Tynt *v.* Tynt, 3 P. Wms. 544. It has been suggested by an able writer (Joshua Williams on Real Assets, p. 118), that since the stat. 3 & 4 W. 4, c. 104, she may marshal the assets in this case also; because she is, as to her paraphernalia, in a position similar to that of a simple contract creditor, who, by force of that statute, may come upon any part of the property of the deceased.

(*x*) 2 Atk. 105.

(*y*) 1 Atk. 440; S. C. 1 Ambl. 6.

(*z*) 2 P. Wms. 542, before the master of the rolls, 1729.

have a right to marshal the assets by throwing the charge upon the estate, as a legatee might in such a case. (*a*)

if the husband pawn the paraphernalia his executors must redeem them for the widow:

It has already appeared that the husband may alien the wife's paraphernalia in his lifetime; but if the alienation be not absolute, but as a pledge or security for money, the wife surviving him will be entitled to have them redeemed by his executors out of her husband's personal estate, if sufficient for that purpose, after payment of his debts. (*b*) Thus, * where the husband had pledged a diamond necklace of his wife as a collateral security for 1,000*l.* borrowed on bond, and authorized the pawnee to sell it during his absence for 1,500*l.*, Lord Hardwicke held, that as in fact it was not sold in his lifetime, this did not amount to an alienation by the husband, and that therefore, the widow was entitled to have it redeemed by his executors. (*c*)

the widow barred of her paraphernalia by marriage articles:

The widow may bar her right to paraphernalia by settlement before marriage; as in Cholmely *v.* Cholmely, (*d*) where the wife by her marriage articles agreed to have no part of her husband's personal estate, but what he should give her by will; and this was held to bar her of her paraphernalia. (*e*)

If the husband should bequeath to his wife all household goods, furniture, plate, *jewels*, linen, &c. for life or widowhood, with the remainder over, this will not bar her of her paraphernalia. (*f*)

by election to take them as legatee.

But in such a case if the widow does not, by some act in her lifetime, manifest her election to take them by her elder and better title, her executor or administrator cannot lay any claim to them after her decease. (*g*)

Jewels, &c. given for the separate use of the wife by third persons, not liable to husband's debts:

Paraphernalia are in their nature materially distinct from gift of jewels, &c. to the wife, by third persons, for *her separate use;* as the latter may be aliened by the wife in the lifetime of the husband, and are not liable to his debts. With respect to what shall be considered as given to her separate use; where some diamonds had been presented to the wife by the husband's father, on her marriage with

(*a*) Oneal *v.* Mead, 1 P. Wms. 693; Lutkins *v.* Leigh, Cas. temp. Talb. 53; 2 Roper Husband & Wife, 146, note (*a*), by Jacob. See *post*, pt. IV. bk. I. ch. II. § I. and II.

(*b*) Graham *v.* Londonderry, 3 Atk. 395.

(*c*) 3 Atk. 394, 395.

(*d*) 2 Vern. 83.

(*e*) S. P. Read *v.* Snell, 2 Atk. 642.

(*f*) Marshall *v.* Blew, 2 Atk. 217.

(*g*) Clarges *v.* Albemarle, 2 Vern. 247.

his son, they were considered by Lord Hardwicke as a gift to the separate use of the wife, and to which she was entitled in her own right. (*h*) So where certain pieces of plate were given to the wife immediately after marriage, by the husband's father, * Lord Hardwicke decided that they were to be considered as gifts to the wife for her separate use. (*i*) And a present by a stranger to the wife during coverture must be construed as a gift to her separate use; as where the Regent of France delivered to the husband, as a present for his wife, his picture set about with diamonds. (*k*)

But with respect to jewels, &c. presented to the wife by the husband himself before marriage, there is no exemption from the liability to his creditors; for, immediately on the marriage, the law gives them to the husband, and he cannot be considered as a trustee for them for her separate use afterwards. (*l*)

secus, of jewels presented by the husband before marriage.

SECTION IV.

Of Donations Mortis Causâ.

It will be proper to close the subject of the estate of an executor or administrator in the chattels personal of the deceased in possession, by considering another species of interest in the property of the deceased which vests neither in the personal representative, nor in his heir, nor in his widow. This is called a *donatio mortis causâ*, and is thus defined in the civil law, from which both the doctrine and the denomination are borrowed: *Mortis causâ donatio est, quæ propter mortis fit suspicionem; cum quis ita donat, ut si quid humanitùs ei contigisset, haberet is, qui accepit; sin autem supervixisset is, qui donavit, reciperet; vel si eum donationis pœnituisset; aut prior decesserit is, cui donatum sit.* (*m*)

(*h*) Graham *v.* Londonderry, 3 Atk. 393.

(*i*) Brinkman *v.* Brinkman, 3 Atk. 394, cited in Graham *v.* Londonderry.

(*k*) 3 Atk. 393; Lord Hardwicke in this case mentioned the case of Countess Cowper, in which several trinkets (which it is presumed were not intended to be worn, like paraphernalia, as ornaments to her person) had been given to her by Lord Cowper himself in his lifetime, and they were held by Sir Joseph Jekyll to be her separate estate. See, also, this case again noticed by his lordship, in 1 Atk. 271; *ante*, 758.

(*l*) Ridout *v.* Lord Plymouth, 2 Atk. 105.

(*m*) Inst. lib. 10, tit. 7. The correctness of this definition, and the inaccuracy of that given by Swinburne, pt. 1, s. 7, pl. 2, is noticed by Lord Loughborough, in Tate *v.* Hilbert, 2 Ves. jr. 119. The description of a *donatio mortis causâ* given by Lord Cowper is, "where a man lies in ex-

*From this definition it results, that to constitute a *donatio mortis causâ*, there must be two attributes: 1. The gift must be with a view to the donor's death. 2. It must be conditioned to take effect only on the death of the the donor by his existing disorder. A third essential quality is required by our law, which, according to some authorities, was not necessary according to the Roman and civil law; (*n*) viz, 3. There must be a delivery of the subject of the donation. (*n*[1])

Attributes of a *donatio mortis causâ:*

1. The gift must be made with a view to the donor's death. (*o*)

tremity, or being surprised with sickness, and not having an opportunity of making his will, but lest he should die before he could make it, he gives with his own hands his goods to his friends about him; this, if he dies, shall operate as a legacy; but if he recovers then does the property thereof revert to him." Hedges *v.* Hedges, Prec. Chanc. 269. [See Parish *v.* Stone, 14 Pick. 203, 204; 2 Kent, 444 *et seq.*; Story J. in Grattan *v.* Appleton, 3 Story, 763; Sargent J. in Cutting *v.* Gilman, 41 N. H. 150, 151. In Michener *v.* Dale, 23 Penn. St. 63. Woodward J. defines *donatio causa mortis* to be "a gift of a chattel made by a person in his last illness, or in *periculo mortis*, subject to the implied condition that if the donor recover, or if the donee die first, the gift shall be void." This definition is substantially that which is given in Roper on Legacies (p. 26), and which was criticised by Gibson C. J. in Nicholas *v.* Adams, 2 Whart. 22, as being redundant, because it was indifferent whether the peril of death be induced by sickness, or any other cause. In another respect the definition was considered too narrow, as conveying the idea that the danger of death must be real, to constitute a gift a *donatio causa mortis*, which was defined to be "a conditional gift dependent upon the contingency of expected death," whether the expectation were groundless or well founded. Considering donations *mortis causâ* as testamentary dispositions, it is obvious that, if made in sickness, they can only be effectual when made in the last sickness, or if made in the fear of death, when death itself has proved that the fear was well founded. The remarks of the chief justice are, however, applicable when the chance of life or death has been decided in favor of the donor, and when the question might arise whether the gift was the ordinary gift *inter vivos*, and consequently irreclaimable, or whether the occasion implied that it was a *donatio causa mortis*, and hence merely conditional. See Grymes *v.* Howe, 49 N. Y. 17.]

(*n*) But see Lord Hardwicke's judgment, in Ward *v.* Turner, 2 Ves. sen. 440.

(*n*[1]) [See the observations of Walton J. in Hatch *v.* Atkinson, 56 Maine, 326, 327, with regard to the strictness with which this class of gifts should be watched. "Gifts *causa mortis*," he says, "are not favored in law. They are a fruitful source of litigation, often bitter, protracted, and expensive. They lack all those formalities and safeguards which the law throws around wills, and create a strong temptation to the commission of fraud and perjury." See Champney *v.* Blanchard, 39 N. Y. 111; Pierpoint C. J. in French *v.* Raymond, 39 N. Y. 625; Shirley *v.* Whitehead, 1 Ired. Eq. 130; Delmotte *v.* Taylor, 1 Redf. Sur. 417; Dewey J. in Rockwood *v.* Wiggin, 16 Gray, 402, 403; Marshall *v.* Berry, 13 Allen, 43, 47, note (*); Headley *v.* Kirby, 18 Penn. St. 326; Michener *v.* Dale, 23 Penn. St. 59.]

(*o*) Nothing can be more clear, said Lord Eldon, in the case of Dufficld *v.* Elwes, 1 Bligh N. S. 530, than that a *donatio mortis causâ* must be a gift made by a donor in contemplation of the conceived

If a gift be not made by the donor in peril of death, *i. e.* with relation to his decease by illness affecting him at the time of the gift, it cannot be supported as a donation *mortis causâ*. (*p*) Where it appears that the donation was made whilst the donor was ill, and only a few days or weeks before his death, it will be presumed that the gift was made in contemplation of death, (*q*) and in the donor's last illness. (*r*)

1. The gift must be made by the donor in peril of death.

* 2. The gift must be conditioned to take effect only on the death of the donor by his existing disorder. (*s*) But although it is an essential incident to a donation *mortis causâ* that it be subject to a condition, that, if the donor

2. The gift must be conditioned to

approach of death. [See Blanchard *v.* Sheldon, 43 Vt. 513, 514; Smith *v.* Kittridge, 21 Vt. 239; Grymes *v.* Howe, 49 N. Y. 17; Delmotte *v.* Taylor, 1 Redf. Sur. 417; First Nat. Bank *v.* Balcom, 35 Conn. 351. As to gifts by one going into the army, or "to the front," see Virgin *v.* Gaither, 42 Ill. 39; Baker *v.* Williams, 34 Ind. 547; Dexheimer *v.* Gautier, 5 Robert. (N. Y.) 216; Gass *v.* Simpson, 4 Coldw. 288.] As to the requisite proof of such a gift, see Cosnahan *v.* Grice, 15 Moore P. C. 215.

(*p*) Tate *v.* Hilbert, 2 Ves jr. 121; S. C. 4 Bro. C. C. 290; Hedges *v.* Hedges, Prec. Chan. 269; Miller *v.* Miller, 3 P. Wms. 357; Gardner *v.* Parker, 3 Madd. 185. See, also, Edwards *v.* Jones, 1 Myl. & Cr. 236; *post*, 773.

(*q*) Lawson *v.* Lawson, 1 P. Wms. 441; Miller *v.* Miller, 3 P. Wms. 356, 358; Hill *v.* Chapman, 2 Bro. C. C. 612; Snellgrove *v.* Baily, 5 Atk. 214; Gardner *v.* Parker, 3 Madd. 184; [Grattan *v.* Appleton, 3 Story, 755; Dole *v.* Lincoln, 31 Maine, 422; Merchant *v.* Merchant, 2 Bradf. Sur. 432.]

(*r*) 1 Rop. Leg. 21, 3d ed. In Blount *v.* Burrow, as reported in 1 Ves. jr. 546, Eyre C. B. seems to be of opinion that there must be positive evidence that the gift was made in the last illness; but this *dictum* is not found in the report of the case in 4 Bro. C. C. 72, and does not seem supported by any other authorities.

(*s*) Tate *v.* Hilbert, 2 Ves. jr. 120; Irons *v.* Smallpiece, 2 B. & Ald. 553; Tate *v.* Leithead, Kay, 658; Staniland *v.* Willott, 3 Mac. & G. 664, 675. [Where the gift was made while the donor was in expectation of immediate death from consumption, and he afterwards so far recovered as to attend to his ordinary business for several months, but finally died from the same disease, it was held that it could not be supported as a *donatio causa mortis*. Weston *v.* Hight, 17 Maine, 287. But it is not necessary to the validity of a *donatio causa mortis* as a testamentary disposition, that it should have been made in such an extremity as is requisite to give effect to a nuncupative will; and hence the circumstance that the donor lived fourteen days after the delivery of the gift, and that he was able to make his will in the mean time, was held not to avoid the gift. Nicholas *v.* Adams, 2 Whart. 17. In Wells *v.* Tucker, 3 Binn. 366, where such a gift was sustained, the donor lived three days after making it. In Michener *v.* Dale, 23 Penn. St. 63, the donor lived six hours; and in neither case would it appear that he was unable to execute a will. See, also, the opinion as given by Jones J. in Adams *v.* Nicholas, 1 Miles, 112. See Borneman *v.* Sidlinger, 15 Maine, 429. There seems to be no rule which limits the time within which the donor must die, to make the gift valid. Grymes *v.* Howe, 49 N. Y. 17.]

take effect only on the death of donor.

live, the thing shall be restored to him, yet it is not necessary that the donor should expressly declare that the gift is to be accompanied by such a condition; for if a gift be made during the donor's last illness, the law infers the condition that the donee is to hold the donation only in case the donor die of that indisposition. (*t*) Thus in Gardiner *v.* Parker, (*u*) A., being confined to his bed, gave to B. a bond for 1,800*l.* two days before his death, in the presence of a servant, saying, "There, take that, and keep it." The question was between the donee and executors of A. And Sir John Leach V. C. decided in favor of the donation, observing that the doubt originated in the donor not having expressed that the bond was to be returned if he recovered; but that the bond being given in the extremity of sickness, and in contemplation of death, the intention of the donor was to be inferred that the bond shall be holden as a gift only in case of his death; and that if a gift be made in the expectation of death, there is an implied condition that it is to be held only in the happening of that event. (*x*)

Still, if from all the circumstances of the gift, there is sufficient evidence to rebut the ordinary presumption, and to make it appear that the gift was unconditional, it cannot be supported as a donation *mortis causâ*. (*y*) Accordingly, * in Edwards *v.* Jones, (*z*) Mary Custance, the obligee of a bond given in the year 1819, for 300*l.*, signed the following indorsement not under seal, on the bond, five days before her death: "I, Mary Custance, of the town of Aberystwith, in the county of Cardigan, widow, do hereby assign and transfer the within bond or obligation, and all my right, title, and interest thereto, unto and to the use of my niece, Esther Edwards, of Llanilar, in the said county of Cardigan, widow, with full power and authority for the said Esther Edwards to sue for and recover the amount thereof, and all interest now due or hereafter to become due thereon; as witness my hand, this 25th day of May, 1830." Immediately after the indorsement had been signed, Mary Custance delivered the bond, or caused it to be delivered to Esther Edwards, and it remained in her hands.

(*t*) 1 Rop. Leg. 4, 3d ed.

(*u*) 3 Madd. 184.

(*x*) See, also, Lawson *v.* Lawson, 1 P. Wms. 441; Staniland *v.* Willott, 3 Mac. & G. 664, 675.

(*y*) See Walter *v.* Hodge, 2 Swanst. 92; S. C. 1 Wils. Chanc. Cas. 445.

(*z*) 1 Myl. & Cr. 226.

Mary Custance died on the 30th of May, 1830, having in the year 1829 made her will, in which she did not mention the bond, or dispose of the residue of her estate, but she appointed an executor. It was argued on the part of Esther Edwards that if this gift could not be established as a *donatio inter vivos*, by reason of the act being incomplete, it might still take effect as a *donatio mortis causâ*. But Lord Chancellor Cottenham held, that in order to be good as a *donatio mortis causâ*, the gift must have been made in contemplation of death, and intended to take effect only after the donor's decease; and that if it appeared from the circumstances of the transaction that the donor intended to make an immediate and irrevocable gift, that would destroy the title of the party who claimed as a donee *mortis causâ*. His lordship further observed, that a party making a *donatio mortis causâ* does not part with the whole interest, save only in a certain event, and it is of the essence of such a gift, that it shall not otherwise take place. Such a donation leaves the whole title in the donor, unless the event occurs which is to divest him. Here, however, there was an actual *assignment, by which the donor, Mrs. Custance, transferred all her right, title, and interest to her niece; which was in itself sufficient to exclude the possibility of treating this as a *donatio mortis causâ*.

3. There must be a delivery of the subject of the conation. The general rule upon this head is, that to substantiate the gift, there must be an *actual* tradition or delivery of the thing to the donee himself, (*a*) or to some

3. There must be a delivery of the subject of donation:

(*a*) Ward *v.* Turner, 2 Ves. sen. 431; Tate *v.* Hilbert, 2 Ves. jr. 120; Bryson *v.* Brownrigg, 9 Ves. 1; Bunn *v.* Markham, 7 Taunt. 224; S. C. 2 Marsh. 532; Irons *v.* Smallpiece, 2 B. & Ald. 553; Thompson *v.* Heffernan, 4 Dr. & War. 285. In the case of Spratley *v.* Wilson, Holt N. P. C. 10, Gibbs C. J. considered actual delivery unnecessary, holding the donation sufficient where a person *in extremis*, said, "I have left my watch at Mr. R.'s at Charing Cross, fetch it away, and I will make you a present of it." But in Bunn *v.* Markham, his lordship desired that the case might not be mentioned, since immediately after the trial he perceived that what he had improvidently thrown out could not be maintained, because a delivery was wanting; and he had accordingly written a remark to that effect, at the end of his own note to the case. See accord. Powell *v.* Hellicar, 26 Beav. 261; [Shaw C. J. in Parish *v.* Stone, 14 Pick. 204, 205; Shepley C. J. in Dole *v.* Lincoln, 31 Maine, 429; Case *v.* Dennison, 9 R. I. 88; Chevallier *v.* Wilson, 1 Texas, 161; Miller *v.* Jeffress, 4 Grattan, 472; Wells *v.* Tucker, 3 Binn. 336; Nicholas *v.* Adams, 2 Whart. 17; Michener *v.* Dale, 23 Penn. St. 63; Murray *v.* Cannon, 41 Md. 466, 477; Brown *v.* Brown, 18 Conn. 410; Meach *v.* Meach, 24 Vt. 591; Singleton *v.* Cotton, 23 Geo. 261; McKenzie *v.* Downing, 25 Geo. 669;

one else for the donee's use. (*b*) The possession of it must be transferred in point of fact. The purse, the ring, the jewel, or the watch, (*b*[1]) must be given into the hands of the donee, either

Smith *v.* Downey, 3 Ired. Eq. 268; Campbell's Estate, 7 Penn. St. 100; Trough's Estate, 75 Penn. St. 115; Zimmerman *v.* Streeper, 75 Penn. St. 147; Champney *v.* Blanchard, 39 N. Y. 111; French *v.* Raymond, 39 Vt. 623; Grymes *v.* Howe, 49 N. Y. 17. There must be as complete a delivery as the nature of the property will admit of. Hatch *v.* Atkinson, 56 Maine, 324; Davis J. in Carpenter *v.* Dodge, 20 Vt. 595, 602; Pennington *v.* Gittings, 2 Gill & J. 208; Bradley *v.* Hunt, 5 Gill & J. 54. In Cutting *v.* Gilman, 41 N. H. 147, 152, Sargent J. said: "A delivery is indispensable to the validity of a gift *causa mortis*. It must be an actual delivery of the thing itself, or of the means of getting possession and enjoyment of the thing, and there must be something amounting to delivery at the time of the gift, for it is not the possession of the donee, but the delivery to him by the donor that is material. An after acquired possession, or a previous and continued possession of the donee, though by authority of the donor, is insufficient." Miller *v.* Jeffress, 4 Grattan, 472; Kenney *v.* Public Administrator, 2 Bradf. Sur. 319; Delmotte *v.* Taylor, 1 Redf. Sur. 417; Egerton *v.* Egerton, 17 N. J. Eq. 419. As to this last statement, note the difference between a gift *inter vivos* and a gift *causa mortis*. Wing *v.* Merchant, 57 Maine, 386, 387; Camp's Appeal, 36 Conn. 88, 92, 93. See Allen *v.* Cowan, 23 N. Y. 502; Westerlo *v.* Dewitt, 35 Barb. 215. In Coleman *v.* Parker, 114 Mass. 30, it was decided that the taking the key of a trunk from the place where it is kept, and the putting goods into the trunk and the returning the key to its place, at the request of the owner in his last sickness, apprehending death and expressing the desire to make a gift of the trunk and contents *causa mortis*, is not a delivery sufficient for that purpose. But in this case Ames J. said: "'This term 'delivery' is not to be taken in such a narrow sense as to import that the chattel or property is to go literally into the hands of the recipient and to be carried away. We have no doubt that a trunk with its contents might be effectually given and delivered, in such a case, by a delivery of the key, not as a symbolical delivery of the property, but because it is the means of obtaining possession. Ward *v.* Turner, 2 Ves. sen. 431, 443. If the key in this case had been placed in the hands of the witness, the donor relinquishing all dominion and control over it, and parting with it absolutely, or if by direction of the donor the witness had taken it into her possession and exclusive control, there would have been a sufficient delivery to make out a full title in the plaintiff." Wing *v.* Merchant, 57 Maine, 383; Dole *v.* Lincoln, 31 Maine, 422; Hunt *v.* Hunt, 119 Mass. 474.]

(*b*) Drury *v.* Smith, 1 P. Wms. 404; [Shepley C. J. in Dole *v.* Lincoln, 31 Maine, 429; Wells J. in Marshall *v.* Berry, 13 Allen, 45; Borneman *v.* Sidlinger, 15 Maine, 429; Sargent J. in Cutting *v.* Gilman, 41 N. H. 151, 152; Ross J. in Blanchard *v.* Sheldon, 43 Vt. 512, 514; Caldwell *v.* Renfrew, 33 Vt. 213; Contant *v.* Schuyler, 1 Paige, 316; Grymes *v.* Howe, 49 N. Y. 17. In Wells *v.* Tucker, 3 Binn. 366, a delivery to the wife of the donor for the use of the donee was held sufficient. Bloomer *v.* Bloomer, 2 Bradf. Sur. 340. So it has been held that a promissory note may pass as a gift *causa mortis*, without actual delivery to the donee when such note is in possession of a third party as trustee for the equitable owner. Southerland *v.* Southerland, 5 Bush, 591.]

(*b*[1]) [Only personal property capable of delivery is subject to a gift *causa mortis;* and it may include all of the testator's personal estate, however large the amount and value; the common law does not limit the amount of property that may be thus disposed of. Walton J. in Hatch *v.* At-

by the donor himself or by his order. (b^2) Thus, in Bunn *v.* Markham, (c) Sir G. Clifton had written upon the parcels containing the property in question the names of the parties for whom they were intended, and had requested his natural son to see the property delivered to the donees. It was, therefore, manifestly his intention that it should pass to them; yet as there was no actual delivery, the court of common pleas held that it was not a valid gift.

what constitutes a delivery:

the deceased must part with the dominion as well as the possession:

A further requisite to give effect to the donation is, that the deceased should, at the time of the delivery, not only part with the possession, but also with the dominion over the *subject of the gift. (d) Thus, in Reddell *v.* Dobree, (e) A., the deceased, being in a declining state of health, delivered to Charlotte R. a locked cash box, and told her to go at his death to his son for the key; and that the box contained money for herself, and entirely at her disposal after he was gone, but that he should want it every three months whilst he lived. The box was twice delivered to the deceased by his desire, and he delivered it again to Charlotte R., and it was in her possession at his death. The box was afterwards broken open by her, and contained a check for 500*l*., drawn by a third party in favor of the deceased, and enclosed in a cover, indorsed with the name of Charlotte R., and the key (which the son of the deceased had refused to deliver to her), had a piece of bone attached to it, with her name written on it. Sir L. Shadwell V. C. held that there was no *donatio mortis causâ;* for that there was nothing more than that to a certain extent the deceased put Charlotte R. in the possession of the box, but retained to himself the absolute power over the contents. (e^1)

But it is no objection that the gift was not made to the donee

kinson, 56 Maine, 327; Pierpoint C. J. in French *v.* Raymond, 39 Vt. 625; Meach *v.* Meach, 24 Vt. 591; White *v.* Wager, 32 Barb. 250; Michener *v.* Dale, 23 Penn. St. 59; Virgin *v.* Gaither, 42 Ill. 39. But see Headley *v.* Kirby, 18 Penn. St. 326.]

(b^2) [The donee must not only take but he must retain possession until the death of the donor. Hatch *v.* Atkinson, 56 Maine, 324.]

(c) 7 Tannt. 231; S. C. 2 Marsh. 532.

(d) Hawkins *v.* Blewitt, 2 Esp. N. P. C. 663; Reddell *v.* Dobree, 10 Sim. 244; See, also, Tapley *v.* Kent, 1 Robert. 400. [Shepley C. J. in Dole *v.* Lincoln, 31 Maine, 429; Huntington *v.* Gilmore, 14 Barb. 243; M'Dowell *v.* Murdock, 1 Nott & McC. 237; Cutting *v.* Gilman, 41 N. H. 147; Walton J. in Hatch *v.* Atkinson, 56 Maine, 327; Shurtleff *v.* Francis, 118 Mass. 154.]

(e) 10 Sim. 244.

(e^1) [Hatch *v.* Atkinson, 56 Maine, 327.]

free from incumbrance, but charged with the performance of a particular purpose. (*f*) Accordingly it was held in a modern case, (*g*) that a gift may be good as a *donatio mortis causâ*, although it be coupled with a trust that the donee shall provide for the funeral of the donor.

but a trust may be annexed to the gift:

a delivery to some one else as agent *for the donor*, is insufficient:

Again, though a delivery to a third party for the donee's use may be good, (*h*) yet a mere delivery to an agent, in the character of agent *for the giver*, is not sufficient. (*i*)

what is a sufficient delivery when the subject is incapable of actual transfer:

But there are cases where the nature of the thing will not *admit of a corporeal delivery; and then it should seem that a delivery of the *means* of coming at the possession or making use of the thing given will be sufficient. (*k*) Thus the delivery of the key of a trunk has been decided to amount to the delivery of a trunk and its contents. (*l*) So the delivery of the key of a warehouse or other place, in which goods of bulk were deposited, has been determined to be a valid delivery of the goods for the purpose of a *donatio mortis causâ*. (*m*) But in these cases it is to be observed that the key is not to be considered in the light of a symbol, in the name of the thing itself; but the delivery of it has been allowed as the delivery of the possession, because it is the *way* of coming at the possession or to make use of the thing. (*n*)

there may be a *donatio mortis*

So a bond may be a subject of *donatio mortis causâ*, because the property is considered to pass by the deliv-

(*f*) Blount *v.* Burrow, 4 Bro. C. C. 75. See Hambrook *v.* Symmons, 4 Russ. C. C. 25.

(*g*) Hills *v.* Hills, 8 M. & W. 401.

(*h*) See *supra*, note (*b*).

(*i*) Farquharson *v.* Cave, 2 Coll. 356.

(*k*) Ward *v.* Turner, 2 Ves. sen. 441.

(*l*) Jones *v.* Selby, Prec. Chanc. 300; Ward *v.* Turner, 2 Ves. sen. 441; [Bell J. in Jones *v.* Brown, 34 N. H. 439, 445; Cooper *v.* Burr, 45 Barb. 9; Allerton *v.* Lang, 10 Bosw. 362. But it has been held that the delivery of the key of a trunk containing money and government bonds is not a sufficient delivery of the money and bonds. Hatch *v.* Atkinson, 56 Maine, 324; Powell *v.* Hellicar, 26 Beav. 261; Headley *v.* Kirby, 18 Penn. St. 326; but see Cooper *v.* Burr, 45 Barb. 9; Miller *v.* Jeffress, 4 Grattan, 472, 479. See, also, Coleman *v.* Parker, 114 Mass. 30, cited *ante*, 774, note (*a*).]

(*m*) Ward *v.* Turner, 2 Ves. sen. 443; S. C. 1 Dick. 170; Smith *v.* Smith, 2 Stra. 955.

(*n*) Ward *v.* Turner, 2 Ves. sen. 443; Bunn *v.* Markham, 7 Taunt. 244; [Hitch *v.* Davis, 3 Md. Ch. 266. In Cutting *v.* Gilman, 41 N. H. 152, 153, Sargent J. said: "Nor will a symbolical delivery answer. To constitute a title of this kind, under a gift *causa mortis*, the donor must not only give, but he must deliver, and that delivery must be actual where the subject-matter of the gift is capable of actual transfer."

ery. (*o*) The same has been decided with respect to bank-notes, because the property is transferred by the delivery. (*p*) And on the same principle, it should seem that all negotiable instruments which require nothing more than delivery to pass to the donee the money secured by them, may be the subjects of *donations mortis causâ*. (*p*[1]) For since it has been so adjudged of bank-notes, there appears no reason why exchequer notes or promissory notes, payable to the bearer, or bills of exchange, or exchequer bills, indorsed in blank, *should not have the same capability; for in all those cases the property passes to the donee by delivery. (*q*)

causâ of a bond or bank-notes:

or of other negotiable instruments which pass by delivery:

It has been a matter of considerable discussion, whether a mortgage can be the subject of a *donatio mortis causâ* by delivery of the mortgage deeds; but the question may now be regarded as settled in the affirmative. (*q*[1]) It seems, indeed,

or of a mortgage deed:

(*o*) Ashton *v.* Dawson, 2 Coll. 363, note (*c*); Snellgrove *v.* Baily, 3 Atk. 214; Ward *v.* Turner, 2 Ves. sen. 441, 442; Blount *v.* Burrow, 4 Bro. C. C. 72; Gardiner *v.* Parker, 3 Madd. 184; *ante*, 727; [Shaw C. J. in Chase *v.* Redding, 13 Gray, 420; and in Parish *v.* Stone, 14 Pick. 205; Wells *v.* Tucker, 3 Binney, 366; Lee *v.* Boak, 11 Grattan, 182. See Overton *v.* Sawyer, 7 Jones (N. Car.), 6.] But such a donation cannot be regarded as a satisfaction of a debt due from the donor to the donee. Clavering *v.* Yorke, Rolls, 25th Oct. 1725 (reported in a note to 2 Coll. 363).

(*p*) Miller *v.* Miller, 3 P. Wms. 356; Hill *v.* Chapman, 2 Bro. C. C. 612; Ashton *v.* Dawson, 2 Coll. 363, note (*c*).

(*p*[1]) [Grymes *v.* Howe, 49 N. Y. 17.]

(*q*) 1 Rop. Leg. 16, 3d ed. See, also, as to a note payable to *order* and not indorsed, Veal *v.* Veal, *post*, 778, 779, note (*z*). See Jones *v.* Selby, Prec. Chanc. 300, as to an exchequer tally. [The promissory note of a stranger, whether payable to bearer or to order, may be given *causa mortis* by delivery of the instrument itself with or without indorsement. Grover *v.* Grover, 24 Pick. 261; Bates *v.* Kempton, 7 Gray, 382; Sessions *v.* Moseley, 4 Cush. 87; Chase *v.* Redding, 13 Gray, 418; Caldwell *v.* Renfrew, 33 Vt. 213; Borneman *v.* Sidlinger, 15 Maine, 429; Brown *v.* Brown, 18 Conn. 410; Turpin *v.* Thompson, 2 Met. (Ky.) 420; Gourley *v.* Linsinbigler, 51 Penn. St. 345; Coutant *v.* Schuyler, 1 Paige, 316; Brunson *v.* Brunson, Meigs, 630. A note not negotiable, or if negotiable, not actually indorsed but delivered, passes, with the right to use the name of the administrator of the payee, to collect it for the donee's own use; Shaw C. J. in Chase *v.* Redding, 13 Gray, 420; Sessions *v.* Moseley, 4 Cush. 87; Bates *v.* Kempton, 7 Gray, 382; Camp's Appeal, 36 Conn. 88, 92; Westerlo *v.* De Witt, 36 N. Y. 340; Brown *v.* Brown, 18 Conn. 410; Bedell *v.* Carll, 33 N. Y. 581, 584; Grymes *v.* Howe, 49 N. Y. 17; Meach *v.* Meach, 24 Vt. 591; although the administrator, at the trial of an action in his name to collect the note, appears and protests against it. Bates *v.* Kempton, *supra;* Grover *v.* Grover, 24 Pick. 261. See Waring *v.* Edmonds, 11 Md. 424.]

(*q*[1]) [A gift of negotiable promissory notes, secured by mortgages of real estate, with proper assignments of the mortgages to the donee, made during the last illness of the donor, who was aware of his con-

never to have been much doubted, that by a delivery by a mortgagee to the mortgagor of the mortgage deeds, a *donatio mortis causâ* is effected. (*r*) But with respect to a delivery to a third party, although it may be inferred from Lord Hardwicke's expressions in Ward *v.* Turner, (*s*) that his opinion was, that the delivery of the mortgage deeds *mortis causâ* may be good, yet in Hassel *v.* Tynte, (*t*) his lordship doubted whether it was allowable by the statute of frauds. And in Duffield *v.* Elwes, (*u*) Sir John Leach V. C. held that a mortgage security cannot by law be given by way of *donatio mortis causâ*, even where the mortgage was accompanied by a bond. In that case, George Elwes was possessed of a bond for 2,927*l.*, and had also a mortgage, created by a deed of even date with the bond, for securing the sum mentioned in the bond, and he had another mortgage for 30,000*l.* On the first of September, 1821, when he was on his death-bed, so ill as to be unable to write, but of sound and disposing mind, in the presence of three persons, as witnesses, he declared that he gave the bonds and mortgages, and the money secured by them, to his daughter Mrs. Duffield. A written statement of this declaration was forthwith made, and signed by three persons in whose presence the declaration was made. Very soon afterwards, on the same day, in the presence of the same persons, the mortgage deeds and bonds were produced to the testator, and *he was told what they were; on which he desired them to be delivered into the hands of Mrs. Duffield; they were accordingly delivered into her hands, and whilst she held the deeds, he took her hands between his, in token of having completed the gift, and expressed satisfaction when he had done so. The vice chancellor declared that there was no good *donatio mortis causâ* of the mortgages. But on appeal to the house of lords, their lordships held that the property in the deeds, and the right to recover the money secured by them, passed in each case by the delivery, followed by the death of the donor, and that the real and personal representatives of the donor were trustees to the donee, to make

dition, and intended the gift as a final disposition of the property, was held to be a good *donatio causa mortis*, in Chase *v.* Redding, 13 Gray, 418; Shaw C. J. in Parish *v.* Stone, 14 Pick. 205. See Borneman *v.* Sidlinger, 15 Maine, 429; 1 Story Eq. Jur. § 607; Meach *v.* Meach, 24 Vt. 591; Hackney *v.* Vrooman, 62 Barb. 650.]

(*r*) Richards *v.* Syms, Barnard. Chan. Cas. 90; Hurst *v.* Beach, 5 Madd. 351.

(*s*) 2 Ves sen. 443.

(*t*) Ambl. 318.

(*u*) 1 Sim. & Stu. 239.

the gift effectual. The decree of his honor was accordingly reversed. (*v*)

And in the late case of Witt *v.* Amis, (*w*) the court of queen's bench held that there was no distinction between a policy of insurance and a mortgage or bond, as regards its capability of being made the subject of a *donatio mortis causâ*, and, therefore, that a policy may be the subject of a gift of that nature. This decision was adopted by Romilly M. R., (*x*) who held also to the same effect as to money due on a banker's deposit note. (*x*[1])

or of a policy of insurance:

or of a banker's deposit note:

But where no property is transferred to the donee by delivery of the subject, there can be no valid *donatio mortis causâ*. Thus in Ward *v.* Turner, (*y*) Lord Hardwicke held that the delivery of *receipts* for South Sea annuities was not such a delivery of the annuities themselves as to support the gift of them as a *donatio mortis causâ;* but he intimated that an actual transfer of the stock would have been sufficient to effectuate the intended donation.

but not of receipt for stock:

On the same ground bills of exchange and promissory notes, *not payable to the bearer*, (*z*) have been considered

or bills or notes not payable to

(*v*) 1 Bligh N. S. 498; S. C. 1 Dow N. S. 1, *nomine* Duffield *v.* Hicks. See, also, 3 Mac. & G. 676. [Real estate cannot be made the subject of a *donatio causa mortis*, even where it is conveyed by deed. Meach *v.* Meach, 24 Vt. 591.]

(*w*) 1 B. & S. 109.

(*x*) 33 Beav. 619.

(*x*[1]) [As to the delivery of the book of a depositor in a savings bank, see McGonnell *v.* Murray, Ir. Rep. Eq. 460; Penfield *v.* Thayer, 2 E. D. Smith, 305; Camp's Appeal, 36 Conn. 88; Tillinghast *v.* Wheaton, 8 R. I. 536; Dean *v.* Dean, 43 Vt 337; Ashbrook *v.* Ryon, 2 Bush, 228; Headley *v.* Kirby, 18 Penn. St. 326; Foster J. in Gale *v.* Drake, 51 N. H. 82; Brown *v.* Brown, 23 Barb. 565; Ray *v.* Simmons, S. Court, R. I. 3 Central Law Jour. 315, 316.]

(*y*) 2 Ves. sen. 431; [Moore *v.* Moore, 22 W. R. 729.]

(*z*) Miller *v.* Miller, 3 P. Wms. 356; Tate *v.* Hilbert, 3 Ves. jr. 111; S. C. 4 Bro. C. C. 286. But see, *contra*, Rankin *v.* Wegnelen, Chitty on Bills, p. 2, 9th ed.; 27 Beav. 309. See, also, Story's Eqnity, eh. x. § 607, where it is doubted whether the doetrine of these last cases ean be supported sinee the decision of Duffield *v.* Elwes; inasmuch as the ground on whieh courts of equity now support *donations mortis causâ* is not that a complete property in the thing must pass by delivery, but that it must so far pass by the delivery of the instrument as to give a title to the donee to the assistanee of a court of equity to make the donation eomplete. And in Veal *v.* Veal, 27 Beav. 303, it was held expressly by Romilly M. R. (relying on Rankin *v.* Weguelen), that a promissory note payable to order may be the subjeet of a *donatio mortis causâ*, and will pass thereby though unindorsed. See, further, Moore *v.* Darton, 4 De G. & Sm. 517. In that case a reeeipt had been given by a borrower to a lender as follows: "Reeeived of D. 500*l.* to bear interest at 4 per eent. per annum." And Knight Bruee V. C. held that the delivery of this receipt

bearer: *sed quære, and see contra, note (z), infra:*

or notes drawn by the deceased in his last illness:

or (generally speaking) checks on bankers:

incapable * of being the subjects of a *donatio mortis causâ*. A promissory note made by a man in his last illness, cannot operate as a *donatio mortis causâ* to the payee; (*a*) for it has not that reference to the death of the donor which is essential to such a gift. (*b*) The same has been decided as to a check on a banker; which is an order for the payment of money, that may take effect immediately, and in the lifetime of the donor; so that it is (generally speaking) altogether inconsistent with the nature of a donation *mortis causâ*. (*c*)

* It has never been decided, whether a *donatio mortis causâ* to an agent of the borrower by the lender on his death-bed, stating that he wished the debt to be cancelled, was a sufficient *donatio mortis causâ* on the ground, *semble*, that the document was essential to the proof of the contract of loan. [See *ante*, 777, note (*q*); Gardner *v.* Gardner, 22 Wend. 526; Champney *v.* Blanchard, 39 N. Y. 111; Bradley *v.* Hunt, 5 Gill & J. 54; Lee *v.* Boak, 11 Grattan, 182; Gray *v.* Barton, 55 N. Y. 68.]

(*a*) Tate *v.* Hilbert, 2 Ves. jun. 111; S. C. 4 Bro. C. C. 287; Holliday *v.* Atkinson, 5 B. & C. 501. In the latter of these cases Lord Tenterden expressed his opinion that the intention to avoid the legacy duty would not be a sufficient consideration for a promissory note; for then the note would not be payable till after the donor's death. 5 B. & C. 503. [That the donor's own promissory note, payable to the donee, cannot be the subject of a *donatio causa mortis*, see Parish *v.* Stone, 14 Pick. 198; Smith *v.* Kittridge, 21 Vt. 238; Holley *v.* Adams, 16 Vt. 206; Raymond *v.* Sellick, 10 Conn. 489; Flint *v.* Pattee, 33 N. H. 520; Craig *v.* Craig, 3 Barb. Ch. 76; Harris *v.* Clark, 2 Barb. Ch. 94; S. C. 3 Barb. Ch. 93; Copp *v.* Sawyer, 6 N. H. 523; Peckham J. in Whitaker *v.* Whitaker, 52 N. Y. 373; Wilson *v.* Baptist Education Society, 10 Barb. 315; Huntington *v.* Gilmore, 16 Barb. 243; Candor's Appeal, 27 Penn. St. 119; Brown *v.* Moore, 3 Head, 671. But see Jones *v.* Deyer, 16 Ala. 221; Wright *v.* Wright, 1 Cowen, 598; Contant *v.* Schuyler, 1 Paige, 317; Bowers *v.* Hurd, 10 Mass. 427.]

(*b*) See *ante*, 771.

(*c*) 2 Ves. jr. 120; 4 Bro. C. C. 286. See, also, Tate *v.* Leithead, Kay, 650; *ante*, 772. However a check under some circumstances has been considered the subject of a *donatio mortis causâ;* as where the testator in his illness drew a bill on a goldsmith for the payment of a sum to A. the wife of B., and delivered it to A. with a written indorsement to buy her mourning. Lawson *v.* Lawson, 1 P. Wms. 441. (But see the remarks of Lord Loughborough in 2 Ves. jr. 121.) So in Boutts *v.* Ellis, 17 Beav. 121 (affirmed on appeal, 4 De G., M. & G. 249), a testator, four days before his death, said to his wife: "I am a dying man; you will want money before my affairs are wound up." On the following day he gave his wife a crossed check, and on the next day but one, remembering that it was crossed, he asked a friend who visited him to take it and give the wife another for it, which the friend did. The testator's check was paid before, and the other check after his death, and it was held by Romilly M. R. and by the lords justices, that the transaction constituted a good *donatio mortis causâ*. But the delivery of the donor's check on his banker, which was not presented before the donor's death, was held not a good *donatio mortis causâ*. Hewitt *v.* Kaye, L. R. 6 Eq. Cas. 198; [Second National Bank *v.* Williams, 13 Mich. 282; Harris *v.* Clark, 3 Comst. 93, 110, 121; Coutant *v.* Schuyler, 1 Paige,

may be *by deed* without delivery of the things contained in it. Lord Hardwicke, on two occasions, (*d*) seems to have expressed an opinion in the affirmative; and Lord Rosslyn, in Tate *v.* Hilbert, (*e*) observed, that perhaps it might not be difficult to conceive that this sort of donation might be by deed or writing, without delivery. But there has already been occasion to show, that such instruments are considered as testamentary and are admitted to probate as such; (*f*) and it should seem, therefore, that (at the present day) they would not, unaccompanied by delivery, be allowed to operate as *donations mortis causâ*. (*g*)

Whether donations *mortis causâ* may be by deed without delivery.

* It may now be expedient to examine in what respects a *donatio mortis causâ* differs from a legacy, and from a gift *inter vivos;* (*g*[1]) whence it will appear how important the distinction is between these three kinds of donations.

How a *donatio mortis causâ* differs from a legacy.

316; Shirley *v.* Whitehead, 1 Ired. Eq. 130; Mandeville *v.* Welch, 5 Wheat. 277, 286; Tiernan *v.* Jackson, 5 Peters, 580.] Where the delivery by a donor, in his last illness, of a check on his bankers was accompanied by a delivery of his bankers' pass-book, and the check was not presented until after the donor's death, it was held by Bacon V. C. that the gift was not a good *donatio mortis causâ*. In re Beaks's Estate, L. R. 13 Eq. Ca. 734. But where the donor gave the donee a document, by which the bankers acknowledged that they held so much money belonging to the donor at his disposal, it was held that the delivery of that document conferred upon the donee the right to receive the money. Amis *v.* Witt, 33 Beav. 619; [Grymes *v.* Howe, 49 N. Y. 17; Meach *v.* Meach, 24 Vt. 591; Harris *v.* Clark, 3 Comst. 111.] Where a check was given by A. to B., and presented without delay, and the bankers had sufficient assets of A., but refused payment because they doubted the signature, and the next day A. died, the check not having been paid, it was held to be a complete gift *inter vivos* of the amount of the check. Bromley *v.* Brunton, L. R. 6 Eq. Cas. 275.

(*d*) Ward *v.* Turner, 2 Ves. sen. 440; Johnson *v.* Smith, 1 Ves. sen. 314.

(*e*) 2 Ves. jr. 120.

(*f*) *Ante*, 104 *et seq.*

(*g*) 1 Rop. Leg. 12, 3d ed.; Rigden *v.* Vallier, 2 Ves. sen. 258. [See Thompson *v.* Thompson, 12 Texas, 327; Kemper *v.* Kemper, 1 Duvall, 401; Ruffin C. J. in Smith *v.* Downey, 3 Ired. Ch. 268.]

(*g*[1]) [Wing *v.* Merchant, 57 Maine, 383, 386; Camp's Appeal, 36 Conn. 88. "The difference between a gift *inter vivos* and a gift *causa mortis* is this: the former is absolute, irrevocable, and complete, whether the donor dies or not; the subject of it must therefore be delivered to the donee or to some other person, with his consent, for his use, and must be accepted by him. Grover *v.* Grover, 24 Pick. 261. If, therefore, it is delivered to a third person, without authority to deliver it to the donee, this depositary, until the authority is executed by an actual delivery to and acceptance by the donee, is the agent of the donor, who may revoke the authority and take back the gift; and, therefore, if the delivery do not take place in the donee's lifetime, the authority is revoked by his death; the property does not pass, but remains in the donor and goes to his executor or administrator. But if intended as a gift *causa mortis*, it could not become absolute and irrevocable till the death of

A *donatio mortis causâ* differs from a legacy in these respects:

1. Probate unnecessary:

1. It need not be proved in the ecclesiastical court; for such a gift takes effect from delivery; so the donee claims the subject of it as a gift from the donor in his lifetime, and not under a testamentary act. (*h*) Hence the court of king's bench has prohibited the executor from proceeding in the ecclesiastical court to recover it from the donee. (*i*)

2. Executor's assent unnecessary.

2. For the reason just given, no assent or other act on the part of the executor or administrator is necessary to perfect the title of the donee. (*j*) In fact, the distinction between a *donatio mortis causâ* and a legacy under a nuncupative will, is, that the former is claimed against the executor, and the other, from the executor. (*k*)

How it differs from a gift *inter vivos:*

A *donatio mortis causâ* differs from a gift *inter vivos*, in these respects, in which it resembles a legacy:

1. It is revocable.

1. It is ambulatory, incomplete, and revocable during the testator's life. (*k*[1]) The revocation may either be affected by the recovery of the donor from his disorder, (*l*) or by resumption

the donor; and, therefore, if delivered to and accepted by the donee, after the decease of the donor, it is sufficient." Shaw C. J. in Sessions *v.* Moseley, 4 Cush. 92. As to the difference between gifts *inter vivos* and gifts *causa mortis*, see, further, Wing *v.* Merchant, 57 Maine, 383, 386; Bedell *v.* Carll, 33 N. Y. 581, 584-586; Carpenter *v.* Dodge, 20 Vt. 595.]

(*h*) 1 Rop. Leg. 12, 3d ed.; Rigden *v.* Vallier, 2 Ves. sen. 258.

(*i*) Thompson *v.* Hodgson, 2 Stra. 777.

(*j*) Tate *v.* Hilbert, 2 Ves. jr. 120.

(*k*) 1 Sim. & Stu. 245; [Sargent J. in Cutting *v.* Gilman, 41 N. H. 151; Grant *v.* Tucker, 18 Ala. 327. "These gifts, if confirmed and held good, do not impair the rights of the widow. Her right is to the property of which the husband died seised or possessed. These gifts have their full effect in the lifetime of the donor, and the property is not in his possession at the time of his decease, and does not come under the administration of the executor." Shaw C. J. in Chase *v.* Redding, 13 Gray, 422; Parish *v.* Stone, 14 Pick. 203; Grant *v.* Tucker, 18 Ala. 327; House *v.* Grant, 4 Lansing, 296; Gibson C. J. in Nicholas *v.* Adams, 2 Whart. 17. See Shepley C. J. in Dole *v.* Lincoln, 31 Maine, 429; Bloomer *v.* Bloomer, 2 Bradf. Sur. 339, 347. One claiming property of a deceased person, under a gift *causa mortis*, is not affected by decrees of the probate court charging the administrator with the property, and ordering it to be distributed among the next of kin. Of such property the donee could only be deprived by the judgment of a court of common law. Lewis *v.* Bolitho, 6 Gray, 137, 139.]

(*k*[1]) [Merchant *v.* Merchant, 2 Bradf. Sur. 432; Parker *v.* Marston, 27 Maine, 196; Bloomer *v.* Bloomer, 2 Bradf. Sur. 339, 347; Meach *v.* Meach, 24 Vt. 591. A *donatio causa mortis* is of the nature of or resembles a legacy. It becomes a valid gift only upon the decease of the donor. Bell J. in Jones *v.* Brown, 34 N. H. 439, 446; Bloomer *v.* Bloomer, 2 Bradf. Sur. 339; Nicholas *v.* Adams, 2 Whart. 17. It is, however, not a testament but a gift. Wells J. in Marshall *v.* Berry, 13 Allen, 43, 47; Nicholas *v.* Adams, 2 Whart. 17-22; Dole *v.* Lincoln, 31 Maine, 422.]

(*l*) *Ante*, 772.

of the possession of the subject. (*m*) But he cannot revoke the donation by a subsequent will; for, on the death of the donor, the title of the donee becomes, by relation, complete and absolute from the time of delivery. (*n*) It may, however, be satisfied by a legacy given to the donee. (*o*) 2. It may be made to the wife of the donor. (*p*) 3. It is liable to the * duties imposed on legacies, by the express provisions of the stat. 36 Geo. 3, c. 52, s. 7, and the stat. 8 & 9 Vict. c. 76, s. 4, which enact that every gift which shall have effect as a donation *mortis causâ* shall be deemed a legacy within the meaning of those acts. 4. It is liable to the debts of the testator upon deficiency of assets. (*q*)

2. It may be made to the wife of the donor.

3. Liable to legacy duty.

4. To debts.

In Hayslep *v.* Gymer, (*r*) an action of debt was brought for money had and received to the use of the plaintiff. It appeared that the defendant was executor of a Mrs. Wilkinson, and the plaintiff lived in Mrs. Wilkinson's house till the time of her death. On the reading of Mrs. Wilkinson's will, the defendant asked the plaintiff whether she had not

Evidence of a *donatio mortis causâ*.

(*m*) Ward *v.* Turner, 2 Ves. sen. 433; Bunn *v.* Markham, 7 Taunt. 232, by Gibbs C. J.; [Merchant *v.* Merchant, 2 Bradf. Sur. 432; Wigle *v.* Wigle, 6 Watts, 522. It has been held that any act, such as the subsequent birth of a child, which operates to revoke a will, should have the same effect in regard to a gift *causa mortis*. Bloomer *v.* Bloomer, 2 Bradf. Sur. 340.]

(*n*) Jones *v.* Selby, Prec. Chanc. 300. See Hambrooke *v.* Simmons, 4 Russ. C. C. 25; [Nicholas *v.* Adams, 2 Whart. 17.]

(*o*) Jones *v.* Selby, Prec. Chanc. 300. See Johnson *v.* Smith, 1 Ves. sen. 314.

(*p*) Lawson *v.* Lawson, 1 P. Wms. 441; Miller *v.* Miller, 1 P. Wms. 356; Tate *v.* Leithead, Kay, 658. See Walter *v.* Hodge, 2 Swanst. 92; S. C. 1 Wils. Chanc. Cas. 445; Boutts *v.* Ellis, *ante*, 780; [Meach *v.* Meach, 24 Vt. 591; Gardner *v.* Gardner, 22 Wend. 526. So the wife may make such gifts to her husband, either for his own use or for the use of another. Caldwell *v.* Renfrew, 33 Vt. 213. A gift to the wife by a stranger is presumed to have been intended for her separate use. Howard *v.* Meunifee, 5 Pike, 668. A wife may make such gifts of specific articles capable of passing by delivery, without the consent of her husband, under the laws of Massachusetts. Marshall *v.* Berry, 13 Allen, 43. See Jones *v.* Brown, 34 N. H. 439. A bond, given by a man, in his last illness, to his wife, for the use of his wife, may be a good *donatio causa mortis*. Wells *v.* Tucker, 3 Binn. 366.]

(*q*) Smith *v.* Casen, mentioned in Drury *v.* Smith, 1 P. Wms. 406; Ward *v.* Turner, 2 Ves. sen. 434. [A *donatio mortis causâ* will not affect the rights of creditors of the donor; Chase *v.* Redding, 13 Gray, 418; Shaw C. J. in Sessions *v.* Moseley, 4 Cush. 92; 2 Kent, 448; Bigelow J. in Mitchell *v.* Pease, 7 Cush. 353; Weston C. J. in Borneman *v.* Sidlinger, 15 Maine, 429, 431; Gibson C. J. in Nicholas *v.* Adams, 2 Whart. 17, 22; in the same manner as other voluntary conveyances and gifts do not affect the rights of creditors. Wells J. in Marshall *v.* Berry, 13 Allen, 46.]

(*r*) 1 Ad. & El. 162.

possession of something given to her by Mrs. Wilkinson, and how she had obtained it. She produced a parcel, which contained bank-notes of the value of 220*l.*, and said that Mrs. Wilkinson had given them to her a fortnight before her death, telling her they would be useful to her, after her (Mrs. Wilkinson's) death; and that no one was present at the time. According to one witness, the defendant then said that he should keep the parcel till the plaintiff required it; according to another, simply that he should keep it. The plaintiff had Mrs. Wilkinson's keys during her illness, and superintended the economy of the house. Other property of Mrs. Wilkinson's to a considerable amount was shown to have been in the power of the plaintiff, which was found by the executors undisturbed. Mrs. Wilkinson did not take to her bed more than a week before her death. During that week the plaintiff showed the notes, in her own possession, to a witness. The action was brought to recover back these notes. The defendant's counsel objected that there was not evidence to go to the jury, of the property of the notes being in the plaintiff. The judge having left the whole evidence to the jury, they * found a verdict for the plaintiff. A motion was afterwards made to enter a nonsuit, because there was no evidence at all of property in the notes, except the plaintiff's own account of the matter. But the court of K. B. refused to disturb the verdict, on the ground that there was some evidence to go to the jury, though slight, and that the declaration made by the plaintiff herself was admissible evidence in her favor by reason of acquiescence (though of trifling weight) in its truth by the defendant, and also as being part of the *res gestæ*, on the occasion of the defendant's obtaining the notes. (*s*)

The court of chancery will direct an issue to try whether

It appears to have been considered at one time that no issue ought to be directed by the court of chancery to try whether there was a *donatio mortis causâ*, inasmuch as it is of a testamentary nature and not triable in the common law courts. (*t*) But according to the modern prac-

(*s*) In this case Littledale and Parke JJ. expressed their opinion that it made no difference whether the delivery of the notes was a gift absolutely, or a *donatio mortis causâ*. [The delivery of the property, necessary to the validity of a gift *causa mortis*, cannot be proved by subsequent declarations of the deceased, shortly before death, to a person not connected with the gift. Rockwood *v.* Wiggin, 16 Gray, 402. But if the subsequent declarations are made to the donee, they will be competent evidence. Dean *v.* Dean, 43 Vt. 337.]

(*t*) Ashton *v.* Dawson, May 5, 1725, *coram* Jekyl and Gilbert, lords commissioners (reported in 2 Coll. 363, note (*c*)).

tice, where there is any doubt whether, in point of fact, there was that which would constitute a good *donatio mortis causâ*, if in point of law the subject of it can be made the subject of such a donation, it has been usual for a court of equity to direct an issue or issues to try that fact. (*u*)

there was a *donatio mortis causâ*.

It may be added in conclusion that the new wills act (1 Vict. c. 26) has not, either in words or in effect, abolished such donations. (*x*)

Donatio mortis causâ not abolished by new wills act.

(*u*) By Lord Eldon in Duffield *v.* Elwes, 1 Bligh N. S. 531.

(*x*) Moore *v.* Darton, 4 De G. & Sm. 517.